Advocating Religion on Public Lands: Native American Practice or Buddhist Sermon?

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Lloyd Burton's *Worship and Wilderness* is a multifaceted book. It is at once a critique of the U.S. constitutional religious free exercise doctrine, a plea for environmental stewardship, a cry for justice for native peoples, and a Buddhist sermon. Sometimes these various facets are in tension with one another. Indeed, that is the attraction of this volume. It is not an easy read. Burton catches you coming around the corner whenever you think you have found a comfortable response. It is a wonderful and lively combination of idealism and common sense—a heartfelt plea to live lightly in the land.

My brief response to Burton's book is organized around three topics: religion—American religion, law—the First Amendment, and accommodating multiculturalism.

Religion—American Religion

This is a book is about religion in the United States, not about religion generally. That fact is important because religion takes a certain form in the U.S. context, mostly for legal reasons. Religious ideas and institutions are domesticated and tamed by law. One can see that process when one uses classical categories of comparison. One such category, "place," is a key concept for this book. Important theorists of religion, including Eliade and Smith, have reflected on the importance of place for religion. Smith goes so far as to divide religions into two ideal types, "locative" and "utopian" (Eliade 1957; J. Smith 1978). Locative religions are related to particular places, places on this earth, holy places. Utopian religions are centered on life in the next world rather than on actual places on earth, and are therefore more easily portable. Both are always

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legally controlled, particularly in the U.S. context, as this book demonstrates.

Most religions, of course, have both locative and utopian aspects, but American religions, particularly American Christianity, has been peculiarly placeless. Americans have, for the most part, been "next-worldly" in their explicit religious life, notwithstanding their famous Weberian tendency to invest worldly pursuits with sacred status. Imported American religions have tended to be utopian, in the main. Such a tendency is evident in many legal contexts. In cases in which I have served as an expert witness on behalf of plaintiffs seeking a legal place for religion, for example, the experts for the opposing sides have characterized Christians generally (the unspoken implication is "real" Christians) as not interested in places or things, and as not therefore in need of legal accommodation for the use of such places and things.[1] Indeed, Americans in various contexts have had very little difficulty classifying religions that are interested in places and things as "not religion," or at least as not desirable or legally protected religion.[2]

In his classic volume of essays, *The Lively Experiment*, now almost 30 years old, Mead reflected on the rootlessness of American Christianity, comparing it with European Christianity (Mead 1976). He saw Americans as having had plenty of space but no time. They were in a hurry. It was space that freed them from the authoritarianism of the European churches; it was space, not place, that defined freedom. Space allowed freedom, in a sense, such as it is. One sees that desire for elbow room, for unbounded liberty, in the brash insistence of the climbers in the Devil's Tower case, as described by Burton in his book (p. 4).

The growing sense that that space is not unbounded has found Americans unprepared, as Mead saw it: "Americans become increasingly aware that their space is almost filled up and hence that their predominant conception of freedom is somehow askew and inadequate" (Mead 1976:15). Mead suggested that there is unfinished work to be done in our understanding of freedom. Burton shows us some of the ways in which our conception of freedom is "askew and inadequate" and offers native religion as a corrective. Native religions have resources, it is implied, because freedom is not so defined by empty space (p. 15), although they remain defined by law.

At various points, Burton contrasts native religions with what he terms "Judaeo-Christianity," apparently referring to all of Juda-

[1] *Warner v. City of Boca Raton* 1999; *Sasnett v. Department of Corrections* 1995. See also Sullivan (1994, 2005).

[2] Americans also lack places of *religious* pilgrimage. Places of pilgrimage tend to be cultural (Graceland) or civic (the Vietnam Memorial).

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ism and all of Christianity, native religions being religions distinctive in being attentive to place. For example, Burton contrasts "*place*-based religious activities [his single hallmark of nearly all indigenous worship] as distinguished from solely *practice*-based forms of worship [his characterization of nearly all Western mainstream religions]" (p. 118). In a rough sense, the contrast between locative and utopian religion makes more sense in comparing Native American religions to American Christianity. The contrast makes less sense for Christianity outside the United States.

