Journal of Law and Religion (2022), **37**, 199–206
doi:10.1017/jlr.2021.91

BOOK REVIEW SYMPOSIUM

Author's Response

Defend the Sacred: Native American Religious Freedom beyond the First Amendment

By Michael D. McNally. Princeton: Princeton University Press, 2020. Pp. 400. $99.95 (cloth); $26.95 (paper); $26.95 (digital). ISBN: 9780691190891.

Michael D. McNally

John M. and Elizabeth W. Musser Professor of Religious Studies, Carleton College

Keywords: Native American religions; sacred places; Indigenous; Native American

I am humbled to have had such close and perceptive readings of a book that I had always imagined as successful if it convened further conversation. My interlocutors in this symposium are people whose work and example I admire deeply, and readers are encouraged to take note of their contributions to the conversation beyond these pages.[1] Would that I could respond comprehensively to each query and comment; in the interest of concision, I have organized my response around a series of points of convergence and trajectories for new inquiry.

Readers may appreciate a brief initial statement from me about the shape of the book. Here is how I begin *Defend the Sacred:*

> This book follows Native American peoples as they struggle to defend the sacred in and through law. Whether the sacred refers to sacred lands, practices, plants, animals, objects in museums, or ancestral remains, Native peoples have over the last fifty years increasingly sought to defend the sacred in hearing rooms, around negotiating tables, or in courts of law and public opinion. But because religious freedom law has largely failed them, Native peoples have gone through and beyond the First Amendment to defend the sacred in other fields of law—environmental law, historic preservation law, federal Indian law and treaty rights, and international human rights law. It's not only that religious freedom law has failed them, but also that *religion* as a category has failed to capture what's distinctive about Indigenous religions, local as they are to particular peoples and to living well on particular lands and waters. This book explores the varying results of

[1] Greg Johnson, *Sacred Claims: Repatriation and Living Tradition* (Charlottesville: University of Virginia Press, 2007); see also, especially, Greg Johnson, "Religion in the Moment: Contemporary Indigeneity and the Politics of Presence" (unpublished manuscript, n.d.); Jace Weaver, *Other Words: American Indian Literature, Law, and Culture* (Norman: University of Oklahoma Press, 2001); Nicholas Shrubsole, *The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019); Charles McCrary, *Sincerely Held: American Secularism and Its Believers* (Chicago: University of Chicago Press, 2022); Tiffany Hale *Fugitive Religion: The Ghost Dance and Native American Resistance after the US Civil War* (New Haven: Yale University Press, forthcoming); Dana Lloyd, *Arguing for This Land: Rethinking Indigenous Sacred Sites* (Lawrence: University Press of Kansas, forthcoming).

> these legal efforts and ultimately returns to *religion*, imagined capaciously as an Indigenous collective right keyed to the collective nation-to-nation relationship but that can carry the legal teeth of religious freedom. (xv)

My argument in *Defend the Sacred* is not, as Charles McCrary rightly observes, to double down on religion or to make a case for having undue faith in religious freedom.[2] Instead, following what I have learned from lawyers and from Native advocates like Suzan Shown Harjo, I consider the indeterminacy of *religion* or *religious freedom* not simply as a constraint on better protections but as an opportunity. I ask not just what has religious freedom meant in the history of Native claims; I ask what religious freedom *might mean.*

Incommensurablity

Nicholas Shrubsole urges us to think deeply about questions of "incommensurability" as a key challenge for Indigenous religious freedom.[3] He suggests in his recent book that the challenge of incommensurability is twofold: incommensurability of "choices and options," where competing claims to, say religious freedom and economic development present difficulties of comparison, and "cultural incommensurability," a more thoroughgoing disconnect rooted in a long-standing attention in the philosophy of language to the abiding difference between one language world and another.[4] Following Benjamin Berger's excellent book *Law's Religion*,[5] which shows just how culturally specific, how parochial, are US and Canadian law despite presumptions to secular universalism, Shrubsole asks "how can a legal order create a reasonable and just scale to measure competing claims if the courts themselves are located within the cultural framework of one of those claims and unwilling to recognize their own cultural location?"[6]

