COMMENT

PAPERS OR PLASTIC: THE DIFFICULTY IN PROTECTING NATIVE SPIRITUAL IDENTITY

by
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Sellers of Native ceremonies offer the opportunity to non-Natives to participate in ceremonial traditions with roots in Native spiritual communities—for a price. These "plastic shamans" have appropriated some Native ceremonies, sometimes with fatal results. Commodifying these spiritual practices removes important communal identities from their sources and furthers the stereotype that Native communities and their cultural practices are relics of the past—a concept reinforced through divorcing cultural practices from vibrant, modern Native societies struggling to maintain an identity. In response to ceremonial appropriation by plastic shamans, some Native spiritual communities have sued operators of botched ceremonies, and have further advocated for legal protection of Native ceremonies in Western legal concepts. However, Western law misses the mark. While spiritual identity is offered protection through exemptions to generally applicable laws, the Western requirement of a bright-line object to represent spiritual identity does not allow for the protection of an intangible ceremony from appropriation. Furthermore, Western concepts of intellectual property are market based, and directly conflict with the intent to protect Native ceremonies from being commodified. These conflicting values demonstrate the tension in protecting spiritual identity. And when Native cultural composition, transformative ceremonial practice, and distributions of ceremonies between Native groups are taken into account, the difficulty becomes even more apparent.

This Comment explores the approach of current Western laws seeking to protect cultural heritage, and then applies one Native proposal through a First

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Amendment analysis to demonstrate the difficulty of protecting Native spiritual identity in Western law. Some of the current means of protecting and preserving Native spiritual identity make appropriation even easier through documentation requirements. While there is a compelling reason to protect Native ceremonies from appropriation, Western courts are limited in their ability to favor one group's religious practices over another. This Comment concludes that while difficult to protect in law, public awareness is the most likely cure to prevent shopping for spirituality—enlightenment and self-actualization cannot be bought off-the-shelf with the clerk asking at checkout "paper, or plastic?"

I. Introduction 592
II. Appropriating Native Spirituality and Current Legal Spirituality Protections 594
A. *The Plastic: Ceremonial Appropriation* 594
B. *Historical Concepts of Native Spirituality* 598
C. *Federal Indian Law Framework* 601
D. *The Papers: Current Cultural Protection* 602
E. *Intellectual Property Concerns* 607
F. *Distribution of Intimate Ceremonial Practices* 611
III. Emerging Efforts for Ceremonial Protection 613
A. *United Nations Approach* 613
B. *Request for Federal Law* 615
C. *Excluding Non-Natives from Native Ceremonies* 616
1. *Cultural Identity* 616
2. *Enforcement* 617
D. *Awareness of Colonization Effects* 618
IV. Analysis of the Approaches: Extreme Difficulty in Crafting a Protective Rule 619
A. *Current Exemptions for Eagle Feathers, Peyote, and Ceremonial Hunting Are Bright-Line Rules that Deal with Easily Identifiable Ceremonial Practices* 620
B. *Free Exercise Difficulties* 622
1. *Substantial Burden on Religious Exercise* 623
2. *Compelling Governmental Interest* 623
3. *The Least Restrictive Means of Furthering the Compelling Governmental Interest* 625
C. *Establishment Clause Concerns* 626
D. *Diversity of Native Identity* 627
E. *Transformative Nature of Native Ceremony* 630
F. *Possible Protectionary Measures?* 631
V. Conclusion 634

I. Introduction

In the United States and Europe, New Age spiritual communities have sprung up, adopting practices held sacred to Native Americans. These practices popularly include the sweat lodge and vision quest, which are traditionally Oglala Lakota in origin. Native activists have titled these

non-Native, self-proclaimed New Age spiritual leaders "plastic shamans," and have vigorously resisted the appropriation of their sacred rites through the press, demonstrations, and litigation. Major opposition to appropriating Native spirituality includes its commodification, the imposition of Western ideas on Native concepts of property, and the dilution of the ideas central to a cultural identity.

In 2009, members of the Oglala Sioux Tribe filed suit in federal court in response to the sweat lodge deaths of three people in Sedona, Arizona caused by New Age guru James Ray.[1] The major claims were that James Ray had impersonated Indians and had caused damage to the reputation of Native spiritual practices. The tribe also joined the United States as a party in failing to enforce the Treaty of Fort Laramie, 1868, citing to the "bad men among the whites" clause, which created a duty for the U.S. Government to prosecute wrongs committed against the Indians.[2] The Oglala Lakota have also been active in seeking to protect their spiritual identity by seeking to exclude non-Natives from acting as spiritual leaders, and this has not been without controversy even within those communities.[3]

Courts have been reluctant to give relief to the Native communities when their rites are appropriated. This Comment discusses the difficulty in protecting these sacred rites. Part II explains the issues that appropriating Native spirituality creates and the background of the current protection architecture that protects Native practitioners from having their own religious practices repressed. This includes exemptions from generally applicable laws in order to practice Native rites. Part III discusses proposed rules and legislation that calls for protection of these practices. These include requests for federal protection and possible tribal-law approaches to protecting Native ceremonies. Part IV details the inherent difficulties in these proposed approaches. These difficulties are encountered when running the proposals through a First Amendment analysis, and are further complicated by gross assumptions about Native spirituality and tribal composition. In exploring these ideas, this Comment focuses primarily on the Oglala Lakota[4] because of the breadth of material available about their spiritual practices, as well as the tribe's activism in seeking to protect their spiritual practices and heritage.

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[1] *See* Complaint at 4–5, Lewis v. James Ray Int'l, Inc., No. CV-09-8196-PCT-FJM (D. Ariz. Nov. 2, 2009) [hereinafter *Hand Complaint*].

[2] *Id.* at 1–2, 4; Treaty with the Sioux Indians, art. I, Apr. 29, 1868, 15 Stat. 635, 635.

[3] In recognizing that there is also controversy in "outsiders" discussing the ideas, thoughts, and beliefs of Native spiritual communities, I seek to provide an approach that takes into account the compelling cause of protecting spiritual ceremonies from appropriation, yet objectively run the proposals through the current legal framework.

[4] The "Sioux" are comprised of Native Americans that use the Dakota, Lakota, and Nakota dialects; the Oglala are one of the seven subdivisions of the Lakota. *See* AKIM D. REINHARDT, RULING PINE RIDGE: OGLALA LAKOTA POLITICS FROM THE IRA TO WOUNDED KNEE xxv, 9 (2007).

II. Appropriating Native Spirituality and Current Legal Spirituality Protections

A. The Plastic: Ceremonial Appropriation

On October 8, 2009, between 55 and 65 people crowded into a 415 square foot, plastic covered "sweat lodge" at the Angel Valley Retreat Center in Sedona, Arizona.[5] Participants paid between $9,000 and $10,000 to take part in Ray's "Spiritual Warrior" retreat,[6] a part of Ray's spiritual and financial wealth improvement program.[7] Enclosed in the plastic-wrapped "sweat lodge," hot rocks were continually brought in to the enclosure, and "[b]y the time the ceremony was halted two hours later, another 46 hot rocks had reportedly been added to the pyre, turning the enclosure into a human cooking pot."[8] The botched ceremony resulted in three deaths and 18 additional hospitalizations,[9] with doctors at the hospital initially believing that the injuries were the result of a mass suicide attempt.[10] Reaction to the deaths was swift from the authorities,[11] legislators,[12] and the Oglala Lakota spiritual community.[13]

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[5] State's Response to Defendant's Motion in Limine (No.1) to Exclude Evidence of Prior Acts Pursuant to Ariz. R. Evid. 404(B) and 403 at 1–2, Arizona v. Ray, No. V1300CR201080049 (Yavapai Cnty. Ariz. Aug. 2, 2010), *available at* http://apps.supremecourt.az.gov/docsyav/; Neil Katz, *Sweat Lodge Death Investigation Turns to Self-Help Guru James Arthur Ray*, CBS (Oct. 12, 2009, 10:20 AM), http://www.cbsnews.com/8301-504083_162-5378668-504083.html.

[6] Katz, *supra* note 5.

[7] Ann O'Neill, *Inside the Sweat Lodge: Witnesses Describe a Ritual Gone Wrong*, CNN (Mar. 14, 2011), http://edition.cnn.com/2011/CRIME/03/14/ray.sweat.lodge.witnesses/index.html.

[8] Andrew Gumbel, *Death Valley*, Guardian (Oct. 21, 2009), http://www.guardian.co.uk/world/2009/oct/22/james-ray-sweat-lodge-death.

[9] *Id.*

[10] *Doctors Feared Mass Suicide After Deadly 'Sweat Lodge,' Survivor Says*, CNN (Mar. 16, 2011), http://articles.cnn.com/2011-03-16/justice/arizona.sweat.lodge.trial_1_james-arthur-ray-sweat-lodge-kirby-brown?_s=PM:CRIME.

[11] *See* Indictment at 1, Arizona v. Ray, No. V1300CR201080049 (Yavapai Cnty. Ariz. Feb. 3, 2010), *available at* http://apps.supremecourt.az.gov/docsyav/ (filed less than five months after the incident); Marc Lacey, *New Age Guru Guilty in Sweat Lodge Deaths*, N.Y. Times (June 22, 2011), http://www.nytimes.com/2011/06/23/us/23sweat.html.

[12] *See* S.B. 1164, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (providing for the adoption of "rules for the regulation of any individual or business that charges people to participate in what the individual or business claims are traditional and authentic Native American practices" off of reservation lands); Luige del Puerto, *Hale Files Bill to Regulate Native American Rituals*, Ariz. Capitol Times (Jan. 19, 2010, 6:32 PM), http://azcapitoltimes.com/news/2010/01/19/hale-files-to-bill-to-regulate-native-american-rituals/.

[13] *See* Arvol Looking Horse, *Statement Regarding Sedona Sweat Lodge Deaths in October, 2009*, Native Village, http://www.nativevillage.org/Inspiration-/statement_regarding_sedona_sweat.htm.

Soon after, on November 2, 2009, Floyd Hand, a delegate of the Oglala Lakota Delegation of the Black Hills Sioux Nation Treaty Council, filed a lawsuit in the U.S. District Court for the District of Arizona, claiming that James Ray had, among other things, impersonated an Indian. He also joined the United States, Attorney General Eric Holder, Arizona Governor Jan Brewer, and Arizona Attorney General Terry Goddard as co-defendants, claiming that they had violated the 1868 Treaty of Fort Laramie.[14] The 1868 Treaty of Fort Laramie contains a clause stating:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.[15]

Eventually in the pro se action, the United States was dropped as a party, and the main cause of action was amended to apply Ray's use of the "sweat lodge" as a violation of the Indian Arts and Crafts Act (IACA) of 1990 with a request for $5,000,000 in direct and punitive damages that would be dedicated to educating the public on the purpose, use, and safety of Native American ceremonies.[16] On October 29, 2010, Judge Martone dismissed the case with prejudice, deciding the IACA did not apply to the Lakota claim.[17] He found that the "sweat lodge experiences that are the subject of plaintiffs' complaint are services, rather than 'goods,'" and "[t]he operation of a sweat lodge is plainly not art, craftwork, or a handcraft."[18] The court cited the Indian Art and Craft Board, which "explicitly rejected the suggestion that the definition of Indian product should cover 'any cultural property of an Indian tribe or moiety and include a reference to a compatible Indian cultural property law.'"[19] The *Hand* case demonstrates the difficulty in discerning the interest that Native ceremonies encompass, with Western legal values needing to be attached in order to bring a successful claim.

James Ray was not the first to appropriate Oglala Lakota ceremonies and is only one of many calling themselves shamans or spiritual leaders. The late Vine Deloria Jr. observed:

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[14] *See* Hand Complaint, *supra* note 1, at 1, 4; Mary Garrigan, *Lakota Lawsuit Against Ray Detailed*, NEWSPAPER ROCK (Nov. 25, 2009), http://newspaperrock.bluecorncomics.com/2009/11/lakota-lawsuit-against-ray-detailed.htm; *Lakota Nation Calls James Arthur Ray on His Disrespect*, DON'T PAY TO PRAY (Nov. 14, 2009), http://dontpaytopray.blogspot.com/2009/11/lakota-nation-calls-james-arthur-ray-on.html.

[15] Treaty with the Sioux Indians, *supra* note 2, art. I.

[16] *See* Second Amended Complaint, Lewis v. Ray, No. CV-09-8196-PCT-FJM (D. Ariz. Mar. 27, 2010).

[17] Order, Lewis v. Ray, No. CV-09-8196-PCT-FJM (D. Ariz. Oct. 29, 2010).

[18] *Id.* at 2.

[19] *Id.* (quoting Protection for Products of Indian Art and Craftsmanship, 61 Fed. Reg. 54,551, 54,553 (Oct. 21, 1996)).

> We do not, as a rule, see non-Indians and New Age people performing the ceremonies of any tribe except the Northern Plains Sioux and so we can conclude that for the most part other tribes have lived up to their end of the sacred covenant, *or* that the Sioux have received some special revelation that demands they universalize their traditions—perhaps even to save the religious practices of other tribes.[20]

This expansive adoption of Lakota practice is centrally focused on the following three ceremonies: "the *inipi* ('sweat lodge'), the *hanble'ceya* ('crying for a vision,' or 'vision quest') and, less often, the *wi'wanyang wacipi* ('gazing at the sun dance,' or simply 'sun dance'), an annual event usually requiring four days of fasting and flesh offering."[21] "New Age religious organizations sell Indian spirituality, marketing participation in 'Indian ceremonials' like the sun dance and the sweat lodge ceremonies. Entrepreneurs even offer to turn consumers into shamans if they purchase a weekend-long course of study!"[22] This self-made creation and sale of the title of spiritual holy man earned the term "plastic shaman": a holy man without any attachment to a Native community.[23] There are "quite a few non-Natives who call themselves 'pipe carriers' because they have received (or rather bought) pipes . . . [and] this is akin to someone calling themselves a priest because they bought the collar."[24] The cycle is then repeated, with other plastic shamans[25] holding their own ceremonies for profit and further divorcing Native ceremonies from their original communities.