I make two points here. Putting aside the somewhat dated category of Judaeo-Christianity, it is important not to generalize, as Burton apparently does, from mainstream American evangelical Christianity. In fact, Christianity (and Judaism, at times) outside the United States is often place-based. Pilgrimage sites and shrines abound outside the United States and attest to the emplacement of Christianity and Judaism. One might respond that that emplacement elsewhere is the result in part of syncretism—the accommodation of new deities and saints by indigenous traditions such as the Celts. That is so. But that has been so since the imperial expansion of Christianity. It is no less authentically Christian for being so. A peculiar aspect of American Christianity is the lack of syncretism—the lack of accommodation with the local gods, the lack of resources embedded in the land. As Mead also emphasized, Americans took the land as empty. Their religious life was correspondingly ahistorical and utopian (1976:108–18). But not all Christianity is place-less. Look at Ireland, at Mexico, at Rome, at Jerusalem, at India.

I would also take issue with "practice-based," as a description of non-native religions. American Christianity is distinguished by its interiority. It is about belief for the most part—what is often denominated "faith." Like Muslims, many American Christians can sum up their religious affiliations in a single sentence: "I have accepted Jesus Christ as my personal lord and savior." It is difficult for Americans for theological and legal reasons to accept authentic religion as having any material manifestations, whether in practice or place.

Burton is pretty hard on Christianity. It is "anthropocentric," and thus not attentive to nature (p. 64). Yes, but some humanitarian workers today might say that the anthropocentric nature of international human rights claims, partially derived from Christian teaching, is what gives Christianity the power to demand intervention on behalf of millions of suffering people. Many times Burton says he is really talking about spirituality, not religion (p. 21). To speak of "spirituality," in my view, is a way of trying to hold on to the positive aspects of religion while chucking the messy historical aspects. While that move makes some inter-religious dialogue

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possible, it runs the risk of homogenizing religion and robbing it of its traction—and perhaps of dis-"place"-ing it.

Law—The First Amendment

The practical functioning of the First Amendment religion clauses, for reasons that I do not have space to argue here, but which I have done in other places (Sullivan 2004), does depend on a reading of religion as private, individual, chosen, and believed, rather than as public, communal, given, and enacted. The latter kind of religion has always provided difficulties for the American law—and continues to do so. Burton, like many advocates of religious freedom, seems to want to have his cake and eat it, too. Betraying, in a way, his advocacy of voluntary local accommodation and negotiation, Burton proposes that native religious practices and places be legally protected under a kind of dual regime, the trust doctrine and the religion clauses (p. 291). Both are pretty shaky, legally and morally. The trust doctrine, under which Indian property is held in trust by the federal government, is unavoidably paternalistic: the religion clauses have been very restrictively interpreted.

Burton also suggests that native religions have been held to a higher standard than other religious traditions when it comes to First Amendment doctrine because they must show that a religious practice is "central and indispensable" to their religion (p. 109). He exaggerates this difference. Certainly Native American religious claims have often been unsuccessful, but after the *Smith* case,[3] no claim for a religious exemption will fly as a constitutional argument, central or not. "Centrality" did become a central feature of federal Religious Freedom Restoration Act (RFRA [1993]) jurisprudence and continues to bedevil state RFRA cases.[4] The free exercise clause, however, has in fact done very little to protect those who desire religious exemptions or accommodations, whatever their religious tradition. *Smith* and *Lyng*[5] served in an interesting way to galvanize the attention of the pro-religionists, adding fuel to the fire of indignation what they saw as the hyper-secularized regime of the federal government. American Protestant ways of being are privileged legally because they are invisible, not because they are more successful at garnering judicial exceptions to laws of general application. (Interestingly, Greg Johnson of the University of Colorado has argued that the Native American Grave Protection

[3] *Employment Division v. Smith* 1990.

[4] See opinions in *Warner v. City of Boca Raton* (1999), cited above.

[5] *Lyng v. Northwest Indian Cemetery Protestive Association* 1988.

