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BOOK REVIEW SYMPOSIUM

Introduction to the Book Review Symposium on Michael McNally's *Defend the Sacred*

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.

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Michael McNally's book *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* responds to recent doubts, raised by Indigenous communities, lawyers, and scholars about the usefulness of religious freedom law for Indigenous nations who are trying to protect their cultural practices and natural environment—especially land and water. Native American plaintiffs have gone to federal courts, armed with the U.S. Constitution's First Amendment, the American Indian Religious Freedom Act (1978),[1] and the Religious Freedom Restoration Act (1993),[2] asking to protect the High Country in northern California,[3] the San Francisco Peaks in Arizona,[4] and the ceremonial use of Peyote in Oregon.[5] They went to federal and state courts to protect water on the Standing Rock Sioux reservation in South Dakota[6] and Mauna Kea in Hawai'i.[7] They lost all these cases. As McNally writes in the preface to the book, "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" (xv).

Following these devastating losses, Indigenous lawyers, activists, and scholars have been searching for a different legal path. In 2019, the Yurok Tribal Council issued the Klamath River Resolution, acknowledging the rights of the Klamath River to exist and flourish, free from the effects of pollution and climate change, and granting jurisdiction to the Yurok Tribal Court over violations of the river's rights.[8] In 2021, the White Earth Nation of

[1] 42 U.S.C. § 1996.
[2] 42 U.S.C. § 2000bb.
[3] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).
[4] Navajo Nation v. United States Forest Service, 479 F.3d 1024 (9th Cir. 2007), *reversed*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *certiorari denied*, 556 U.S. 1281 (2009).
[5] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
[6] Standing Rock Sioux Tribe v. Army Corps of Engineers, 985 F.3d 1032 (D.C. Cir. 2021).
[7] In re Conservation District Use Application HA-3568, 431 P.3d 752 (Hawai'i 2018).
[8] Yurok Tribal Council, "Resolution 19–40: Resolution Establishing the Rights of the Klamath River," May 9, 2019, http://files.harmonywithnatureun.org/uploads/upload833.pdf.

Ojibwe sued the Minnesota Department of Natural Resources in tribal court on behalf of wild rice.[9]

McNally's book is about Native American attempts to protect the sacred: sacred places, sacred objects, and sacred practices. If we generalize, we can say it is about struggles to protect sacred *relationships*. And because it is about sacred relationships, religion must be understood as a collective, rather than an individual, right. To find religion that is understood collectively, McNally looks beyond the First Amendment right to religious freedom to bring together religious freedom law, federal Indian law, and international law. This is a lot for an author to do in one book, and McNally makes sure to pay equal attention to each of these legal fields, and he brings to them the sensitivities of a religious studies scholar. The outcome is impressive, to say the least; this book is important to several audiences, including religious studies scholars, legal practitioners, and Indigenous activists.

However, I am interested in a couple of things *Defend the Sacred* does not explicitly do: one is religion as a relationship that transcends the notion of rights, and the other is Indigenous law, or tribal law, as a sphere which is meaningfully separate from domestic U.S. law and international law. What can we learn from the Yurok Klamath Resolution and the Ojibwe lawsuit in the name of wild rice? What do they teach us about Native American religious freedom and about Indigenous sovereignty—the two things that McNally cares about in this book?

The writing of *Defend the Sacred* was motivated by the author's realization that there is very "little intellectual commerce . . . between the fields of federal Indian law and religious liberty law" (10). This symposium is driven by similar observations, and I am delighted to bring together scholars of legal studies, Indigenous studies, and religious studies to respond to McNally's book. There are a few benefits, in my mind, to bringing together discourses on religious freedom with discourses on Indigenous sovereignty, as McNally does in this book. Firstly, religious studies scholars have been effective at showing that the practice of defining religion has its own motivations (colonial, protestant, academic). The courts (and Indigenous litigants) engage in practices of defining religion for their own reasons, and thus they become actors in the religious studies game, perhaps unknowingly. Uncovering these processes, as McNally does, is important because in the academic field of law and religion the definitional question (how courts define religion) has been so central that it has overshadowed other questions, such as that of Indigenous sovereignty. Bringing religious studies, legal studies, and Indigenous studies into conversation helps to demonstrate that the definition of religion is not an end in itself. However, the language of sovereignty has remained largely theoretical, while religious freedom has public momentum, even if it seems to have become the tool, principally, of conservative Christians.[10] For these reasons, integrating the discourses on religious freedom and on Indigenous sovereignty has such a great potential to promote and protect Indigenous rights.