This commodification and sale of Native ceremonies and spirituality is particularly offensive to Native practitioners. "The use of Native motifs, imagery, and themes in the 'spirituality' marketed as New Age religion is particularly offensive, both because of its commodification and its distortion of Native traditions."[26] Inés Hernández-Ávila observed:

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[20] SUZANNE OWEN, THE APPROPRIATION OF NATIVE AMERICAN SPIRITUALITY 54 (2008) (quoting Vine Deloria Jr., *Is Religion Possible? An Evaluation of Present Efforts to Revive Traditional Tribal Religions*, WICAZO SA REV., Spring 1992, at 35, 36, *reprinted in* FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 261, 263 (James Treat ed., 1999)). "Lakota spirituality has spread beyond the Lakota themselves and has been adopted and adapted into different contexts ranging from New Age retreats to urban centres of Native American activism; it has been combined with other practices and re-presented in forms unrecognizable to the Lakota." *Id.* at 58.

[21] *Id.* at 50.

[22] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 239 (1998); *see* Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 214 (2003-2004).

[23] *See generally Introduction*, NEW AGE FRAUDS & PLASTIC SHAMANS, http://newagefraud.org.

[24] OWEN, *supra* note 20, at 98.

[25] Plastic shamans are also called "spiritual hucksters," sellers of "Native American spirituality for profit." *Id.* at 88.

[26] COOMBE, *supra* note 22, at 239.

> Once money enters the conversation, the nature of the gatherings and ceremonies is altered. Money affirms entitlement on the one hand, since devotees of consumer culture believe that enough money can buy anything, and on the other hand, money encourages people to assume a false authority because it is profitable to do so.[27]

This takes the form of holding ceremonies, selling sacred artifacts like pipestone pipes,[28] and writing books "'purporting to expose the inner workings'" of Native spirituality.[29] Another part of the anger is that there is a detached sense of Native spiritual identity, divorced from the extant Native communities that struggle economically, socially, and culturally.[30]

In response to these concerns, in 1993, Oglala Lakota spiritual leaders issued the *Declaration of War Against Exploiters of Lakota Spirituality*, stating among other things that "for too long we have suffered the unspeakable indignity of having our most precious Lakota ceremonies and spiritual practices desecrated, mocked and abused by non-Indian 'wannabes,' hucksters, cultists, commercial profiteers and self-styled 'New Age

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[27] Inés Hernández-Ávila, *Mediations of the Spirit: Native American Religious Traditions and the Ethics of Representation*, 20 AM. INDIAN Q. 329, *reprinted in* NATIVE AMERICAN SPIRITUALITY: A CRITICAL READER 11, 27 (Lee Erwin ed., 2000)). "'Commodification' is another issue, but money and gifts are exchanged by traditional[practitioners] as well. However, according to Arvol Looking Horse, this is done after the ceremony. This distinction is important in that money does not buy entry, but is given in appreciation at the end . . . . Entry to a ceremony is not guaranteed by the ability of the participant to pay, and likewise a participant is not denied entry for reason of lack of funds." OWEN, *supra* note 20, at 108.

[28] For a description of the sacred red pipes made of pipestone or "catlinite," quarried from the Pipestone National Monument in Minnesota, see ROBERT L. HALL, AN ARCHAEOLOGY OF THE SOUL: NORTH AMERICAN INDIAN BELIEF AND RITUAL 79 (1997) and William T. Billeck, *Catlinite*, *in* ARCHAEOLOGY OF PREHISTORIC NATIVE AMERICA: AN ENCYCLOPEDIA 123, 123 (Guy Gibbon et al. eds., 1998). *See generally* PAUL B. STEINMETZ, PIPE, BIBLE, AND PEYOTE AMONG THE OGLALA LAKOTA: A STUDY IN RELIGIOUS IDENTITY 57–82 (1990) (describing the centrality of sacred pipes to Lakota, Dakota, and Nakota tribes).

[29] OWEN, *supra* note 20, at 89 (quoting WARD CHURCHILL, *In the Matter of Julius Streicher: Applying Nuremburg Standards to the United States*, *in* FROM A NATIVE SON: SELECTED ESSAYS IN INDIGENISM, 1985–1995, at 445, 450 (1996)).

[30] "The authors of Native American spirituality 'grew rich peddling their trash while real Indians starved to death, out of the sight and mind of America.'" *Id.* at 89 (quoting WARD CHURCHILL, *Spiritual Hucksterism: The Rise of Plastic Medicine Men*, *in* FROM A NATIVE SON: SELECTED ESSAYS IN INDIGENISM, 1985–1995, at 355, 355 (1996)). Inés Hernández-Ávila states that "[w]hile Indian people are still being denied their own full religious expression, many non-Indians are devouring Native American spiritual traditions in the same way they have consumed Native American art, . . . once again with no thought to real, present-day, political, social, economic, and cultural/religious struggles in which Native people are engaged." Hernández-Ávila, *supra* note 27, at 25. And the Lakota are not alone in the struggle to maintain a spiritual identity in the face of modern consumerism as "[i]ndigenous peoples in Hawaii, for example, seek to rescue such signs of their traditional culture as the hula and the luau from their commercial distortions in a tourist industry founded upon the consumption of their cultural distinction." COOMBE, *supra* note 22, at 185.

shamans' and their followers."[31] In 2003, Arvol Looking Horse, the 19th generation keeper of the White Buffalo Calf Pipe Bundle,[32] issued the *Looking Horse Proclamation on the Protection of Ceremonies*, which took a more active approach by mandating exclusion of non-Natives from conducting Lakota ceremonies.[33] Looking Horse also stated that the Lakota

> are the only indigenous nation in the world that has opened our sacred ceremonials, of the altar, out to the public. Now we are seeing the abuses and violations. Anyone can read a book or get close to our ceremonial people, then go out and practice our ways without proper protocols.[34]

The frequency of these publicly issued statements, coupled with the James Ray lawsuit, demonstrates the tension between Native and New Age practitioners, and that the issue of ceremonial protection remains a hotly contested issue.

B. Historical Concepts of Native Spirituality

The relatively recent popularity of Native spirituality is stark in contrast to attitudes held in relatively modern history. In 1883 Secretary of the Interior, H.M. Teller, wrote about the Lakota, saying that

> the Sun Dance was an old, heathenish dance which hindered the civilization of the Indians and stimulated the warlike passions of the young warriors, that the medicine men, always found in the anti-progressive party, used their conjurers' arts to prevent people from abandoning their heathenish rites and customs and that the destroying and distributing of property at a person's death prevented the Indians from appreciating the value of property as an agent of civilization.[35]

"Specific religious offences were later codified by Thomas J. Morgan, Commissioner of Indian Affairs, in 1892, mentioning that anyone practising the ways of a medicine man would be imprisoned between 10 and

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[31] Declaration of War Against Exploiters of Lakota Spirituality, June 10, 1993, *available at* http://puffin.creighton.edu/Lakota/war.html.

[32] *Wodakota Board of Directors*, WODAKOTA FOUND., http://www.wolakota.org/board.html. The White Buffalo Calf Bundle was given to the Lakota by White Buffalo Calf Woman, and this pipe is of central and highly sacred significance to the Lakota, Nakota, and Dakota tribes practicing Native religion. THE SACRED PIPE: BLACK ELK'S ACCOUNT OF THE SEVEN RITES OF THE OGLALA SIOUX 3–9 (Joseph Epes Brown ed., 1953) [hereinafter THE SACRED PIPE].

[33] Arvol Looking Horse, *Looking Horse Proclamation on the Protection of Ceremonies*, INDIAN COUNTRY TODAY (Apr. 25, 2003), http://indiancountrytodaymedianetwork.com/ictarchives/2003/04/25/looking-horse-proclamation-on-the-protection-of-ceremonies-88707 ("Discussions in the meeting included the molestation taking place in ceremony, indecent mockery, mixing of new age beliefs, charging for ceremonies and death, which was never heard of before in our ancient ceremonial history.").

[34] OWEN, *supra* note 20, at 77 (quoting Looking Horse) (internal quotation mark omitted).

[35] STEINMETZ, *supra* note 28, at 16.

30 days for a first offence."[36] Consequently, this repression of Native religion persisted until 1934, when John Collier, the Commissioner of the Bureau of Indian Affairs, repealed the outright prohibition, stating, "No interference with Indian religious life or ceremonial expression will hereafter be tolerated. The cultural liberty of Indians is in all respects to be considered equal to that of any non-Indian group."[37] And although this was a grant of freedom at the federal level, tribal officials still had influence on controlling Indigenous religion. In 1938, the Lakota Tribal Council passed a resolution that the Council would "protest, object and demand prohibition of pre-[I]nca, [S]tone [A]ge, or other North American uncivilized practices of Oglala Sioux now exhibited for show and amusement purposes off the Pine Ridge Indian Reservation."[38] Also in 1938, the Tribal Council passed an ordinance that taxed "extracts, [and] remedies." The Council could regulate traditional religious practitioners because of the services they performed for tribal members.[39] Traditional practitioners continued to be arrested by tribal police until early in the 1970s.[40]

This intra-Lakota conflict with the Tribal Council created additional conflicts with traditional practitioners. Often these conflicts were along ethnic lines: mixed and full-blood Lakotas clashed over beliefs, with full-bloods mostly practicing traditional religion, and mixed-bloods leaning towards practicing Christian-based religions.[41] Additionally, the mixed-blood Lakota favored the Tribal Council system of government, which led to intra-tribal repression of traditional religious practices.[42] Not only were Tribal Councils seeking to repress traditional culture, but they were also giving in to pressure from competing Christian churches. To this end, the Lakota Tribal Council passed a resolution on the reservation prohibiting peyote, the sacrament central to the Native American Church.[43]

Following the Civil Rights movement in the late 1960s, the Lakota were identified as a source of traditional knowledge that could be attached to a re-identity of Native Americans.

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[36] OWEN, *supra* note 20, at 31.

[37] OFFICE OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, CIRCULAR NO. 2970, INDIAN RELIGIOUS FREEDOM AND INDIAN CULTURE (1934), *reprinted in Survey of Conditions of the Indians of the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs*, 75th Cong. pt. 34, at 18319, 18320 (1937) (circular written by John Collier, Commissioner, Office of Indian Affairs).

[38] REINHARDT, *supra* note 4, at 93 (emphasis omitted).

[39] *Id.*

[40] *See* OWEN, *supra* note 20, at 31.

[41] *See* REINHARDT, *supra* note 4, at 94, 98.

[42] *See id.* at 92. Frank G. Wilson, the mixed blood Tribal Council President of the Oglala Lakota, "dismissed the traditionalists as 'unlettered tribesmen' and claimed that *tiospayes* [extended families] were based on communism." *Id.* at 93 (emphasis added).

[43] *Id.* at 98.

The American Indian Movement (AIM) sought the spiritual guidance of Oglala Lakotas, full bloods with a link to the past and spiritual community, achieving a re-identity after decades of urbanization.[44] Some of the traditional practitioners saw this opportunity as a way to reclaim their traditional ways after decades of repression.[45] This re-identity was in an effort to respond to popular culture perceptions of Native Americans, because,

> [d]ivided into at least two thousand cultures . . . at the time of "first contact," the idea and image of the Indian as a singularity is and remains a "white" stereotype, which nonetheless has created its own realities as a result of white power and the necessity of Native Americans to respond to it.[46]

Popular culture "ma[de] mythic and imaginary images of Native Americans more visible than they are as living peoples with contemporary concerns and pressing political problems, preserving 'the crippling myth that Native Americans, their lands, their cultures, their sovereign powers, their very existence, are relics of the past.'"[47] And when Native Americans fought against these images by

> [c]ontesting legally legitimated claims that stereotypical images of themselves be considered merely the marketing vehicles of others, Native peoples have come up against commercial indifference, animosity, and public ridicule. . . . Dismissed by some as evidence of 'political correctness' gone to ridiculous extremes, the offensiveness of these signs is denied by many . . . .[48]

Given the struggle to assert these singular identities, the blurring of traditional religious practices in popular culture, and commodifying of sacred Native ceremonies, it is hard to deny that there is a compelling reason to seek to protect Native religious practices from being transformed and distorted far from their original contexts or purposes. Yet, the current Western system of governance offers little in ways of protecting these ceremonies or identities.

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[44] *Id.* at 160.

[45] *See* OWEN, *supra* note 20, at 34–36.

[46] COOMBE, *supra* note 22, at 188.

[47] *Id.* at 189 (quoting Don Pierson, *Redskins Nickname Will Be Protest Target*, CHI. TRIB., Jan. 19, 1992, *available at* 1992 WLNR 4176132); *see also* CHARLOTTE COTÉ, SPIRITS OF OUR WHALING ANCESTORS: REVITALIZING MAKAH AND NUU-CHAH-NULTH TRADITIONS 150–55 (2010). Whale protection groups criticized a proposed Makah whale hunt, saying it was not "traditional" because the Makah were using high-power rifles, motorized boats, and tracking devices. However, this is based on an image that "[t]he 'real Indian' became identified as the Indian encountered at the time of contact, locking indigenous cultures in the past, unable to progress into modernity." *Id.* at 152. These views reflect "misconceived notions of culture change by assuming that any technological innovation used during the hunt, or within Makah society for that matter, demonstrated the group's cultural assimilation" and are therefore not "real Indians." *Id.* at 154.

[48] COOMBE, *supra* note 22, at 186.

C. Federal Indian Law Framework

The current system of laws imposed on Native American communities has deep roots in federal law. Referred to as the "trilogy by Chief Justice John Marshall,"[49] three cases set the stage for the current federal Government–Tribal relationship. *Johnson v. M'Intosh* held that the federal government has the exclusive power to acquire real property from Indian tribes.[50] *Cherokee Nation v. Georgia* held that tribes are distinct dependent nations separate from both foreign nations and the states.[51] *Worcester v. Georgia* recognized that Indian tribes have inherent sovereignty to govern their members and territory and that states are not free to impose their laws on tribes.[52] These cases have their roots in the Constitution's Commerce Clause,[53] and frame the Federal–Tribal relationship.