Tiffany Hale does not invoke incommensurability per se, but a similar obstacle finds her looking beyond the expansion of such settler colonial categories as religious freedom.[7] Though she delivers the criticisms graciously, Hale is more than a bit uneasy with the scope of my discussion in *Defend the Sacred*, urging us to "think bigger," else we risk "reducing the intellectual and spiritual" inheritances of Indigenous peoples to "the paltriness of legalese," concluding that "[w]e have to think about what gets lost in every expedient translation."[8] Shrubsole and Hale point to places where the evolution I commend will never deliver the revolution required for a fuller dismantling of settler colonialism. Greg Johnson's query about the work of the NDN Collective is on point here, and to be sure, the optimal way to protect Native sacred places, for example, is to restore such places to Native control: "Land Back," indeed.[9]

"What *Do* We Do with This?"

But as each contributor to this symposium observes, I take a pragmatic view of what law does. I have learned that I am constituted this way and perhaps this is what draws me so to law: legal processes cannot stop at incommensurability. As Charles McCrary suggests,

[2] Charles McCrary, "Secularism and the Freedom to (Self-)Regulate: A Response to Michael McNally's *Defend the Sacred*," *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

[3] Nicholas Shrubsole, "Raising Indigenous Religious Freedom to a Higher Standard: Michael McNally's *Defend the Sacred* and the Canadian Legal and Legislative Landscapes," *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

[4] Shrubsole, *What Has No Place, Remains*, 14–15.

[5] Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

[6] Shrubsole, *What Has No Place, Remains*, 15.

[7] Tiffany Hale, "Reflections on the Power of Relentless Creativity," *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

[8] Hale, "Reflections on the Power of Relentless Creativity."

[9] Greg Johnson, "Defending the Sacred into the Future," *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

when a court faces how to classify meteorites or when officers in the field of secular governance encounter Josie Valadez Fraire smudging and her cry that they cannot mess with her Indigenous Spirituality, they do not say "what can we possibly do with that? They say "what *do* we do with that?"[10] Like my interlocutors, I have little faith that this analogical reasoning process of settler colonial law, with its Euro-American starting points, will be sufficient to the task, but it will go on apace, and commending more imagination in these spaces seems to me wise if not urgent in the near term. And, crucially, these processes are not just in the courts; rather, it is in the capillary actions of the settler colonial state where so much of the action occurs.[11] The court decisions I explore in the book surely give shape to realities on the ground for Native people trying to practice their ways; yet, as I aver in chapter 2, it is one thing for courts increasingly to hold corrections officials accountable for violations of inmates' religious rights, but quite another for those changes to carry through the corrections system because wardens in any given prison possess an enormous amount of discretion. I would argue that these prison cases are the ones that best illustrate officials' day-to-day decisions about "what do we do with that."[12]

Integrity

It is the sacred place claims that most push the envelope of law's analogical reasoning in this space. This brings me to Jace Weaver's comments, and I thank him for his characteristically lucid state of the field of Native religious freedom.[13] I find it telling that Weaver is both a religion scholar and enough of a practicing lawyer to author briefs when approached for particular cases. Weaver dives right in and makes what I want to underscore is a valuable suggestion that jurists take on the analysis of "integrity" to more effectively parse Native claims to sacred places. In a case I follow closely in the book (96–115), the Navajo, Hopi, Havasupai, White Mountain Apache, and Yavapai Apache brought a religious freedom challenge to federal approval of a plan to bolster the prospects of a ski area in an Arizona national forest by making artificial snow from treated sewage effluent. In 2008, the Ninth Circuit found no "substantial burden" on Native religious exercise, but only diminished "spiritual fulfillment."[14]