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and Repatriation Act of 1990, often described as toothless, has actually opened a space for Indian religion, a space perhaps denied by the First Amendment [Johnson 2005].)

Religions, all religions, should probably quit trying to get the courts to validate their religious practices by seeking permission to hold certain views and do certain things. Law should do what law does, without privileging religion of any kind. Exceptions should only be validated on the basis of historical wrongs—such as with affirmative action. Indians will do better legally to rely on what mileage they can gain from the genuine shame of American history than from trying to persuade courts that their religions are as good as anyone else's.

Accommodating Multiculturalism

In educating us about native religions, Burton runs into the same difficulty as those advocating legal accommodation of multiculturalism in general. Should law treat religion as culture to be reified and accommodated as difference or should law see religion as a rival?

Cultural relativism is used by Burton and others as a marvelous solvent. It equalizes and educates. It forces us all to hold ourselves and our cultures at arm's length and place them next to other selves and cultures. We see that we have origin myths; they have origin myths. We have coming-of-age rituals; they have coming-of-age rituals. But all ontological and metaphysical claims are reserved.

The problem presented by such relativism is illustrated by an incident recounted in the book. At one point Burton describes one of the arguments made by those who objected to an accommodation made to Native Americans. Apparently the concern was, among other things, that U.S. Park Service signs calling attention to the sacred status of the land would indoctrinate their children into Native American religions (p. 139). The assertion was that their children would be confused by the Park Service's declarative statement, made without qualification, that the land was sacred. Such a statement was a violation of their religious beliefs. What are the alternatives? Must we always use the locution, as Burton usually does in the book, that such and such is understood to be sacred by so and so? In order not to offend anyone? Perhaps the government should not post such signs but leave it to individuals and groups to live and articulate those realities for themselves?

There is an effective ethnographic film called *Sweating Indian Style* (S. Smith 1994) that I have used in teaching undergraduates. In the film, a group of California women, all white, build a sweat

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lodge under the direction of a self-taught spiritual leader, also white. The film watches the women as they discuss their project, travel to a "wilderness" location, and laboriously construct a tent and a pit of stones for the fire. These women apparently understand themselves to be borrowing a traditional Native American religious practice as a form of spiritual discipline likely to lead to personal enlightenment. They are eager, sincere, and energetic.

Interspersed with the scenes of the building of the sweat lodge are interviews with Indian women, from different locations—among whom are one who is an anthropologist at the Smithsonian Institution, one who lives on a reservation, and one who lives in an urban area. In different ways, each of the Indian women testifies to varying degrees of discomfort with the activities of the white women. A particularly angry Indian woman calls the borrowing a form of spiritual theft—the final indignity, as it were. Indian religious practices belong, she says, in the context of the history and larger cosmological structure of Indian peoples. Their healing potential belongs in the context of the suffering of the Indian peoples.

When I show this film to white college students they are often confused. On the one hand, they believe that religion is something that is individual and chosen and free—"spiritual," they might say. The California women are in some sense exercising their First Amendment rights. Yet the students also respond to the plea of the Indian women. Perhaps religion is not so transferable. Perhaps religion is something connected to the life and bodies and places of a people. It is not something that you can patch together. The film does not offer a solution, but it does suggest that we might listen to one another, as Burton also suggests.

Burton is persuasive that the accommodation made among the climbers and the Plains Indians over the use of Devil's Tower can be viewed as an example of a negotiated local cultural accommodation that seems to have mostly worked, notwithstanding the occasional establishment absolutist. But this is not "law," traditionally understood, not the law of the First Amendment. Park Service employees facilitated a deal, rather than imposing one. Law in the voice of command perhaps cannot solve these problems—particularly law that objectifies and reifies religion.

Burton tells us at several points that his own religious identity is Buddhist (p. 12). What is privileged in this book then is not native traditions, which are relativized along with Christianity, but Buddhist ways of understanding the world. One could argue that it is Buddhist practice that is enacted here rather than being subjected to the anthropologist's gaze. I don't really mean this is a criticism but as a corrective. This is not a book about religion and law. It is a sermon. And it is most effective read in that spirit.

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