More recently, the Supreme Court has decided several cases that restrict the tribe's ability to reach beyond their tribe's members or reservation lands. In *Oliphant v. Suquamish Indian Tribe*,[54] and *Montana v. United States*,[55] the tribe's ability to regulate or even prosecute non-tribal members was severely restricted. This is in conformity with *Morton v. Mancari*, which asserted that a person's ancestry is irrelevant to giving preference to tribal members, but instead recognized the political nature of the trib-

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[49] *See* Sarah Krakoff, *The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law*, 98 CALIF. L. REV. 1253, 1255 (2010); *see also* Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 937 (2011).

[50] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592; *see also* United States v. Sioux Nation, 448 U.S. 371, 424 (1980) ("[T]he 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.").

[51] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[52] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593 (1832) ("[T]he several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

[53] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . .[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[54] 435 U.S. 191 (1978) (holding that the Suquamish Tribe lacked jurisdiction to prosecute non-Indians who assaulted a tribal officer and damaged tribal property on the reservation); *see also* Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(2) (2006) ("'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe . . . including courts of Indian offenses . . . *to exercise criminal jurisdiction over all Indians*." (emphasis added)); United States v. Lara, 541 U.S. 193, 210 (2004) ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.").

[55] 450 U.S. 544, 557 (1981) (holding that the Crow Tribe lacked authority to regulate non-Indians hunting and fishing within the reservation on fee lands).

al citizenship status.[56] With these precedents, the ability of a tribe to protect traditional religious ceremonies from non-tribal members on or off a reservation is severely restricted, and would likely give New Age practitioners near free rein in performing Native American ceremonies, even if there was a tribal law that prohibited non-members from performing ceremonies.

D. The Papers: Current Cultural Protection

The current legal regime does protect Native American cultural practices, but these protections are tied to tangible and easily defined categories. The Indian Arts and Crafts Act (IACA) of 1990 allows a tribe, an Indian, the Attorney General, or an Indian arts and crafts organization to

> bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good . . . in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization.[57]

This is in addition to criminal penalties under federal law that prohibit false representation of Indian crafts.[58] The IACA "is essentially a truth-in-advertising law designed to prevent marketing products as 'Indian made' when the products are not, in fact, made by Indians as defined by the Act."[59] So, this protection extends to only the tangible aspects of Native cultural resources.

The marketing of Indian arts and crafts also has weight in the discussion of protecting ceremonies because of the objects distinctly tied to religious practices. For example, sales of catlinite pipes by named Lakota crafts persons are opposed by traditional practitioners' beliefs in the sacredness of the Pipe itself, and usage of the Pipe after sale.[60] The possession of cultural objects creates a spiritual identity, as some within the Native community have remarked that

> it is our culture and history, which belong to us alone, which make us what we are, which constitute our identity and assure our surviv-

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[56] Morton v. Mancari, 417 U.S. 535 (1974) "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 553 n.24.

[57] 25 U.S.C. § 305e(a).

[58] 18 U.S.C. § 1159(a) (2006).

[59] Protection for Products of Indian Art and Craftsmanship, 61 Fed. Reg. 54551, 54552 (Oct. 21, 1996).

[60] OWEN, *supra* note 20, at 66; *see* COOMBE, *supra* note 22, at 187 ("Some Native peoples might feel less resentment about the exploitation of Indianness if more of the profits made their way back to Indian peoples to serve their social needs . . . . Others, of course, might well view this as a form of cultural prostitution.").

> al. . . . [Within] cultural nationalism, . . . [a] group's survival, its identity or objective oneness over time, depends upon the secure possession of a culture . . . [and] "culture" and "history" become nearly synonymous . . . because the group's history is said to be preserved and embodied in material objects . . . known by the term "cultural property."[61]

Additionally, the Native American Graves Protection and Repatriation Act (NAGPRA) protects human remains and items intimately associated with burials as cultural items.[62] Yet any ceremonies naturally involved in putting those objects or human remains in that area are beyond the scope of that legislation.[63] This again demonstrates the ability for Western law to seek to protect spiritually important aspects of Native life, but stop short by limiting the protection to bright-line and readily identifiable physical objects.[64]

As part of protecting Native religious practices, the law continues to recognize exemptions from generally applicable prohibitions because of the compelling interests at stake. All parts of Bald and Golden Eagles, their eggs, and nests are prohibited from being possessed by the general public without a permit.[65] However, enrolled members of federally recognized tribes are issued permits to possess these eagle parts if they are intended to be used for religious purposes.[66] These purposes extend from the belief that eagles and their feathers are conduits for communicating with divinity.[67] Courts have recognized that there is a compelling interest

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[61] Richard Handler, *Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism*, *in* THE POLITICS OF CULTURE 63, 66 (Brett Williams, ed., 1991)).

[62] 25 U.S.C. §§ 3001–13.

[63] *See id.*

[64] *See* COOMBE, *supra* note 22, at 225.

[65] Bald Eagle Protection Act, 16 U.S.C. § 668 (2006); *see also* Francis X. Santangelo, Note, *A Proposal for the Equal Protection of Non-Indians Practicing Native American Religions: Can the Religious Freedom Restoration Act Finally Remove the Existing Deference Without A Difference?*, 69 ST. JOHN'S L. REV. 255, 279 (1995).

[66] *See* 50 C.F.R. § 22.22 (2012). "Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof . . . for the religious purposes of Indian tribes," the Secretary may authorize the takings. 16 U.S.C. § 668a (2006).

[67] James R. Dalton, Comment, *There Is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions*, 2005 BYU L. REV. 1575, 1587 ("To the Indian, the eagle is a messenger to the Creator; it is revered as a spiritual conduit and its feathers and other parts are prized as tools that help the faithful communicate with Divinity."); *see* David Swallow Jr., *Letter: On Burying Eagle Feathers With Slain Police Officers*, NATIVE AMERICAN TIMES (Mar. 6, 2013), http://www.nativetimes.com/life/commentary/6044-letter-on-burying-eagle-feathers-with-slain-police-officers ("The eagle is a great, sacred bird. The one who carries the messages and prayers for the Lakota People and other tribes in all ceremonies. . . . There are ceremonies conducted in which eagle feathers are awarded, such as the Naming ceremony, or the Making of a Relative ceremony and other ceremonies as well and these feathers are like the guardians, the *wowanglakis*. These feathers are to

in both protecting the eagles and also in "fostering the culture and religion of federally-recognized Indian tribes."[68] Yet the Tenth Circuit did not view the exception "as protecting Native American religion qua religion, but rather as working to preserve the culture and religion of federally-recognized tribes."[69] This limits the demand for these eagle feathers to only members of federally listed tribes, thereby allowing this scarce physical resource to be enjoyed only by tribal members.[70]

The Native American Church (NAC) also enjoys an exception from generally applicable controlled substance prohibitions in that members of the NAC are allowed to possess and consume their sacred sacrament peyote[71] in religious ceremonies.[72] When used in a religious context, NAC

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be are kept in an honorable way. They are not to be disrespected or mistreated or displayed improperly, such as being hung on a rear view mirror.").

[68] United States v. Wilgus, 638 F.3d 1274, 1288, 1295–96 (10th Cir. 2011) (holding that the government's compelling interests were balanced and advanced in the least restrictive manner by criminalization of possession of eagle feathers without the permit available only to members of federally recognized tribes); *see also* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (ruling that restricting permits to possess or transport eagles or eagle parts for religious purposes to members of federally recognized tribes was the least restrictive means of pursuing a compelling interest in restoring Indian treaty rights, including giving tribe members alternative access to eagles).

[69] *Wilgus*, 638 F.3d at 1286.

[70] *See* United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003) ("The government has a compelling interest in eagle protection that justifies limiting supply to eagles that pass through the repository, even though religious demands exceed supply as a result.").

[71] Peyote is a classified as a hallucinogen under Schedule I of the Controlled Substance Act., 21 C.F.R. § 1308.11(d)(26) (2012); *see also* Santangelo, *supra* note 65, at 283 & n.114. I struggle to use the word "peyote," as popular culture has taken this plant's effects out of context when appropriated and exploited by the counterculture movement of the 1960s. *See* STEINMETZ, *supra* note 28, at 92–93; s*ee also* ZOOLANDER (Paramount Pictures 2001) ("So I'm rappelling down Mount Vesuvius when suddenly I slip, and I start to fall. And I mean I'm about to die. . . . Just falling, ahh ahh! I'll never forget the terror. When suddenly I remember, 'Holy shit, Hansel, haven't you been smoking peyote for six straight days, and couldn't some of this maybe be in your mind?'"). I would much rather use the Lakota word for peyote "pejuta" meaning "medicine." STEINMETZ, *supra* note 28, at 99. "Peyote as a constant source of visions can easily be exaggerated[, as] most members consume rather small amounts . . . . [James Howard] 'suspect[s] that many of the 'visions' attributed to the consumption of peyote by American Indian peyotists are as much a result of a lack of sleep, the hypnotic eighth-note drum beat, and the habit of staring into the sacred fire, as to the hallucinogenic properties of the plant.'" *Id.* (quoting James H. Howard, *Half Moon Way: The Peyote Ritual of Chief White Bear*, 28 MUSEUM NEWS 1 (1967)); Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1221 (D. Or. 2009), *vacated sub nom.* Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011) ("There is no evidence that the NAC's distribution and use of peyote have resulted in any significant diversion to recreational users, or serious health effects to NAC members.").

[72] *See* 21 C.F.R. § 1307.31 (2012) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious

participants note that "[p]eyote is not like a narcotic: 'when you eat it, your mind turns to the Great Spirit and to Jesus Christ. In one song I can learn what it might take twenty or twenty-five years in school.'"[73] Although "[t]raditions, such as the Native American Church, . . . may be considered part of the Christian fold when categorized based on doctrine, [they] are indigenous religions when defining them according to their practice."[74] Courts have been willing to recognize the compelling interest of the NAC to use peyote, but limit this resource to only members of the NAC.[75] Additionally, Congress and state legislatures found the compelling interest to preserve this freedom to use peyote by the NAC, despite the Supreme Court's finding to the contrary in *Employment Division v. Smith.*[76]

Ceremonial hunting[77] also provides an exception to otherwise generally applicable laws. Most exemplary is the ability of some Native communities to harvest whales. Generally, the Marine Mammal Protection Act (MMPA) prohibits the "taking" of any marine mammal, which includes

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ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.").

[73] STEINMETZ, *supra* note 28, at 100 (quoting Bernard Ice, a member of the Native American Church).

[74] OWEN, *supra* note 20, at 178.

[75] *See* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1220 (5th Cir. 1991) (upholding Texas state law exempting the ceremonial use of peyote by Native American Church members against an equal protection challenge by an individual asserting that others who wished to use peyote as a religious sacrament should be entitled to do so); United States v. Boyll, 774 F. Supp. 1333, 1342 (D.N.M. 1991) ("Indeed, the federal exemption explicitly establishes a governmental interest in preserving the exemption of peyote as a controlled substance for its ritual use by Indian and non-Indian members of the Native American Church."); State v. Mooney, 98 P.3d 420, 428 (Utah 2004) ("In interpreting the reach of the federal exemption as incorporated into Utah law, we rely on its plain language . . . . [T]he exemption applies to members of the Native American Church, without regard to tribal membership. The bona fide religious use of peyote cannot serve as the basis for prosecuting members of the Native American Church under state law.").

[76] Emp't Div. v. Smith, 494 U.S. 872 (1990); *see* American Indian Religious Freedom Act Amendments Act of 1994, Pub L. No. 103-344, sec. 2, § 3, 108 Stat. 3125 (codified at 42 U.S.C § 1996a (2006)) (amending the American Indian Religious Freedom Act to accord specific protection for the right of tribal members to use peyote for religious purposes, after the Supreme Court held that such a right was not a feature of the First Amendment Free Exercise Clause in *Smith*); *see also* OR. REV. STAT. § 475.752(4) (2011) ("In any prosecution under this section for manufacture, possession or delivery of that plant of the genus Lophophora commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use: (a) In connection with the good faith practice of a religious belief; (b) As directly associated with a religious practice; and (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.").

[77] *See* Nathan Sherrer & Tim Murphy, *Probing the Relationship Between Native Americans and Ecology*, 4 J. SCI. & HEALTH U. ALA. 16, 17, *available at* http://www.bama.ua.edu/~joshua/archive/aug06/Nathan%20Sherrer.pdf (describing various ceremonies and rituals used by Native Americans as representing the "reciprocal relationship between the hunter and the hunted").

whales.[78] However, Pacific Coastal tribes have performed whaling as part of their culture and religious practice.[79] Within the MMPA, there is an exception for Alaskan Natives in the taking for "subsistence" or for "creating and selling authentic native articles of handicrafts and clothing."[80] And hunting has been an activity that the government has been able to regulate for quite some time.[81] However, the ability of federal agencies and courts to identify hunting as a means to practice traditional religion is only incidental to the hunting, which remains a bright-line activity within the eyes of Western law.[82]

In seeking to protect Native spiritual practice, the legislature, the courts, and administrative agencies have found a compelling interest to preserve the spiritual practices of Native Americans in using eagle feathers, peyote use, and ceremonial hunting, but have only been able to provide these abilities through using a clearly identifiable and bright line physical object to represent religious practice.

Congress has additionally gone further to protect Native spiritual practices in the American Indian Religious Freedom Act (AIRFA) of 1978 and its 1994 amendments.[83] However, AIRFA was largely "without teeth."[84] Additionally, AIRFA merely recognized that the First Amendment rights enjoyed by non-Natives would be applied to Native Americans, as the "inherent right of freedom to believe, express, and exercise the traditional

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[78] Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a) (2006); Anderson v. Evans, 371 F.3d 475, 498 (9th Cir. 2004) ("[T]he MMPA places a general moratorium [on whaling] on all persons except certain Native Alaskans with subsistence needs.").