Here, an inquiry into "integrity" could introduce religious concerns into impact analyses that otherwise stop at physical concerns within the narrowly drawn confines of "sites." The sewage effluent sprayed as artificial snow on the Peaks was seen to pass muster in terms of the parts per million of pollutants. It looked white as snow, and it did not cover the whole massif of the mountain. But for the Diné, the injury has as much to do with water that has come into contact with the dead, a form of impurity that remains even after organic pollutants have been treated away. It seems to me that thinking with the category of "integrity" would allow a court to name the plain harm here as something more than the purely "subjective" questions of spiritual fulfillment.

Weaver finds support in Canadian law on aboriginal rights. In *Van der Peet*, the Supreme Court of Canada found against an Indigenous party, but articulated a test that could be handily met by many Native claims to sacred places or practices.[15] Under *Van Der Peet*, aboriginal rights are those which are "integral to a distinctive culture" that existed at the time of non-Native settlement. Weaver agrees with Shrubsole that the decision assumes a static

[10] McCrary, "Secularism and the Freedom to (Self-)Regulate."

[11] See Pamela E. Klassen, "Spiritual Jurisdictions: Treaty People and the Queen of Canada," in *Ekklesia: Three Inquiries in Church and State*, ed. Paul Christopher Johnson, Pamela E. Klassen, and Winnifred Fallers Sullivan (Chicago: University of Chicago Press, 2018), 107–75.

[12] See, for example, *Yellowbear v. Lampert,* 741 F.3d 48 (10th Cir. 2014).

[13] Jace Weaver, "The Struggle to Protect Native American Religious Freedom," *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

[14] Navajo Nation v. United States Forest Service, 535 F.3d 1058, 1063, 1070 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009).

[15] R. v. Van der Peet, [1996] 2 S.C.R. 507.

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

view of Indigenous religions and cultures, but sees an important step forward at least for certain kinds of claims in the United States. "Though admittedly far from perfect," Weaver writes, *Van der Peet* "should nonetheless make it easier to protect cultural and religious traditions and sacred sites that until now have been extremely difficult to vindicate in the courts."[16]

Weaver's thinking here is an example of just the sort of ingenuity with which Native advocates have engaged the discourse of religious freedom. He offers one further way to bundle or integrate the two possible organizing principles of Canadian and US law: religious freedom and aboriginal rights or inherent tribal sovereignty, and I for one, want Weaver to flesh this out further in the legal studies literature, so that litigators and courts can handily access it in Westlaw or Lexis as they do their work under such intense time pressures.

Religion as Cultural Resource?

Greg Johnson's remarks give us much to think with, but I want to respond directly to his interest in thinking about religion in the register of culture and cultural rights, since it lingers in Shrubsole's and others' comments too. Whatever religion is, it is of course best understood as a facet of culture. This is especially true of Indigenous religions, where one searches in vain for clear lines that mark off religion from other facets of culture: economy, political organization, art, medicine, foodways. It should follow that legal protections of culture make more sense than those of religion, and they do in principle, maybe especially so in Canada, where the presenting problem of linguistic and cultural pluralism is a core concern of the state. But in the United States, I would argue, cultural rights protections are largely toothless in comparison with those of religious freedom law.