In *Defend the Sacred* McNally carefully creates connections between religious freedom and Indigenous sovereignty. Its chapters take us on a journey from a period when Indigenous religion was suppressed in order to break communities, or collectives, or sovereign nations, apart, all the way to the possibility, today, to claim Indigenous sovereignty, as collectives, in

[9] See Minnesota Department of Natural Resources v. White Earth Band of Ojibwe, No. 21-cv-1869, 2021 WL 4034582, at *1 n. 1 (District of Minnesota Sept. 3, 2021) (denying an injunction to prohibit the case from proceeding in tribal court). For a draft copy of the tribal court complaint, see Complaint for Declaratory and Injunctive Relief, Manoomin v. Minnesota Department of Natural Resources (White Earth Nation of Ojibwe Tribal Court Aug. 4, 2021), https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf (accessed on August 16, 2021).

[10] The Law, Rights, and Religion Project challenged this narrative of religious freedom as principally a conservative Christian endeavor in its 2019 report: Elizabeth Reiner, et. al, *Whose Faith Matters? The Fight for Religious Liberty beyond the Christian Right* (New York: Law, Rights, and Religion Project, 2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.19.pdf.

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order to protect religion (as unfitting as this term may be to describe Indigenous practices and relationships).

Chapter 1, "Religion as Weapon," lays the groundwork for connecting religion and sovereignty by explaining how attacks on Indigenous religions, specifically through the civilization regulations that were in place from 1883 to 1934, served as attacks on Indigenous sovereignty, and were part and parcel of policy developments that transformed the relationship between the United States and Native communities from nation-to-nation relationships to that of "domestic dependent nations" and their "guardian," to use the words of U.S. Supreme Court Chief Justice John Marshall.[11] Chapters 2 and 3, both titled "Religion as Spirituality," demonstrate how, in struggles to protect Indigenous religion and Indigenous sovereignty—in legal cases about religious practice in prisons and about sacred lands—religion has been reduced by the federal courts to spirituality. Reducing Indigenous religious practices to spirituality does two things, according to McNally: it individualizes religion and focuses on belief rather than on practice, thus breaking Indigenous collectives into groups of separate individuals; at the same time, it categorizes Indigenous ceremony as something that is not exactly religious and therefore does not fall under the protective umbrella of the First Amendment's religion clauses. So, in a way, what those legal cases do is disable both the rhetoric of sovereignty and that of religion in the context of Indigenous rights claims. The environmental discourse that makes religion into a "cultural resource," the focus of chapter 4, has a similar effect on Indigenous religion and sovereignty.

Chapters 5 and 6 (both titled "Religion as Collective Right") follow legislative efforts to connect religion and sovereignty by making religion into a collective, rather than an individual, right: "AIRFA [American Indian Religious Freedom Act] and NAGPRA [Native American Grave Protection and Repatriation Act[12]] draw on the power of religious freedom discourse but tailor the protections in terms of the nation-to-nation relationship of federal Indian law" (226). Chapters 7 and 8 (both titled "Religion as Peoplehood") take us from the collective right to religion to explicit sovereignty claims, but to do so they have to desert the language of religious freedom altogether. In other words, while chapters 5 and 6 follow Indigenous efforts to protect or promote Indigenous sovereignty using the language of religious freedom, chapters 7 and 8 follow Indigenous efforts to protect what is sacred to them through reliance on treaty rights, or the language of sovereignty.

The conclusion to the book takes us beyond rights to sovereignty or self-determination and envisions (following developments in Bears Ears, for example) a world of collaboration – both inter-tribal collaboration and co-management of sacred sites by the U.S. government and Indigenous peoples. The appointment of Representative Deb Haaland (Laguna Pueblo) as the first Native American secretary of the interior certainly supports this vision. But, to return to the examples I offered at the opening of this introduction—of the Yurok and of the Ojibwe people turning, not to state mechanisms, but to tribal courts—I think the real connection between religion and sovereignty that McNally is looking for in this book is to be found in these examples. The Yuroks are aiming to protect their relationship with the sacred Klamath River through the Klamath Resolution. The White Earth Nation of Ojibwe are trying to protect, in tribal court, their sacred relationship to wild rice. By granting jurisdiction to their own courts, they assert their sovereignty in the most exciting way I can think of. And, because tribal courts actually originated as part of the civilization regulations with which McNally opens his book (as courts in which reservation superintendents had the authority to punish those who insisted on practicing their Indigenous ceremonies), I see these developments as an unwritten happy end for *Defend the Sacred*. I know that these developments took place after the book was written, and I know we have a long way to go in terms of Indigenous sovereignty, and so I am thrilled to open this conversation, inspired by this beautiful, important book.

[11] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[12] 25 U.S.C §§ 3001-3013 (2000).

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