[79] *See* COTÉ, *supra* note 47, at 32 (Makah and Nuu-chah-nulth tribes "believe[] that a whale was not caught, but, with the proper rituals and utmost respect shown to the whale, it would give itself up to the whaler and to the people who had shown it the most esteem."). And the resulting ceremonial feast, a "potlatch," was held after the hunt to reinforce cultural and social hierarchies. *Id.* at 35–41.

[80] 16 U.S.C. § 1371(b); *see also* Endangered Species Act § 10(e), 16 U.S.C. § 1539(e) (2006) (allowing subsistence taking of endangered wildlife for Alaskan Natives).

[81] *See* Cooperative Agreement Between the National Oceanic and Atmospheric Administration and the Alaska Eskimo Whaling Commission as Amended 2008, *available at* http://www.nmfs.noaa.gov/pr/pdfs/agreement_aewc.pdf.

[82] *See* Metcalf v. Daley, 214 F.3d 1135, 1139 (9th Cir. 2000) ("Shortly thereafter, on March 22, 1996, NOAA entered into a formal written Agreement with the Tribe, which provided that '[a]fter an adequate statement of need is prepared [by the Makah], NOAA, through the U.S. Commissioner to the IWC, will make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe.'" (alterations in original)).

[83] American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2006)); American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C § 1996a).

[84] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) ("[The bill's sponsor] Representative Udall emphasized that the bill would not 'confer special religious rights on Indians,' would 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'" (quoting 124 CONG. REC. 21444, 21445 (1978))).

religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[85] Had earlier religious repressions not taken place,[86] not only would AIRFA be unnecessary, but Natives and non-Natives would be on equal footing under the gaze of the First Amendment. Congress additionally passed the Religious Freedom Restoration Act (RFRA)[87] in 1993 "to restore the compelling interest test as set forth in *Sherbert v. Verner*,[88] and *Wisconsin v. Yoder*,[89] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[90] So in essence, these Acts reaffirmed that the Free Exercise Clause of the First Amendment applies to both Native and non-Native alike: an affirmative freedom to believe and worship by prohibiting the government from making laws that prohibit the free exercise of religion.[91]

E. Intellectual Property Concerns

Some have recognized that cultural practices including ceremonies could be protected, or at least recognized, in intellectual property law.[92]

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[85] 42 U.S.C § 1996.

[86] *See supra* notes 35–48 and accompanying text.

[87] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)); *see id.* § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section."); *id.* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

[88] 374 U.S. 398 (1963).

[89] 406 U.S. 205 (1972).

[90] 42 U.S.C. § 2000bb(b) (citations omitted); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (ruling that the government failed to demonstrate a compelling interest in applying the Controlled Substances Act to the UDV's sacramental use of a hallucinogenic tea containing the Schedule I drug, DMT); Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1219 (D. Or. 2009), *vacated sub nom.* Church of Holy Light of Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011). *See generally* Jason Gubi, *The Religious Freedom Restoration Act and Protection of Native American Religious Practices*, MOD. AM., Fall 2008, at 73.

[91] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988); *see also* United States v. Warner, 595 F. Supp. 595, 599–600 (D.N.D. 1984) (referring to free exercise of Native religion: "The purpose of the regulation was not to further the interests of the NAC or any other religion, but to meet possible free exercise claims by removing affirmative barriers to religious practices. Nor does the exemption in effect sponsor the religion of the NAC; it merely allows the free exercise of the traditional NAC religion.").

[92] *See, e.g.*, Robert J. Miller, *American Indian and Tribal Intellectual Property Rights*, 13 TUL. J. TECH. & INTELL. PROP. 179, 183–84 (2010); Tsosie, *supra* note 49, at 950.

With Native ceremonies most likely falling into the copyright[93] category, the implicit goals of using copyright law must be explored to at least gain a cursory understanding of the compatibility of Native ceremonial practices with the current protective scheme offered through copyright law.

> Today, copyright laws in the United States and elsewhere protect virtually all "original works of authorship," including literary, musical, dramatic, and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; architectural works; and, in the United States and some other countries, sound recordings. . . . When copyright exists, it subsists from the moment of creation and vests in the author of the work.[94]

Copyright is then supported by two theories: the incentive theory and the prospect theory. "[I]ncentive theory suggests that, in the absence of copyright protection, the number of works created and published would be less than optimal due to the ability of others to free-ride upon the efforts of creator and publishers and thereby prevent them from recouping their investments,"[95] whereas "prospect theory suggests that according ownership rights in all of the various uses for any given copyrighted work will maximize social welfare by encouraging the efficient development of markets for those uses."[96] Both of these concepts reflect a market-based and resource-consumption protection in seeking to encourage new and innovative works. As a defense to a copyright violation allegation, "copyright law recognizes independent creation . . . which means that a copyright defendant is liable only if she engages in the unauthorized *copying* of another's work."[97] This does not extend to people who merely read or watch copyright-protected works because of the enormous transaction costs associated with trying to enforce merely viewing a work that violates a copyright.[98]

> The thought of penalizing people for reading books, watching movies, or listening to or making music within the privacy of their own homes arguably grates upon First Amendment and privacy concerns in a way that penalizing people for copying, distributing, or *publicly* performing those works apparently does not. . . . The utilitarian products we use . . . may not be as intensely personal as the books we read, the music we listen to, or the films we watch, and in regu-

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[93] COOMBE, *supra* note 22, at 224–25 ("The rhetoric of cultural nationalism clearly bears the traces of the same logic that defines copyright. Each nation or group is perceived as an author who originates a culture from resources that come from within and can thus lay claim to exclusive possession of the expressive works that embody its personality.").

[94] ROGER D. BLAIR & THOMAS F. COTTER, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES 27 (2005) (footnotes omitted).

[95] *Id.* at 30.

[96] *Id.* at 31.

[97] *Id.* at 102–03.

[98] *Id.* at 147.

> lating the former but not the latter the state conveys less of an impression of attempting to control the minds of its citizens.[99]

Recognizing the intensely private nature of religious practices and beliefs, using copyright legal protections in an effort to preserve one group's use of religion over others similarly "grates upon the First Amendment" in the same manner as would penalizing people for private consumption versus public distribution. Interestingly, this raises the question of whether performing Native ceremonies would be considered a private practice, or a public distribution. I speculate that facially it could be polarizing depending on the viewpoint taken on whether ceremonial practice is public or private, and therefore subject to copyright protections. But when questioned about whether a person should be subject to the regulation of the government for their religious practices, most people would be against the government controlling the pulpit, regardless of the form.

However attractive it may be to attempt to classify Native American spiritual practices as intellectual property, the clear conflict between Native and Western concepts of property demonstrates the difficulty in crafting an intellectual property based protectionary measure.[100]

> Despite guarantees of basic rights and freedoms, the "modern" world requires title deeds and copyright in order to protect land and cultural claims, while aboriginal peoples, of course, did not keep such records of ownership—some claim that to do so would be "untraditional," not aboriginal. Failing that, historical or material evidence might be accepted in courts. For as long as land rights and religious rights are regarded as separate issues by the US or Canadian governments, the courts will be unable to give the fundamental freedom of religion to aboriginal peoples.[101]

The communal nature of Native ceremonial practice can be found in the words included in the ceremonies themselves, with prayers offered for the benefit of the community as opposed to self.[102] These views are vastly different from Western identities of property, as "[l]aws of intellectual

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[99] *Id.* at 149.

[100] *See* Kelsey Collier-Wise, Essay, *Identity Theft: A Search for Legal Protections of Intangible Indigenous Cultural Property*, 13 GREAT PLAINS NAT. RESOURCES J. 85, 99–100 (2010).

[101] OWEN, *supra* note 20, at 32–33.

[102] *See* THE SACRED PIPE, *supra* note 32, at 65–66 (prayer "That my people may live!"); *id.* at 57 (cry and pleading during the *hanblecheyapi*: "O Great Spirit, be merciful to me that my people may live!"); *see also* James R. Walker, *The* Hunka *Ceremony*, *in* JAMES R. WALKER, LAKOTA BELIEF AND RITUAL 216, 235 (Raymond J. DeMallie & Elaine A. Jahner eds., 1991) (describing the *Hunka* ceremony: after distributing fat meat to all of the ceremonial participants, "the *walowan* [ceremonial conductor] should say that he is hungry and has no fat meat to eat and ask the candidate for some. If the candidate should say that he has no meat, then the *walowan* should say to him that he has some in his mouth and advise him that as a *Hunka* he should be ready to take the meat from his own mouth and give it to a hungry *Hunkaya*").

property generally—copyright, trademark, and publicity rights, in particular—constitute a political economy of mimesis in capitalist societies, constructing authors, regulating activities of reproduction, licensing copying, and prohibiting imitation, all in the service of maintaining the exchange value of texts."[103] These "[s]implistic reductions of Native concerns to trademark or copyright considerations and the assertion of intellectual property rights fail to reflect the full dimensions of Native aspirations and impose colonial juridical categories on postcolonial struggles in a fashion that reenacts the cultural violence of colonization."[104] Moreover, "[i]n the law's division of intellectual property from cultural property, authors with intellect are distinguished from cultures with property. . . . [T]hose who have culture speak only on behalf of a cultural tradition that must be unified and homogeneous before we will accord it any respect."[105]

The balance between seeking protection through intellectual property and characterizing Native culture as property not only generates friction,[106] for the most part, it falls outside of the typical ways reserved for legal protection. For example, under United States copyright law, protected works need to fit within a short list of tangibly re-creatable forms.[107] Ideas and procedures are specifically excluded,[108] which would most likely be the form in which Native ceremonies would be classified. However, if those expressions are transcribed into a book, for example, then the words contained within the book are copyrightable. But as mentioned earlier, using the copyrighted material as a handbook for performing a ceremony would not be prohibited, whereas making a copy of the book would be. Although there may be an incentive to fix ceremonial practices into a tangible form for legal protection, this comes with dangers that may only become apparent decades after their writing.

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[103] COOMBE, *supra* note 22, at 169.

[104] *Id.* at 232–33 (included in the list of colonial oppression is the seizure of land, suppression of Indian religious practice, prohibition of Indian language, expropriation of ceremonial objects, collection of grave material and artifacts by archaeologists, definition and description of Native culture by non-Natives, forced adoption of children, separation of families, and a legacy of sexual abuse).

[105] *Id.* at 243.

[106] *Id.* at 204–05 ("Most such strategies, however, involve characterizing their own historical usages of names and symbols as exercises of commercial possession, representing a course of conduct in Anglo-American proprietary terms to assert that these signifiers are marks in trade . . . . Under state statutory and common law dilution provisions, moreover, Native peoples could argue that the offensive commercial usage 'diluted' the value and significance of their own marks. To do so, however, would involve characterizing their culture as property . . . . As one American Indian activist remarked, you can legally protect a mark, but not a peoples' being, against commercial dilution.").

[107] *See* 17 U.S.C. § 102(a) (2006).

[108] *Id.* § 102(b).

F. Distribution of Intimate Ceremonial Practices

Probably the most difficult aspect of ceremonial protection for the Lakota arises from the circumstances in which intimate ceremonial information has been widely distributed and readily available for appropriation. Most influential is the book *Black Elk Speaks*,[109] and its resulting progeny. "Originally published in 1932, *Black Elk Speaks*, the story of a Lakota 'holy man,' took on a new lease of life in the climate of the early 1970s when it was reissued and has remained a textbook of 'Native American' spirituality ever since."[110] In this book, Black Elk describes Lakota life in the transition from pre-colonial rule to reservation life. Also included are descriptions of his own personal visions as well as ceremonies performed to empower those visions for the benefit of his people.[111] Twenty years later in 1953, Joseph Epes Brown published *The Sacred Pipe: Black Elk's Account of the Seven Rites of the Oglala Sioux*.[112] "Some of the descriptions are so detailed it would be possible to replicate the ceremonies using the book as a manual."[113] However, the intimacy of the details conveyed was not lost on Brown:

> Most of the material contained in this book has, in the past, been very closely guarded by the Indians. It was believed, and rightly so, that these things are too sacred to be told indiscriminately; but it is now said by those few old wise men of the Sioux who are still living that, when we are nearing an end of a cycle, when men everywhere are falling away from an understanding of, and participation in, the truths that have been revealed to them in the beginning . . . then it is permissible and even desirable to give out this knowledge.[114]

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[109] JOHN G. NEIHARDT, BLACK ELK SPEAKS: BEING THE LIFE STORY OF A HOLY MAN OF THE OGLALA SIOUX (Univ. of Neb. Press 1988) (1932).

[110] OWEN, *supra* note 20, at 34.

[111] NEIHARDT, *supra* note 109, at 162–76 (describing the horse ceremony performed to empower his vision); *id.* at 177–87 (describing the dog vision); *id.* at 188–93 (describing the *heyoka* dog sacrifice ceremony as a result of Black Elk's vision).

[112] THE SACRED PIPE, *supra* note 32.

[113] OWEN, *supra* note 20, at 41–42; s*ee also* THE SACRED PIPE, *supra* note 32, at 3–9 (detailing the White Buffalo Calf Woman origin); *id.* at 10–30 (directions and script on how to pray with a *chanupa* [sacred catlinite pipe] and perform the Keeping of the Soul ceremony); *id.* at 31–43 (*inipi*, Sweat Lodge ceremony, construction, diagrams, and script); *id.* at 44–66 (*hanblecheyapi*, Crying for a Vision ceremony, diagrams, script and practice); *id.* at 67–100 (*wiwanyag wachipi*, Sun Dance ceremony, script, diagrams, equipment list, and procedure); *id.* at 101–15 (*hankapi*, The Making of Relatives ceremony, script, process, equipment); *id.* at 116–26 (*ishna ta awi cha lowan*, Preparing a Girl for Womanhood ceremony, process, script, equipment); *id.* at 127–38 (*tapa wanka yap*, The Throwing of the Ball ceremony, process, script, equipment; this ceremony includes having people scrambling to catch a thrown sacred ball, symbolically chasing after *Wakan Tanka*, the Great Spirit). *See generally* RAYMOND A. BUCKO, THE LAKOTA RITUAL OF THE SWEAT LODGE: HISTORY AND CONTEMPORARY PRACTICE 122–37 (1998) (prayer language and songs in both Lakota and English).