Especially where sacred places are concerned, however, it seems all roads lead, of necessity, through the cultural protections afforded under cultural resource law, especially the National Historic Preservation Act (NHPA) and National Environmental Protection Act (NEPA).[17] The regulatory procedures under these statutes is where the action is at, so to speak, for most Native nations. Tribal historic preservation offices assert Native nations' rights to consultation and input in the review processes these two laws require of government actions that have significant enough impacts on cultural and natural resources. But NEPA and the NHPA only require government to take "a hard look" (a term of art under NEPA) at these impacts and to provide reasons for whatever decisions government makes. As the oil flowing through the Dakota Access pipeline each day attests, courts have few footholds to step in when tribal consultation is perfunctory or when review processes are "streamlined" (another term of art) by the industry of consultants that perform the reviews with the developers typically paying their invoices. As Weaver reminds,[18] I should add to the list of cultural resource laws the American Antiquities Act of 1906,[19] which authorizes presidents to designate National Monuments, as President Obama did in 2017 with Bears Ears National Monument, rightly considered the first Native American National monument because the blueprint came from an intertribal coalition that continued to have a say in its co-management. Trump famously gutted it by 85 percent with his own proclamation. President Biden has of course recently restored it and then some. As with other sacred places, such as Wyoming's Bear Lodge (Devil's Tower) or vast subsistence use areas like Alaska's Gates of the Arctic, the protections afforded under the Antiquities Act have been momentous, but Native nations seeking such protections must enjoy a high level of political capital to gain access to the agenda of any White House. And in most cases, protections

[16] Weaver, "The Struggle to Protect Native American Religious Freedom."

[17] National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101–7108; National Environmental Policy Act of 1970, 42 U.S.C. §§ 4321–70m-12.

[18] Weaver, "The Struggle to Protect Native American Religious Freedom."

[19] American Antiquities Act of 1906, 54 U.S.C. §§ 320301–03.

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

under the Antiquities Act bear the marks of an early twentieth-century public-land conservation movement that paid little attention to Native peoples whose sacred places they were at the time, except as interpretive objects, "cultural resources" set in amber at these now *American* places. This was the argument Trump made in his proclamation reducing Bears Ears by 85 percent: a reduction of sacred places and landscapes to "sites," many of them archaeological, and the small margins needed to guarantee their integrity as archaeological sites.

Close to the heart of the legal weaknesses of NEPA and the NHPA, I would argue, lies a definitional problem. Sacred places are reduced to the managerial discourse of cultural resources, and it is not just the federal officials in the land-management agencies, whose decisions in the field can make all the difference in terms of integrity, access, and use to sacred places, who appear to have bought in; most tribal efforts to consult and protect sacred places and practices and ancestral remains are shot through with the language of cultural resource management. If the system worked optimally, it would provide Native nations a voice at the table and relieve them of having to make a showing of "religion," or of having to share closely guarded ceremonial knowledge. And the NEPA/NHPA review processes would prompt articulation of sacred claims in terms more legible to secular governance—no third rail here: Native religious interests can be advanced in these review processes without implying an all-or-nothing response from government managers. Religious uses can be enumerated with other uses for managerial balancing in a culturally diverse democracy. But these apparent advantages of making claims in the language of cultural resource rather than religious freedom can amount to little real gains at the end of the day. Here again the San Francisco Peaks case illustrates the point. When Native peoples like the Diné and Hopi believe their very peoplehood and ancestral well-being is in question by the spraying of treated sewage effluent on San Francisco Peaks, the NEPA and NHPA reviews found no impacts significant enough to change the government approval, leading the tribes to make religious freedom claims in the courts when the cultural resource laws failed them.[20] I wonder whether the problem may not be translating claims to the sacred into those of cultural resource in the first place.

My favorite words of *Defend the Sacred* are those of Frank Ettawageshik, former chair of the Little Traverse Band of Odawa, and a deep thinker. Where reserved rights to Great Lakes fish under a series of treaties had been enforced by courts largely in terms of economic value as natural resources, Ettawageshik offered this corrective: "Our ancestors didn't say 'those are our fish.' Rather, they reserved the right to fish. That meant they reserved a right to sing to the fish, to dance for the fish, to pray for the fish, to catch and eat the fish but to live with the fish, to have a relationship with the fish" (254).[21]

In current work, I am trying to wrestle further with how the discourse of cultural resource or cultural property so misrecognizes such rights to relationship asserted by Ettawageshik that it becomes an obstacle to legal protections of what Native nations hold sacred. I would certainly welcome the perspective of tribal historic preservation officers themselves as it relates to the NHPA and NEPA. But it also seems to be a presenting problem for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in domestic law and policy. This is by way of response to Charles McCrary's wanting to hear more from me based on my rather cryptic remark at the conclusion of my chapter on the Declaration:

> Translating religion into secular discourses (culture, development, resource, heritage, land rights, collective self-determination, cultural property) or enumerating the spiritual as among the distinct facets of those discourses worthy of enumeration in articles on, say, cultural or resource rights, reinscribes and maybe even extends the reductive logic of the Enlightenment even as it aspires to move beyond the religious/secular divide. To dissolve arguably religious claims to those of culture, or to render religion

[20] *Navajo Nation*, 535 F.3d at 1070.

[21] Quoting Frank Ettawageshik, "Relationships: How Our Ancestors Perceived Treaties and Property Rights" (presentation, 13th Vine Deloria, Jr. Indigenous Studies Symposium, Northwest Indian College, May, 2018).

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

> as the adjective modifier *spiritual*, can dull the edges of certain Indigenous concerns that are, for lack of a better term, irreducibly sacred, sacrosanct, urgent, or ultimate, and in the doing lower the barrier to violation of those rights as merely cultural, and as capable of being suspended under a variety of prevailing concerns of national security or interest defined by states. (293)

Religion as Law

One instance where the instrumental valuation as cultural resource and valuation as sacred comes into focus are the Anishinaabe efforts in Minnesota to protect a sacred plant and food, *manoomin* or wild rice, from threats that copper-nickel mining and oil pipelines pose to water quality. In the treaties of 1837 and 1854 (and arguably of 1855) that ceded much of northern Minnesota to the United States, Anishinaabe leaders reserved express rights to hunt, fish, and gather on ceded lands off their reservations.[22] *Manoomin* here had economic value, but the relationship with the plant goes well beyond that of a staple food source. Sacred prophecies brought Anishinaabe people to migrate from the Atlantic seaboard back to the place "where food grows on the water," homelands they had left during the ice age. The relationship with the plant is integral to Anishinaabe peoplehood, the first solid food fed to babies and often the last medicine taken by elders as they prepare for their journey.[23]

In 2018, the White Earth Nation affirmed the inherent rights of *manoomin,* including those to "pure water," "to be free from patenting," infection or drift from genetically modified organisms and recognized the legal personhood of *manoomin* and its—or better, *their*—right to file lawsuits in assertion of those rights.[24] Earlier this year, Manoomin filed suit in White Earth tribal court against Minnesota's Department of Natural Resources for the state's approval of up to five billion gallons of water for completion of Enbridge's Line Three oil pipeline, which snakes around the Anishinaabe reservations but traverses waters and rice beds on the ceded lands of the 1854 and 1855 treaties. The state of Minnesota lost its bid that a federal judge toss out the lawsuit, so at the time of this writing the suit proceeds in the courts of White Earth Nation.[25]

With Line Three now completed, it remains unclear what impact this particular legal action can ultimately have. But as with Yurok Nation's recognition of the legal personhood of the Klamath River in 2019, Manoomin's legal action brings into focus a possibility that Charles McCrary raises: whether in Native thinking, "the sacred is just as much a legal category as a religious one."[26] The *Manoomin* case so clearly shows that the language of rights is, in Anishinaabe thinking, a language of the right to fulfill obligations, essentially to *regulate*, and religious freedom rights can perhaps be more capaciously understood in order to better encompass Indigenous religions that foreground collective obligations in these terms.

[22] Treaty with the Chippewa art. 5, 7 Stat. 536 (July 29, 1837); Treaty with the Chippewa art. 11, 10 Stat. 1109 (September 30, 1854). See also, Treaty with the Chippewa 10 Stat. 1165 (February 22, 1855), in which the reserved rights of 1837 and 1854 should be considered implied.