[114] Joseph Epes Brown, *Preface* to THE SACRED PIPE, *supra* note 32, at ix, xii.

Black Elk also used the metaphor of *The Throwing of the Ball* ceremony[115] to describe his motivations in divulging the information:

> At this sad time today among our people, we are scrambling for the ball, and some are not even trying to catch it, which makes me cry when I think of it. But soon I know it will be caught, for the end is rapidly approaching, and then it will be returned to the center, and our people will be with it. It is my prayer that this be so, and it is in order to aid in this "recovery of the ball," that I have wished to make this book.[116]

Given the timing of the divulging of this information in the 1930s and 1950s, when Native religious repression and conceptions of Native American savagery were at a peak, Black Elk's pragmatic use of publishing may have served to preserve Lakota spirituality when it may have come to the brink of completely disappearing.[117]

However, the dissemination of this information has led to exploitation and appropriation in an unrestricted manner.

> It has been our unfortunate history in the United States that once released from the control of a particular Native culture, information concerning religious practices has often times been exploited, with the result that the culture is thereby also exploited. . . . This has led to a high level of mistrust by Native groups . . . .[118]

This reluctance to disclose spiritual concerns was also demonstrated in *Muckleshoot Indian Tribe v. United States Forest Service*[119] and *Pueblo of Sandia v. United States*[120] when tribes were consulted about their religious and spiritual practices and connections to lands in differing land actions by the government.[121] So with *Black Elk Speaks* and *The Sacred Pipe* available as

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[115] *See* THE SACRED PIPE, *supra* note 32, at 127–38; *supra* note 113 and accompanying text.

[116] *Id.* at 138.

[117] *See* OWEN, *supra* note 20, at 30 ("The government policies against the practice of Lakota ceremonies are important to discuss as they provide the context that led Black Elk to speak of his people's traditions to non-Natives, not only to preserve them, but also to counter the accusations of savagery and promote a Lakota spirituality that is compatible with a Christian sense of morality."); *id.* at 73 ("'Indeed, through the preservation and sharing of our ways, the whole world now knows of the Lakotas.' He implies that the sharing of ceremonies with non-Natives has also helped to preserve them for future generations of Lakota." (quoting Tom Kanatakeniate Cook, *Cook: Statements from Elders Regarding the Protection of Ceremonies*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 7, 2003), http://indiancountrytodaymedianetwork.com/mobile/ictarchives/2003/07/07/cook-statements-from-elders-regarding-the-protection-of-ceremonies-88974)).

[118] Steven C. Moore, *Sacred Sites and Public Lands*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 81, 97 (Christopher Vecsey ed., 1996).

[119] 177 F.3d 800 (9th Cir. 1999).

[120] 50 F.3d 856 (10th Cir. 1995).

[121] *Muckleshoot Indian Tribe*, 177 F.3d at 806–07 ("The Tribe was unable, or unwilling, to provide [cultural, religious, and resource] information sufficient to persuade the Agency that it should reconsider its decisions."); *Pueblo of Sandia*, 50

manuals[122] for anyone to replicate the Lakota's ceremonies, the danger of misusing, distorting, and appropriating of culturally sensitive information is readily apparent.

III. Emerging Efforts for Ceremonial Protection

Given the problem of appropriating Native culture through transforming their ceremonies and rituals, several proposals have emerged in seeking to offer a form of protection to Native communities. Some have argued for types of intellectual property law to protect these ceremonies,[123] whereas others have advocated for stricter protections in Freedom of Information Act (FOIA) disclosures when tribes have consulted with the government.[124] One approach deals with international protections through the United Nations[125] and its sub-organizations.[126] Finally, at least one Tribal organization has advocated amending the AIRFA to ensure that non-Natives are unable to lead Native ceremonies.[127]

A. United Nations Approach

The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage[128] has a direct application to the protection of Native ceremonies. As defined in Article 2, "'intangible cultural heritage' means the practices, representations, expressions, knowledge, [and] skills . . . that communities, groups and, in some cases, individuals recognize as part of their cultural heritage," manifested in "social practices, rituals and festive

F.3d at 860 ("Because communications from the tribes indicated the existence of traditional cultural properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information, we hold that the agency did not reasonably pursue the information necessary . . . .").

[122] *See supra* note 113 and accompanying text; *see also* Steinmetz, *supra* note 28, at 57–82 (describing the process of several ceremonies, including offering the sacred pipe, the pipe fast (*hanbleceya* or vision quest), *yuwipi* ceremony, and sun dance ceremony).

[123] *See* Collier-Wise, *supra* note 100, at 93; Miller, *supra* note 92, at 183–84.

[124] *See* Ethan Plaut, Comment, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 Ecology L.Q. 137 (2009).

[125] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

[126] Convention for the Safeguarding of Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 36 (adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO)).

[127] *The Cheyenne Declaration Regarding the Protection of Sacred Ceremonies*, Dakota-Lakota-Nakota Human Rights Advocacy Coalition (May 6, 2003), http://www.dlncoalition.org/dln_issues/2003maycheyennedeclaration.htm [hereinafter *Cheyenne Declaration*].

[128] Convention for the Safeguarding of Intangible Cultural Heritage, *supra* note 126.

events."[129] States party to this convention are to inventory and designate a competent body to safeguard the intangible cultural heritage to include:

> [A]dopt[ing] appropriate legal, technical, administrative and financial measures aimed at:
>
> > (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage . . . ;
> >
> > (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; [and]
> >
> > (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.[130]

Member States have published a long list of dances, songs, and cultural performances recognized by the Convention.[131] However, obviously missing from the list of Member States is the United States.[132] Without the Unites States as a signatory nation, Native American spiritual communities are without the option to participate in UNESCO's protective aspirations.

Given the scope of the Convention and its attempt to provide an inventory of cultural practices, the Convention runs counter to both Natives' mistrust of government organizations and the reluctance typically encountered when looking to extract this kind of information from Native practitioners.[133] "The Convention also ignores the fact that certain cultural groups might not want to have their intangible cultural heritage inventoried."[134] So while applicable, both the United States not being a signatory of the Convention, and the difficulty of extracting or receiving voluntary disclosure of the information the Convention is looking to inventory, mean that applying this UNESCO standard to protect Native

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[129] *Id.* art. 2(1)–(2).

[130] *Id.* art. 13.

[131] *Intangible Heritage Lists*, UNESCO, http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011.

[132] *See* Convention for the Safeguarding of Intangible Cultural Heritage, *supra* note 126, at 4–5.

[133] *See supra* notes 118–22 and accompanying text; *see also* Audrey Mense, Note, *We Could Tell You, But Then We'd Have to Kill You: How Indigenous Cultural Secrecy Impedes the Protection of Natural Cultural Heritage in the United States*, 11 CHI.-KENT J. INT'L & COMP. L. 21 n.93 (2011), http://www.kentlaw.edu/jicl/articles/spring2011/Mense_Note.pdf ("The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage promotes a similar database in the realm of traditional knowledge as a means of increasing IP protection for indigenous groups. This proposal has been met with distrust on the part of native peoples, for such a database could ultimately increase the rate at which their knowledge is pirated.").

[134] Erin K. Slattery, *Preserving the United States' Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention of the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. 201, 248 (2006).

ceremonies from appropriation would only further exacerbate the ability of others to appropriate Native spirituality.

The United Nations Declaration on the Rights of Indigenous Peoples (DRIP)[135] provides another avenue of recognizing and protecting Native ceremonial practice. Although originally opposed to approving the 2007 Declaration, in December 2010, the United States under the Obama Administration reversed this position and "[t]he State Department also asserted that the Declaration was consistent with U.S. federal Indian policy, thereby justifying the Administration's decision to support the Declaration as a statement of non-binding federal policy."[136] Spiritual practices of Native people are recognized in Articles 25, 31, 34, and 36 which "call[] for acknowledgment of the spiritual relationship that binds indigenous peoples to their land, their ancestors, and to their future generations. This is an unbroken cord of light, transcendent and enduring, which ties together the constituent forces that enable the survival of native peoples throughout these lands."[137] The protections for Native spirituality in the DRIP are referred to as "rights," which are affirmative grants to Indigenous peoples for increased autonomy in maintaining their own cultural identity.[138] Article 38 of the DRIP then instructs signatory States to "take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."[139] Yet, while the aspirational goals of the "unfortunately acronymed 'DRIP'"[140] seek to address the Native interest in their self-determination, the non-binding and uncertain nature of the United States' implementation of this policy gives little in the way of affirmative protection for Native ceremonies. However, Professor Rebecca Tsosie remarks that "[t]he reality is that indigenous peoples have always transcended the limited views of the federal bureaucrats and politicians who attempt to craft the terms of their survival."[141]

B. Request for Federal Law

In working with the Lakota during the 2003 Protection of Ceremonies Meeting hosted by the Cheyenne River Sioux Tribe, members of the Cheyenne brought *The Cheyenne Declaration Regarding the Protection of Sacred Ceremonies*[142] to the group for approval.[143] The Cheyenne Declaration addressed the Bush Administration, stating:

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[135] Declaration on the Rights of Indigenous Peoples, *supra* note 125.

[136] Tsosie, *supra* note 49, at 924.

[137] *Id.* at 949 (footnote omitted).

[138] *See* Declaration on the Rights of Indigenous Peoples, *supra* note 125 arts. 25, 31, 34, 36.

[139] *Id.* art. 38.

[140] Susan Simpson, *The Lakota Tribe's Lawsuit over the Sweat Lodge Deaths Cites to Wrong DRIP*, THE VIEW FROM LL2 (Nov. 15, 2009), http://viewfromll2.com/2009/11/15/the-lakota-tribes-lawsuit-over-the-sweat-lodge-deaths-cites-to-wrong-drip/.

[141] Tsosie, *supra* note 49, at 948.

[142] *Cheyenne Declaration*, *supra* note 127.

> We hope that these unfortunate incidents can altogether be avoided with the proper relevant changes to [AIRFA], making it impossible for those non-natives to lead these sacred ceremonials, taking into account the element of our "Native language" which is our key component in summoning the Powers and Sacred Elements in prayer and song and which is exclusive of the Native Americans in our Inherent right to worship in the ways of our Grandfathers and theirs before them.[144]

However, the delegates at the meeting unanimously rejected empowering the federal government to intrude on their religious practices.[145] Given the reluctance to empower the federal government, especially after looking back to the events leading to the standoff at Wounded Knee,[146] it is unsurprising that the Cheyenne Declaration was rejected.

C. Excluding Non-Natives from Native Ceremonies

The major proposal of Native groups in seeking to protect their ceremonies from appropriation is to exclude non-Natives from presiding over Native ceremonies. While this has a broad range of ethnic connotations and issues involved in administration, the major aspects of the proposal are broken down into two major reasons for the exclusion: cultural identity and enforcement.[147]

1. Cultural Identity

Both the *Declaration of War Against Exploiters of Lakota Spirituality* and the *Looking Horse Proclamation on the Protection of Ceremonies* seek to preserve the cultural identity of the Oglala Lakota by allowing only Natives

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[143] *See* OWEN, *supra* note 20, at 74. Lakota, Cheyenne, Ponca, and Southern Ute spiritual leaders met in Bear Butte, South Dakota to address the protection of ceremonies from appropriation. Stephanie M. Schwartz, *Bear Butte Protection of Ceremonies Meeting*, WAMBLI HO NEWS (May 10, 2003), http://www.linkcenterfoundation.org/wambliho/WambliHoReport_May2003.html.

[144] *Cheyenne Declaration*, *supra* note 127. The "unfortunate incidents" mentioned in the passage is a reference to a "Solstice sweat lodge ritual" not under the guidance of a traditionally recognized spiritual leader resulting in two people of non-Native descent killed in El Dorado County, California. *Id.*

[145] OWEN, *supra* note 20, at 74.

[146] In 1972, Oglala Lakota Tribal Council Chairman Dick Wilson relied on the institutional authority granted to him through the Indian Reorganization Act, a BIA backed system of tribal authority. Wilson was subject to impeachment proceedings for his dictatorial tendencies, and used the BIA police to harass and arrest members of the American Indian Movement. In part, Wilson's actions, backed by the BIA, provoked the 1973 seventy-one day standoff at Wounded Knee, South Dakota. REINHARDT, *supra* note 4, at 150–55, 184–88.

[147] OWEN, *supra* note 20, at 86 (Looking Horse's "reasons for limiting ceremonies to the Lakota are twofold: Lakota are more likely to know the protocols, that is behave correctly according to 'tradition,' and he has some influence over Lakota people if they go astray.").

to preside over ceremonies.[148] Not only is this in effort to preserve cultural identity,[149] but also to ensure that ceremonies remain respectful. Part of the rationale is based on the belief that the ceremonies were given to Natives originally, so they have the divine authority to control the practice of the ceremonies.[150] The other part of the rationale is that only select Natives are likely to perform the ceremonies in the proper manner, as improperly performing ceremonies would both be dangerous and disrespectful.[151] Some others have sought to exclude non-Natives for more ethnically exclusive reasons.[152]

2. Enforcement

The pragmatism of allowing only Natives to preside over ceremonies also ensures that the Native spiritual communities have a way to rein in practitioners thought to be out of conformity with traditional protocols.

> Generally, if a member of a Native American or First Nations community breaks a protocol, that person could be ostracized from the group. This would not have the same effect on someone from out-

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[148] *Id.* at 59 ("The two documents . . . are particularly relevant as they concern the general practice of Lakota ceremonies and the perceived exploitation or abuse of them by 'rogue' Native Americans, their non-Native followers and non-Natives that claim to be ceremonial leaders."); s*ee also id.* at 61 (the *Declaration of War Against Exploiters of Lakota Spirituality*, passed by "five-hundred representatives" of the Lakota, Dakota, and Nakota Nations on June 10, 1993).

[149] WARD CHURCHILL, *A Little Matter of Genocide: Colonialism and the Expropriation of Indigenous Spiritual Tradition in Academia*, *in* FROM A NATIVE SON: SELECTED ESSAYS ON INDIGENISM 1985–1995, at 315, 320 ("We have many particular things which we hold internal to our cultures. These things are spiritual in nature . . . . They are *ours* and are *not* for sale." (quoting Barbara Owl, a White Earth Anishinabe)); COOMBE, *supra* note 22, at 239–40 ("The commodification of Indian spirituality is understood to pose the threat of cultural dissolution. Spiritual knowledge cannot be objectified and exchanged as a commodity or learned as an act of self-discovery: White people are often eager to learn about our spirituality, apparently seeing it as the latest self-help opportunity. . . . [However, Native spirituality] is based on respect and is meant to be taught in somewhat specific and often personal ways, the meanings of which are ruined by translation into a classroom or mass venue. The same is true for spiritual images that get used in ways wildly out of their cultural context." (footnote omitted)).

[150] *See* OWEN, *supra* note 20, at 59 ("Arvol Looking Horse, the current Keeper of the Sacred Pipe, believes that the Pipe and the seven ceremonies given by White Buffalo Calf Women to the Lakota were for the Lakota only, but that holy men, such as Frank Fools Crow, decided to include other Native Americans. However, Looking Horse disapproves of those who extend the ceremonies to non-Natives . . . .").

[151] *Id.* at 91 ("Native Americans consistently claim that their ceremonies are harmful when not conducted in the right way—following specific protocols and treating the powers with respect—thus the complaint made against non-Native appropriation is in reference to how the ceremonies are performed.").

[152] STEINMETZ, *supra* note 28, at 34 ("[T]he white man had destroyed his own religion and they did not want him destroying the Indian religion."); *see also* OWEN, *supra* note 20, at 40 ("In other words, AIM sought to transform Lakota tradition into a non-Christian pan-Native American one for Indians only. They were anti-syncretist and sought only aspects of Native American cultures that had their roots in pre-colonial times, ignoring the adaptations as deviations from a presumed original.").

> side the community, which is one reason Native Americans object to the non-Native appropriation of ceremonies—traditional sanctions are designed for members of the same community and ineffectual when applied to those from the outside.[153]

Looking Horse also seeks to limit those participating in ceremonies to those that possess an eagle feather, thereby restricting participation to only federally recognized tribes, and then, only those who have earned an eagle feather.[154] So community norms associated with traditional, precolonial customs were a form of maintaining ceremonial and religious norms that are not as controllable once these intimate details leave their original Native communities. With the inability to rein in offenders, ceremonial, and therefore, cultural identity has the ability to escape their traditional boundaries and transform into unrecognizable caricatures of their originals.

D. Awareness of Colonization Effects

Colonization of Native communities has set the backdrop for not only relinquishment of the resources once enjoyed before the arrival of Western culture, but the importation of the legal regime that is at odds with the culture of the colonized.[155]

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[153] OWEN, *supra* note 20, at 110; *see also id.* at 61 (AIM is "most concerned with the commercialization of their ceremonies, but the AIM resolution goes further by threatening to make the perpetrators outcasts.").

[154] *Id.* at 69 ("He recognizes the difficulty in enforcing such a decision when he adds that the only protection in government law, 'is that only enrolled members can carry an eagle feather.' As endangered species, eagle parts, including feathers, are heavily restricted and Native Americans have obtained special rights with the regard to their use and ownership. Even within Native American circles, the eagle feather is restricted to those who have 'earned' it and, as Looking Horse explains in the proclamation: 'In all the Seven Sacred Rites, there has always been the understanding of earning and a requirement of an eagle feather while participating in these Rites.' This is certainly not the case at the moment—many people participate in the *inipi* ceremony without first having earned an eagle feather. However, those who conduct the ceremony are likely to have one." (quoting Looking Horse, *supra* note 33)).

[155] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278–79 (1955) ("[C]ongressional recognition of Indian right of permanent occupancy . . . may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) ("As stated by Chief Justice Marshall in *Johnson v. M'Intosh*, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." (citation omitted)); Beecher v. Wetherby, 95 U.S. 517, 525 (1877) ("But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose."). *See generally* Krakoff, *supra* note 49; Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847 (2011); Tsosie, *supra* note 49.

> [T]he fact persists that on America's Indian reservations, Indigenous people do not live under Indigenous governments. They rule themselves through foreign, Western political institutions that are subject to federal authority. Such is the legacy of colonialism.[156]

And the colonialism has marginalized Native communities in image and treatment of their culture, property, and human remains.[157] And part of this colonization extended into the commercial market with images of Indigenous life exploited for profit.[158] Given this aggressive take-over of nearly all aspects of Indigenous life, Native communities seeking to assert their own identities began to use spirituality as a way to resist and redefine the colonization.[159] As the Civil Rights movement of the 1960s gave a voice to marginalized minorities, the relationship between AIM and the Lakota provided both a way to raise awareness of Indigenous life on the reservations and forge an identity of Native Americans that stretched across tribal boundaries.[160] Despite the militancy of the methods used to raise awareness, the use of spirituality to assert a Native cultural identity proved to be an effective way of resisting colonialism.[161]

IV. Analysis of the Approaches: Extreme Difficulty in Crafting a Protective Rule

Acknowledging the validity of the reasons for protecting Native ceremonies from appropriation, the difficulties in forming laws aimed at protecting Native ceremonies arise not only in the First Amendment of

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[156] Reinhardt, *supra* note 4, at 215.

[157] Hernández-Ávila, *supra* note 27, at 25 ("Many, if not most, non-Native Americans seem to feel an entitlement regarding Native American ceremonial and cultural traditions, artifacts, and gravesites, including ancestral bones, that can only be understood in the context of the original entitlement the first colonizers felt toward this land by 'right of conquest' and soon after, 'Manifest Destiny.'"). "While Indian people are still being denied their own full religious expression, many non-Indians are devouring Native American spiritual traditions in the same way they have consumed Native American art . . . once again with no thought to real, present-day, political, social, economic, and cultural/religious struggles in which Native people are engaged." *Id.*

[158] Coombe, *supra* note 22, at 178 ("The spoils of imperial conquest—teepees, wigwams . . . magnified images of an alterity claimed in the spirit of national expansion—were first asserted as trademarks in national commerce . . . .").

[159] Owen, *supra* note 20, at 36 ("'[AIM's] leaders were constructing an ideology affirming an Indian identity supported by [an] Indian religion, which turned out to be basically Oglala Lakota, thanks to the handy paperback *Black Elk Speaks* and the willingness of several Oglala *wicasa wakan* [holy men] to assist the neophytes. . . .' In other words, they have appropriated Lakota spirituality for their own ends as part of an anti-colonial agenda." (third alteration in original) (quoting Alice Beck Kehoe, The Ghost Dance: Ethnohistory and Revitalization 76 (1989))).

[160] *Id.* at 37 ("At that time the Lakota felt they needed the urban activists [AIM] in order to help Pine Ridge move towards a more traditional structure of tribal government.").

[161] *See* Steinmetz, *supra* note 28, at 34, 172.

the Constitution, but also in current intellectual property law. The diverse religious identities within Native communities further add to the difficulty. Yet, while the reasons for protecting indigenous spiritual identity are compelling, a legal remedy is, and will likely remain, unavailable.

A. Current Exemptions for Eagle Feathers, Peyote, and Ceremonial Hunting Are Bright-Line Rules that Deal with Easily Identifiable Ceremonial Practices

The federal and accompanying state law exemptions for peyote, eagle feathers, and ceremonial hunting deal with protection of Native ceremonial practices through using easily identifiable objects, not subject to a wide interpretation. It is easy to recognize that without these specific ceremonial objects Native ceremonies would be viewed under the same light as typical Western religious practices. If, for example, instead of the sacrament peyote in the NAC, the church used the Eucharist, no further recognition in protecting Native practices would be necessary. In addition, if instead of eagle feathers, domestic fowl feathers could be substituted for use in the ceremony, no individual exemption would be needed in the eyes of the law: Native ceremonies in practice would be legally no different from any of the other practiced religions in the United States.

Furthermore, because of the regulated nature of peyote and eagle feathers, the recognition of their importance in Native ceremonies carved out the necessary exemptions. I propose that maintaining this is mostly due to the economic nature of these ceremonial items. First, eagles are protected under federal law because of historically threatened population numbers.[162] This has made availability of eagle feathers limited because of not only scarcity in their natural environment, but also because the Bald Eagle Protection Act made the feathers even scarcer by regulating them. By giving members of federally recognized tribes the exclusive, non-scientific, non-educational access to these items, Congress created a regulatory monopoly on these ceremonial items, which has engendered an identity and an incentive to seek to maintain the exclusive distribution scheme. Because the primary permitted way of receiving the feathers is through the federal repository, and the waiting list often stretches into years of waiting time,[163] seeking the exclusionary policy of keeping non-Natives from receiving feathers will not likely increase waiting times for receiving feathers, thus maintaining the exclusive privilege associated with eagle feathers.[164]

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[162] Bald Eagle Protection Act, ch. 278, 54 Stat. 250, 250 (1940) (codified at 16 U.S.C. § 668) ("Whereas the bald eagle is now threatened with extinction: Therefore *be it enacted* . . . .").

[163] *See* Jessica L. Fjerstad, Note, *The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA, and the Regulation of Indian Religious Practices*, 55 S.D. L. REV. 528, 548–49 (2010).

[164] *See, e.g*, Mary Garrigan, *Tribute to Officers Violated No Laws*, RAPID CITY JOURNAL (Aug. 31, 2011), http://rapidcityjournal.com/news/tribute-to-officers-violated-no-laws/article_e134a362-d374-11e0-ac1a-001cc4c03286.html (In response to Native

Second, peyote is a Schedule I controlled substance.[165] This is because it both contains mescaline (another Schedule I controlled substance[166]) and has been associated with minority groups' use and perceived dangers of immorality in the eyes of the dominant culture.[167] In addition to its regulatory scarcity, peyote is also scarce because of its small natural environment—with distribution ranges in the United States limited to the Rio Grande River Valley in southern Texas[168]—and because of the small cactus's very slow growth and regeneration rate after harvest.[169] This has resulted in decreased availability of peyote for NAC practitioners because of distribution restrictions imposed by law, inter-tribal competition for the plant, and perceived associations with hippies.[170] So in seeking to protect the ceremonial identity of the NAC, it is apparent that the economic scarcity of the sacrament may influence the call to exclude non-Natives as much as the desire to maintain Native identity.

Similarly, ceremonial hunting takes on an identity tied to an easily identifiable ceremonial representation: the quarry itself. Endangered species, such as marine mammals, and regulated game animals are managed by governmental agencies based on their populations (the "supply").[171] The agencies regulate the "demand" by issuing permits or licenses to "take" the animal.[172] This ability to recognize the wildlife as a commodity demonstrates that Western law is familiar with managing markets and is fully capable of attaching secular significance to objects, regardless of important religious and spiritual associations.[173]

With the economic nature of these ceremonial items in context, turning to the law's ability to give these items protection, it demonstrates

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police officers placing eagle feathers in the casket of a slain police officer, Floyd Hand of the Black Hills Sioux Nation Treaty Council complained to the Rapid City Police Chief, claiming "[t]hat's really a violation. The family has no right burying eagle feathers. That's against the federal law . . . ." After reviewing the issue, the South Dakota U.S. Attorney and other Native leaders disagreed in this situation.).

[165] *See* s*upra* note 71 and accompanying text.

[166] 21 C.F.R. § 1308.11(d)(24) (2012).

[167] *See* United States v. Clary, 846 F. Supp. 768, 774–76 (E.D. Mo. 1994) *rev'd*, 34 F.3d 709 (8th Cir. 1994).

[168] EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS 168 (2d ed. 1996).

[169] *See id.* at 51.

[170] STEINMETZ, *supra* note 28, at 92–93 (In 1975, the amount of peyote used in ceremony was getting as low as 200 buttons per ceremony, when in the early 1960s, it was not uncommon for 1000 buttons to be consumed in a ceremony. Now using peyote is "becoming more symbolic than being a real medicine.").

[171] *See,* e.g., Endangered Fish and Wildlife; Gray Whale, 58 Fed. Reg. 3121, 3121 (Jan. 7, 1993) (delisting the gray whale from the endangered species list because of higher population numbers).

[172] *See* Bald Eagle Protection Act, 16 U.S.C. §§ 668–668d (2006); Endangered Species Act, 16 U.S.C. § 1539 (2006).

[173] *See* Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e (2006); *supra* notes 57–64 and accompanying text; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006); *supra* notes 62–63 and accompanying text.

that the law can recognize and protect these items in Western culture because of the ability to readily identify and create bright-line rules that are unavailable in the indefinable context of ceremonial practice. Court decisions have recognized that, but for the use of a regulated item, the courts will not look into the validity of a religion's ceremonies that are in all other ways in conformance with the law.[174] The court will instead turn to review the laws that seek to prohibit the free exercise of the religious beliefs.

B. Free Exercise Difficulties

Using the proposal in the *Looking Horse Proclamation* for the government to craft a rule that limited performing Lakota ceremonies to only Native Americans would likely create an immediate constitutional issue under the First Amendment. The Free Exercise Clause states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[175] The law imposed needs to be of general applicability.[176] Denying New Age practitioners the

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[174] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210 (D. Or. 2009), *vacated sub nom.* Church of Holy Light of Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (holding that a city's ordinance prohibiting the ceremonial sacrifice of animals was subject to strict scrutiny, with the resulting ordinance found unconstitutional because the city suppressed more conduct than was necessary to meet the city's goals); Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972) ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." (footnote omitted)); Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974) ("While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hindrance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity." (footnote omitted)); United States v. Meyers, 906 F. Supp. 1494, 1502–03 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996) (The Court will consider non-dispositive factors to determine whether beliefs are a religion for RFRA purposes, including ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensivenesss of beliefs, and accoutrements of religion.). *But see* United States v. Ballard, 322 U.S. 78, 87 (1944) ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.").

[175] U.S. CONST. amend. I.