[23] See Michael D. McNally, "Where Food Grows on the Water: Manoomin/Wild Rice and Anishinaabe Peoplehood," in *Native Foodways: Indigenous North American Religious Traditions and Food*, ed. Michelene E. Pesantubbee and Michael J. Zogry (Albany: State University of New York Press, 2021).

[24] White Earth Band of Ojibwe Reservation Business Committee, *Rights of Manoomin* (December 2018), sec. 1(a) ("Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions; the right to be free from patenting; as well as rights to be free from infection, infestation, or drift by any means from genetically engineered organisms, trans-genetic risk seed, or other seeds that have been developed using methods other than traditional plant breeding.").

[25] Minnesota Department of Natural Resources v. White Earth Band of Ojibwe, No. 0:21-cv-01869-WMW-LIB, 2021 U.S. Dist. LEXIS 167790* (D. Minn., September 3, 2021).

[26] McCrary, "Secularism and the Freedom to (Self-)Regulate."

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

A key point I make in my introduction to Native religions classes comes from the Dakota scholar Ella Deloria's wonderful work of ethnographic fiction, *Waterlily*. The book is organized around the exacting and sophisticated network of kinship obligations to people, plants, animals, and spirits that envelop (and sometimes constrain) individuals ideally into a social harmony that hums with the sacred. Students come to the class expecting a story of free individuals pursuing their spiritual fulfillment without the rules of organized religion. Instead, they reckon with just how difficult it is for Deloria's characters to live up to their exacting obligations under the rules of kinship. Native religions, in this view, are all about the regulation necessary for right relationships.[27]

Like Tiffany Hale, I see these networks of relational obligations coursing through Native claims to the sacred. Claims to sacred places are often misrecognized as concerns of use of or access to "sites," but claims are often about rights to be in relationship with places that have subjectivity in their own right, and with the non-human species that populate traditional lands and waters. The desecration of the San Francisco Peaks by fake snow from treated sewage was allowed to proceed because it neither limited access or use, nor met the test of being coercive in nature to Native practitioners, but for the Diné it was as much a violation of their law as their religious freedom.[28] Title One of the Navajo legal code enumerates responsibilities due San Francisco Peaks and the other five sacred mountains, referred to as the leaders, the foundation of the Navajo Nation.[29]

In this regard the obstacle to what Tiffany Hale calls out as matters of relationships and responsibilities may not be legalese so much as a poverty of legal imagination and which registers in which Native peoples choose to articulate their claims. I refer readers to the legal imagination of Anishinaabe scholar John Borrows, who works out in the Canadian context just such a shift in register. He makes clear at each turn that legal pluralism or comparative law is always in play when Native peoples are in settler colonial courts.[30] In Canada, where the fact of legal pluralism already issues from the marriage of the English common law with French continental law tradition, an extension to First Nations legal tradition makes a lot of sense, and Americans stand much to learn from the kinds of dialogue Nick Shrubsole suggests.

United National Declaration on the Rights of Indigenous Peoples

Developments around the UN Declaration on the Rights of Indigenous Peoples are the subject of my prospective concluding chapter—a subject about which my interlocutors roundly wanted more. Its passage may have involved compromises with modern Western categories and institutions of international law, but the language of the Declaration emerged through decades of in-house Indigenous debate. Although not binding in the same sense as a treaty or convention, the Declaration is more than merely aspirational: its first article finds that, in order for all binding international human rights law to meaningfully apply to the globe's Indigenous peoples, it must apply collectively as well as individually.[31] Religious rights find their most direct expression in Article 12, but crucially much of the rest of the Declaration is shot through with what we might call religious concerns under other

[27] Ella Cara Deloria, *Waterlily*, new ed. (Lincoln: University of Nebraska Press, 2009).

[28] *Navajo Nation*, 535 F.3d at 1063, 1070.