[176] *See Lukumi Babalu*, 508 U.S. at 545–46 ("The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement of general

ability to appropriate and use Lakota ceremonies would almost certainly rise to an actionable claim.[177] With the cause of action being that the government had prevented free exercise of New Age religion, a court would then turn to the RFRA to analyze the claim under the strict scrutiny test: if the burden imposed "is in furtherance of a compelling governmental interest . . . and is the least restrictive means of furthering that compelling governmental interest."[178]

1. Substantial Burden on Religious Exercise

Prohibiting non-Natives from presiding over Native ceremonies could present a substantial burden to New Age practitioners. "[T]he threshold inquiry under RFRA is whether the statute [or conduct] in question *substantially burdens* a person's religious practice. If there is no substantial burden, RFRA does not apply."[179] And "[t]o be a 'substantial burden,' the government must either compel a person do something in contravention of their religious beliefs or require them to refrain from doing something required by their religious beliefs."[180] So, depending on the particular New Age beliefs held by the person who would be presiding over the Native ceremony, prohibiting them from performing the ceremony would be requiring them to refrain from a central tenet of their New Age beliefs. If, by chance, this performance was part of only a tourist attraction or self-help retreat, like James Ray's self-empowerment seminar, this would not rise to the level of a denial of "something required by their religious beliefs." It would be more like restricting a commodity from the market, or would only require the self-help retreat host to hire a Native practitioner to preside over the ceremony.

2. Compelling Governmental Interest

Assuming that the New Age practitioner would be substantially burdened by preventing non-Natives from performing Native ceremonies, this would advance the analysis to determine if there is a compelling governmental interest. Although there is a compelling interest in preserving

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applicability is designed to prevent." (alterations in original) (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment))).

[177] *See id.* at 558 ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: 'Congress shall make no law . . . prohibiting the free exercise [of religion]. . . .'" (Scalia, J., concurring in part and concurring in the judgment) (quoting U.S. CONST. amend. I)); *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) ("The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring))).

[178] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (2006).

[179] Crosley-El v. Berge, 896 F. Supp. 885, 887 (E.D. Wis. 1995) (second alteration in original) (quoting Morris v. Midway S. Baptist Church, 183 B.R. 239, 251 (Bankr. D. Kan. 1995)) (internal quotation marks omitted).

[180] *Id.* (quoting *Morris*, 183 B.R. at 251) (internal quotation marks omitted).

Native culture from appropriation, the issue is whether it is a compelling *governmental* interest. At least two courts have recognized the compelling nature of preserving Native religious and treaty rights.[181] However, both of these were in the context of ensuring a direct ability for Native practitioners to actively participate in their "own" religious traditions. These courts did not address the secondary impacts of appropriating Native ceremonies, which results in the dilution of Native culture through commodification and the resulting distortion of Native culture. The courts would need to recognize that an important government interest exists in regulating the practice of Native ceremonies. It is easy to speculate that no religious organization, whether Native or not, would want a compelling governmental interest allowing governmental intrusion into their religious practices.

However, assuming that a Native religious community would want there to be a compelling governmental interest in preserving their culture, thereby permitting only Native "clergy"[182] to preside over Native ceremonies, it is possible to find a legal hook for this argument. The trust relationship between federally recognized tribes and the government might rise to such a level that there is a lesser standard of review to demonstrate a compelling governmental interest. This "rational relationship"[183] test reduces the constitutional burden from the compelling interest standard to the rational basis standard, as echoed in *Mancari*.[184] So long as the benefits imposed are for members of federally recognized tribes, the test withstands scrutiny, and the regulation will probably be upheld. But this begs the question if the benefits from excluding non-

[181] United States v. Wilgus, 638 F.3d 1274, 1295–96 (10th Cir. 2011) (asserting that the government has a compelling interests in fostering the culture and religion of federally-recognized Indian tribes); Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (recognizing a compelling interest in restoring Indian treaty rights).

[182] I use this term because it probably best translates to the proposal in the *Looking Horse Proclamation*: excluding non-Natives from presiding over Native ceremonies. Looking Horse, *supra* note 33.

[183] *See* Rupert v. U.S. Fish & Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992) ("In a series of equal protection cases involving laws attacked as treating Native Americans in ways that created *racial* classifications, the Supreme Court has 'repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when *rationally related* to the Government's "unique obligation toward the Indians.'" (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979)); *id.* at 35 ("The principles affirmed in these cases 'point . . . broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications,' and we therefore see no reason not to use the 'rational relationship' analysis here, where the government has treated Native Americans differently from others in a manner that arguably creates a *religious* classification." (omission in original) (quoting United States v. Antelope, 430 U.S. 641, 646 (1977))); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 517 (2005). However, it should be noted that *Rupert* pre-dates RFRA, and its applicability may be in question post-RFRA.

[184] Morton v. Mancari, 417 U.S. 535 (1974).

Natives from presiding over Native ceremonies will benefit *only* members of federally recognized tribes. It is reasonable to conclude that preventing the appropriation and commodification of Native American cultural and religious identity would benefit both federally recognized tribes and terminated or non-recognized Native communities in that general Native culture would be protected. So, with the broader benefits granted, the *Mancari* government-to-government relationship does not exist, and therefore, the "rational relationship" test is left aside in favor of "compelling governmental interest." Most likely, preserving Native culture would, and should, qualify as a compelling interest.

3. The Least Restrictive Means of Furthering the Compelling Governmental Interest

A blanket prohibition along ethnic or federal recognition lines prohibiting non-Natives from presiding over ceremonies is a far cry from the least restrictive means of preserving Native identity from appropriation and distortion. For a court to find a compelling interest, a two-prong approach requires the government to support its choice of regulation, and refute the alternatives presented by the challenger.[185] If, as the courts have stated, there is a compelling governmental interest in preserving Native culture, the overbroad effects of prohibiting performance of Native ceremonies by non-Natives fails on the first inquiry about who else could perform ceremonies: Tribal members could perform the ceremonies in exactly the same manner as New Age plastic shamans, taking the same commodifying approaches and distorting the same traditions off the reservation.[186] Of course, Looking Horse added the qualifiers of having to also speak Lakota and possess an eagle feather, which gives additional ties to the Lakota community and the de jure requirement of being a member of a federally recognized tribe.[187] While these requirements, if also in law, would only define who within the Native community could lead a ceremony, and still would not negate the ability

[185] *Wilgus*, 638 F.3d at 1289 ("The task of deciding whether a particular regulatory framework is the least restrictive—out of all conceivable—means of achieving a goal virtually begs a judge to go on a fishing expedition in his or her own mind without tethering the inquiry to the evidence in the record. It is incumbent upon us, therefore, to limit ourselves to consideration of the alternative regulation schemes proffered by the parties, and supported in the record.").

[186] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (omission in original) (quoting Florida Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment))).

[187] *See* Looking Horse, *supra* note 33.

of "rogue" Native Americans to employ the same distortions that New Agers have.[188]

C. Establishment Clause Concerns

If the courts were to determine who would be able to run the Native ceremonies, they would have to engage in analysis typically prohibited by the scope of the Establishment Clause.[189] Typically, intra-church controversies are protected from review because of the dangers of entangling the courts in purely religious debates.[190] However, the guardian–ward relationship of the federal government to Native Americans is recognized

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[188] *See supra* Part III.C.

[189] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668, 674 (1970))).

[190] Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Superior Court, 439 U.S. 1369, 1373 (1978) ("Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.'" (citation omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 306 (1940))); Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 713 (1976) ("For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."); Van Osdol v. Vogt, 908 P.2d 1122, 1134 (Colo. 1996) ("What we do hold is that a church's choice of who shall serve as its minister is inextricably related to religious belief and therefore invokes the protection of the First Amendment."); Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 353 (D.C. 2005) ("Because judicial intrusion in religious disputes can advance religion or otherwise impermissibly entangle the civil courts in ecclesiastical matters, the Establishment Clause precludes civil courts from resolving disputes involving religious organizations whenever such disputes affect religious doctrine or church polity or administration."); Hutterville Hutterian Brethren, Inc. v. Waldner, 791 N.W.2d 169, 178 (S.D. 2010) ("Civil courts have no subject matter jurisdiction when it comes to matters of 'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'" (quoting *Milivojevich*, 426 U.S. at 714)).

as an exception to the typical entanglement prohibitions.[191] In addition, the courts can uphold a statute that presents a restriction on religion if there is a public danger associated with the practices of the religion.[192] So, given the unique relationship of the government to Native Americans, this may allow for more intrusion of the state into Native religious practices; however, this is premised on the assumption that there is some uniformity in identifying what is a Native ceremonial practice. The diversity of Native American ceremonial practice among tribes is one of the other difficulties in crafting a rule, and, even within those spiritual communities, religious controversy abounds.

D. Diversity of Native Identity

The diversity of interests within the Lakota themselves demonstrates how difficult it would be to even define what Native ceremonial beliefs are, let alone how to approach the issue. First, the organization of Lakota religious authority is largely decentralized, with individual clans determining appropriate practices.[193] This creates a difficulty for the courts to assess if an intrusion is warranted because the religious organization typically needs to be a "hierarchical church" to warrant the most protection from intrusion.[194] This Western idea of a church, and therefore religious

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[191] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991) ("The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.").

[192] Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("'[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.") (second alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)).

[193] *See* OWEN, *supra* note 20, at 72 ("[*T*]*iospaye* as an autonomous entity are historical as well—it was the headman of each band that signed the treaties. This applies to spiritual matters, as well. 'All tiyospaye bloodlines own the Lakota cultural property rights, along with the power to act on them for the survival and prosperity of their relatives.'" (quoting Tom Kanatakeniate Cook, *Mitakuye Oyasin: A Response to the Looking Horse Proclamation*, Indian Country Today Media Network (Apr. 25, 2003), http://indiancountrytodaymedianetwork.com/ictarchives/2003/04/25/mitakuye-oyasin-a-response-to-the-looking-horse-proclamation-88708)).

[194] 1 W. COLE DURHAM JR. ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 1:3 (2012), *available at* Westlaw, database RELORGS ("Where the power and congruence of a group's beliefs may be difficult to assess, the courts move on to explore its shared symbols, rules prescribing conduct, group activities and the degree of group incursions upon individual autonomy. Thus, churches and religious organizations embrace a broader spectrum of social organizations than those that fit the traditional theistic image projected by the usually listed denominations. There is a clear sense that a church must not only be organized, but must be commonly perceived as a

practice, separate from daily life, runs counter to at least Lakota traditional spiritual practice.[195] Diversity of opinions about non-Native participation also abounds, with some Native spiritual leaders in direct opposition to the *Looking Horse Proclamation*. Tom Kanatakeniate Cook writes:

> Many people view the proclamation as an effort by a small group to impose rules of conformity upon everyone, and see it as a threat to control the spiritual lives of people. . . .
>
> I submit that our family circles cannot support the decision reached here for some very specific reasons: first and foremost, this body lacks historical precedent or foundation for governance of the people. Traditional governance has always been based upon the sovereignty and integrity of the *tiospaye*, or extended family, in matters of control, government, and cultural property rights.[196]

He also writes, "[W]e feel the Pipe Proclamation contains an unfortunate racial foundation, and we can not, in the spirit of these ancient prayers, endorse a racist approach.'"[197] AIM leader Clyde Bellecourt said that "[t]he songs were not given to Arvol Looking Horse. It is not up to him to say nobody else can use them."[198] And the late AIM leader Russell Means stated that:

> [N]on-Natives would appropriate what they want. . . . "[His] own response to non-Indian participants is . . . we welcome you into our sun dance, provided you continue to participate in our way of life. If you cannot do that, we do not want you to participate because we do not want to harm you."[199]

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church. The contents of its creed are less important than its appearance and functions."); *see also* New v. Kroeger, 167 Cal. App. 4th 800, 815 (2008), *review granted*, 198 P.3d 1087 (Cal. 2009), *dismissed, remanded, and ordered republished*, 202 P.3d 1089, 815–17 (Cal. 2009).

[195] *See* Hand Complaint, *supra* note 1, at 7 (Arvol Looking Horse states that the White Buffalo Calf woman brought the Sacred Bundle to the Lakota "to insure that our culture and ways of life (*not a religion*) is maintained in a good way with protocols that are very strict." (emphasis added)).

[196] Cook, *supra* note 117; *see* REINHARDT, *supra* note 4, at 209 (discussing the importance of traditional clans on sources of authority: "[M]uch of the full-blood community continued to have little faith in the Oglala Sioux Tribal Council . . . [and had] 'no allegiance to the tribal council, except to the extent that temporary alliances with council officials may serve the immediate interests of individuals, because the true allegiance is between kinsmen whose locus of organization is out in the districts.'" (quoting MARLA N. POWERS, OGLALA WOMEN: MYTH, RITUAL, AND REALITY 147 (1986))).

[197] Cook, *supra* note 193; *see* Cook, *supra* note 193 ("[T]iospayes ['extended families' or 'clans'] are inherent sovereign entities in matters of life and religion."); *see also* STEINMETZ, *supra* note 28, at 16 (when the sacred Calf Pipe was displayed in the presence of a white priest, to the complaint of a Lakota woman, a religious leader stated that "the Calf Pipe is open to everyone regardless of race and that is the way they do it there.").

[198] OWEN, *supra* note 20, at 80.

[199] *Id.*

Given the decentralized nature and diversity of opinions on non-Native participation, "the issue concerning the ownership of Lakota ceremonies is unresolved."[200] "Consequently, Lakota attending the Protection of Ceremonies meetings have been unable to finalize how they can implement their recommendations against exploitation without, in effect, institutionalizing authority."[201] Non-universal agreements on what constitutes improper uses of spiritual practice are not unique to the Lakota. On the Chippewa reservation, a highway sign with the Chippewa heroic figure of Nanabozho vanquishing Paul Bunyan is repeatedly chopped down "by local residents outraged by the sacrilege done to their local mascot; [yet] people on the reservation resurrect the sign again and again."[202]

The decentralized authority of Lakota religious authority also creates confusion about how to identify who is an authorized spiritual leader. "The problem then is how to determine whose consent [to lead ceremonies] is valid, which is difficult in the Lakota tradition, lacking, as it does, a centralized authority and where several medicine men have given permission to non-Natives to perform Lakota ceremonies."[203] Traditionally, to be recognized as a spiritual leader, a person needs to be Lakota by ethnicity, recognized as a spiritual leader, and have received personal visions for making a ceremony.[204] However, on at least one occasion, a Catholic Priest was recognized as an authorized spiritual leader and allowed to participate in the sun dance.[205] However, this was not without controversy at the time.[206]

It would be disingenuous and ignorant to fail to identify the competing religious beliefs held by Native Americans. Not all Native Americans subscribe to traditional Native belief systems. For example, on the Pine Ridge reservation, there are at least six identifiable religious ideologies.[207] These include traditional Lakota practitioners, two different traditions of the NAC,[208] and Catholic and Protestant Christian churches with their own variations. The conflicts between these groups demonstrate the difficulty in trying to identify religious practice as a Native identity.[209] Histor-

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[200] *Id.* at 63.

[201] *Id.* at 172.

[202] COOMBE, *supra* note 22, at 179.

[203] OWEN, *supra* note 20, at 107.

[204] *See id.* at 80–87.

[205] *See* STEINMETZ, *supra* note 28, at 31.

[206] *See id.* at 31–32.

[207] *See id.* at 170–97 (describing Lakota religious identity consisting of six religious groups: traditional Lakota symbols, Body of Christ Church, NAC of two types, and traditional Christian churches with varied doctrinal beliefs).

[208] *See id.* at 193–97 (the Cross Fire, and Half-Moon traditions of the NAC). For a description of the differences and similarities of NAC ceremonial traditions, see ANDERSON, *supra* note 168, at 49–76.

[209] Steinmetz comments upon comparing the historical old traditions with the modern white man's technology and change continuum, stating that "I think it is more correct to say that the Lakota identity, just like anyone else's, is frequently

ically, sun dances and peyote ceremonies have come under opposition by Native Christian communities.[210] And traditional Lakotas have had other conflicting views of Christian presence on the reservation. Eugene Rowland, the principal minister of an offshoot of the Pentecostal Body of Christ Independent Church remarks:

> The American Indian Movement is telling people that Christianity is a white man's religion and that the Indian people should go back to their Indian religion. Sometimes when I preach, people mock me and make fun of me. Some Indian people still believe in *yuwipi* meetings and talking to the spirits, which is wrong, and Christ doesn't want it.[211]

The conflicting views within Native communities demonstrate that a bright-line rule seeking to protect only "Native" ceremonies would apply only to traditional practitioners, and would not afford the same protection to Native Americans that are practicing different religious ideologies.

E. Transformative Nature of Native Ceremony

Another issue arising is the transformative nature of Lakota ceremony, as well as other religions present on Pine Ridge, which often have competing views on Native identity. "Yuwipi men are making changes in the ceremony, showing that it is a living tradition," using a different standard "because of a vision."[212] In addition *tiospayes* are conducting their own sun dances, which are not subject to an overarching authority.[213] NAC branches have also used varying methods of performing ceremony, sometimes incorporating the traditional Lakota pipe into their ceremonies.[214] Not only has this transformation been apparent in Lakota communities, but the Lakota's own ceremonies have been distributed to other tribes in a pan-Indian movement, in essence giving Lakota ceremony a broader application that transcends a tribal identity.

The distribution of Lakota ceremonies in an effort to re-forge a Native identity has caused their ceremonial traditions to spread to other communities, with the resulting appropriation of Lakota ceremonies by other tribes. Looking Horse stated:

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ambivalent—containing both feelings of continuity and discontinuity with basic human needs, of security and insecurity, of strength and fear." STEINMETZ, *supra* note 28, at 169.

[210] *Id.* at 30 (explaining that the 1962 sun dance had protests from within the community, a conflict between traditional Lakota religion and Christianity); *id.* at 91 ("[P]eople tried to conduct Peyote meetings in Manderson during the 1930s but the strong Catholic community there had the police run them out.").

[211] *Id.* at 154.

[212] *Id.* at 65.

[213] *See id.* at 33 (noting 14 different sun dances during one year).

[214] *Id.* at 94–95 (discussing the differences and frictions between different NAC branches and using the pipe in the peyote ceremony).

> Chief Fools Crow and my father Stanley Looking Horse decided to allow other Native Nations to participate in these Rites. Their reasons were based on the fact that most Nations have lost their ways through assimilation or lack of Teachers to teach their Indigenous ways. They honored and understood the unity of the First Nations People when different Tribes came to the aid of the Wounded Knee Occupation. I cannot undo their decision out of respect for our Chief and Elder. It has also been in our history that our Ancestors have respectfully shared our ceremonies with other Indigenous Nations.[215]

This has led to Lakota traditions of the *inipi* sweat lodge being spread from Mexico to Newfoundland, as well as allowing other Lakota-based practices to be used by other tribes.[216] Also notable is the spread of the Lakota term *mitakuye oyasin* meaning "all my relations,"[217] with this being used by the Apache, Chocktaw, and Ojibwe.[218] In turn, the Lakota traditions of using the pipe, ghost dance, and the sun dance have become more of a "pan-Indian movement,"[219] with activists[220] seeking to use this as a way to recreate a Native identity.[221] So not only has the line blurred about which tribe is using Lakota ceremonies, but also the Lakota-vested authority to recognize spiritual leaders was essentially given up when these traditions were spread to other Native communities. These communities would have their own protocols for determining who could lead their ceremonies, and with differing standards and beliefs, it would be impossible to know if they were following Lakota-based grants of authority. This lack of bright-line identification only adds to the confusion when trying to craft a rule to protect Native ceremonies, while ensuring that autonomous spiritual practice is not infringed.

F. Possible Protectionary Measures?

Given the broad range of issues discussed earlier, it is readily apparent that creating a rule of law that adequately protects Native cultures from ceremonial appropriation would be extremely difficult, and proposals would seem to only raise more questions than they would answer. Different tribes may want different rules, as some may not be shy about requesting governmental intervention; others expressly want the government to stay out of their religious and cultural practices. Yet the Lako-

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[215] Avrol Looking Horse, *Protection of Ceremonies O-mini-c'i-ya-pi*, DAKOTA-LAKOTA-NAKOTA HUM. RTS. ADVOC. COALITION, http://www.dlncoalition.org/dln_issues/protection_of_ceremonies.htm.

[216] OWEN, *supra* note 20, at 54.

[217] In turn meaning that all life is connected and inseparable. *Id.* at 52.

[218] *Id.* at 54.

[219] STEINMETZ, *supra* note 28, at 166–67.

[220] *See id.* at 168 ("The presence of AIM has produced conflict within the Lakota identity which must be worked out in the years to come.").

[221] *See* REINHARDT, *supra* note 4, at 160; STEINMETZ, *supra* note 28, at 32 (The present day sun dance is more "pan-Indian" than a Lakota tribal identity.).

ta sought remedy in court,[222] and without a law for the court to apply, the claims will fail before even being heard on their merits. With appropriated acts being most likely performed off-reservation, a Tribal law would not have jurisdiction over the non-tribal member,[223] nor would the tribal courts be able to prosecute such a person.[224] However states can use their police power to craft laws that could address the appropriation of ceremonies.

In *Nevada v. Hicks*, the Supreme Court ruled that states could regulate, even extending to tribal members on tribal lands, if state interests outside the reservation are implicated.[225] So, given the earlier identified compelling interest in protecting Native ceremony and culture, a state could craft a law addressing appropriating ceremonies. There are some laws that prohibit impersonating a priest.[226] While this could be extended

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[222] It has been posited, "I think it's fairly clear that the lawsuit, which in essence is a criticism of cultural appropriation and the commodification of Indian Heritage, is intended as a means of obtaining publicity rather than a serious legal claim." Simpson, *supra* note 140. *See generally* Order, Lewis v. Ray, No. CV-09-8196-PCT-FJM (D. Ariz. Oct. 29, 2010).

[223] *See* Montana v. United States, 450 U.S. 544, 564–65 (1981) ("Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05." (footnote and citations omitted)); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

[224] Nevada v. Hicks, 533 U.S. 353, 367 (2001) ("Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.").

[225] *Id.* at 362 ("'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.' When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision *Confederated Tribes*." (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980))).

[226] *See* ALA. CODE § 13A-14-4 (LexisNexis 2005) (Fraudulently pretending to be clergyman: "Whoever, being in a public place, fraudulently pretends by garb or outward array to be a minister of any religion, or nun, priest, rabbi or other member of the clergy, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding $500.00 or confinement in the county jail for not more than one year, or by both such fine and imprisonment."); *see also* CANON 1384, *in* VI CODE OF CANON LAW: SANCTIONS IN THE CHURCH bk. VI, pt. II, at 431 (1983) ("[A] person who illegitimately performs a priestly function or another sacred ministry can be punished with a just penalty."); Edward N. Peters, *Fake Priests*, IN THE LIGHT OF THE LAW (Dec. 28, 2005), http://www.canonlaw.info/blogarch05.htm.

to include a Native American priest, the difficulties arise in identifying who is a Native priest, and what authority recognizes them as a priest.[227] This could lead to licensing systems within *tiospayes*. However, if there are already non-Natives approved to practice, how would they get retroactive approval or documentation? So this hardly seems like a solution.

Or, because of the compelling state interest in preserving the culture of Native communities, a state law that prohibits the non-religious performance of Native ceremonies would not run afoul of RFRA because only practices central to one's religion are protected.[228] But of course, the question about what is a Native ceremony arises.[229] Not only does the transformative nature of Native ceremony make this difficult to assess, but appropriated ceremonies may be altered enough to have them be distinguishable enough from Native ceremonies, that in the eyes of the law, and using "independent creation" principles from copyright law,[230] these ceremonies are no longer exclusively Native.

There are always non-legal methods of persuasion through public education or the press.[231] "Whereas it may be impossible to delineate formal rules defining, sanctioning, and prohibiting specific acts of 'cultural appropriation,' it is possible to enact and practice an ethics of appropriation that attends to the specificity of the historical circumstances in which certain claims are made."[232] While using the courts as a stepping stone into the press may awaken the public on an important social issue, it also has the possibility reawaken stereotypes, only solidifying prior misconceptions.[233] So not only is it difficult to convince the courts to identify

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[227] *See supra* Part IV.D.

[228] *See supra* Part IV.B.1. This also brings up the question whether, if the proposed law would not run afoul of RFRA, would it then be protected by the First Amendment's freedom of speech clause? For purposes of this Comment, that question will remain unexplored for both scope and space concerns.

[229] *See supra* Part IV.E.

[230] *See supra* note 97 and accompanying text; *see also* COOMBE, *supra* note 22, at 218 ("That which is recognized as authentic to a culture cannot bear any traces of that culture's contact with other cultures; particularly, it may not be marked by that society's history of colonialism that enabled such works to make their way into Western markets.").

[231] *See* Declaration of War, *supra* note 31 (Methods of publicizing cultural appropriation include "utilizing whatever specific tactics are necessary and sufficient—for example demonstrations, boycotts, press conferences, and acts of direct intervention."). For a similar approach to publicizing another Lakota social issue, see *Tribe Suing Beer Makers over Alcohol Problems*, CBS (Feb. 9, 2012, 3:25 PM), http://www.cbsnews.com/8301-201_162-57374180/tribe-suing-beer-makers-over-alcohol-problems/. After reading the comments associated with the article, it is clear that the observation in note 48 is accurate: clearly dismissive and mocking comments abound with the Native social issue.

[232] COOMBE, *supra* note 22, at 230.

[233] *See Tribe Suing Beer Makers over Alcohol Problems*, *supra* note 231; *see also* COOMBE, *supra* note 22, at 179 ("The respect due the Chippewa peoples and their customs cannot be legislated.").

an important Native issue, convincing the non-Native public is equally, if not more, difficult.

V. Conclusion

While it is difficult to try to define what constitutes appropriation from sincere religious beliefs and then try to protect Native culture from its dilution and misrepresentation, at least one thing is clear: destructive acts that bring the repute of Native culture and religion down need consequences. And whether that is to be formed in a court of law or public opinion, the difficulty arises from culture-clash that is still in the process of being resolved.

When looking to identify the issue at hand, understanding the history of colonization and repression of Native culture provides adequate context for understanding the anger generated by the appropriation of Native ceremonies. And also understanding the different values espoused by not only Native and Western culture, but also by those within each culture demonstrates that the diversity of opinion on the same subject only adds to the confusion of the issue.

The legal system imposed upon Native cultures also demonstrates the difficulty in seeking to protect historically repressed traditions. However, awareness of the importance of protecting Native culture has begun. Although slow to recognize the importance of preventing commodification of Native ceremonies, the law has afforded protections in ways that it readily understands: physical objects are used in the law as a conduit to allow religious participation. Values associated with the free exercise of religion have prompted numerous legislative acts as well as court decisions that enable Native spiritual communities to worship as they have since time immemorial. However, this is different from what some have proposed: the legal exclusion of non-Natives from Native ceremonies. This is different in that instead of a free exercise of religion, it is a prohibition on worship for some in favor of others. While this may keep the tourists out of Native ceremonies, sincere believers will be unconstitutionally excluded if enacted into law. And of course, getting government mixed up in religion, while permitted in some limited circumstances, seems like an ever unpopular choice, not only exacerbating the colonization of Native peoples, but also setting the stage for more intrusion from the government into our most personal of belief systems.

Recognizing that preserving Native culture is a compelling interest is the first step, but now the question is where to step next. Treading lightly in this issue will not only be necessary for legal ramifications, but also for cultural sensitivity. Because of the respect due to all belief systems, balancing the interests of sincere believers will be difficult as well. But if any one value can be distilled from the debate, it is that a culture should be able to control its own image. This extends to understanding that Western capitalist values do not always translate in the context of spiritual beliefs. Money is immaterial to some, and in struggling to maintain an iden-

tity, the judgments of those within the Native community should be respected. Consumers of Native culture should understand that you cannot buy spirituality in any form—these are not commodities that you can buy off-the-shelf like shopping at a grocery store or boutique.