[29] Navajo Nation Code title 1, § 205(B–D) ("Diné Natural Law declares and teaches that . . . [t]he six sacred mountains . . . must be respected, honored, and protected for they, as leaders, are the foundation of the Navajo Nation . . . The Diné have the sacred obligation and duty to respect, preserve, and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking[.]").

[30] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); *Drawing out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010); and, especially, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

[31] United Nations General Assembly Res. 61/295 art. 1, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, A/RES/61/295 (September 13, 2007).

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press

headings, and not just those of culture. Article 25, which is about land rights, affirms Indigenous rights to "maintain and strengthen their distinctive spiritual relationship" with lands and waters and "uphold their responsibilities to future generations in this regard." Article 36, which is largely about rights to Indigenous political and legal institutions, enumerates spirituality along with customs, procedures, and practices. Other articles about economic development, education, language, art, or medicine include references to religious or spiritual dimensions. The Declaration puts into legal language an Indigenous truth, religion is at once everywhere and almost nowhere—in the sense the West thinks of it. In the work of implementing the Declaration's norms in domestic US law, where it will gain any meaningful teeth, I think it wise to emphasize, not downplay, the language of religion. Kristen Carpenter's review of *Defend the Sacred* responds in kind to lay out in considerable detail where provisions of the Declaration might have an impact on US religious freedom law.[32]

Sacred place protection, where my work currently focuses in concert with a Luce-supported project at the Native American Rights Fund/Colorado School of Law,[33] is one key place where the norms of the Declaration can address the imbalances and up the game of US law. Courts would think anew about religious freedom law cases, especially what counts as a substantial burden for Native peoples. But deeper in the weeds of government actions affecting Native peoples and their sacred places, a more proximate opportunity is to operationalize the Declaration's norm of free, prior, and informed consent in various ways. At one level, it makes the wide range of what passes for tribal consultation more accountable to the United States' own commitments under a series of executive orders and memoranda. And if "consent" rings fear in government agencies that Native peoples would enjoy a veto power on any and every government action, there are a range of ways to obtain free, prior, and informed consent through negotiated consent agreements. That is in part what the Native American Rights Fund's Sacred Place Project is trying to do: document and educate both Native Nations and officials in various federal agencies about best practices in consent agreements and co-management agreements between agencies and Native nations, like the one involving New Mexico's Kasha Katuwe/Tent Rocks National Monument and Cochiti Pueblo, or perhaps Bears Ears, as that experiment in collaborative management plays out.

Defending the Sacred Generates Religion

Finally, I confess that one place my book does not deliver what it promises is in more fully documenting what Jace Weaver called the "galvanic" nature of movements like Standing Rock.[34] As Greg Johnson's work on Mauna Kea elucidates, such movements are also generative of religion, and religious studies scholars should take further notice. I aspire in my own future work to better address this urgent, game changing facet of contemporary Native movements in the space of religious and cultural freedoms. I am encouraged that current and forthcoming work, especially by Johnson and Dana Lloyd, offers a fuller and more inspirational accounting of how efforts to defend the sacred are generative of, not just indexical to, Native religions.[35] Further attention to these elements of our subject will no doubt elaborate on Tiffany Hale's point, borne of her historical work on the Ghost Dance, that such movements are not only defensive in posture, but oriented toward Indigenous futures.[36] May that generativity of Native religious traditions as they encounter the law continue to flourish apace.

[32] Kristen A. Carpenter, "Living the Sacred: Indigenous Peoples and Religious Freedom," *Harvard Law Review* 134, no. 6 (April 2021): 2137–49.

[33] The Implementation Project (website), accessed December 6, 2021, https://un-declaration.narf.org/about/university-of-colorado/.

[34] Weaver, "The Struggle to Protect Native American Religious Freedom."

[35] Johnson, "Religion in the Moment"; Lloyd, *Arguing for This Land*.

[36] Hale, "Reflections on the Power of Relentless Creativity"; Hale, *Fugitive Religion*.

https://doi.org/10.1017/jlr.2021.91 Published online by Cambridge University Press