Journal of Law and Religion (2023), 1–19

RESEARCH ARTICLE

Religious Freedom and Sacred Lands

Sonia Sikka

Professor, Department of Philosophy, University of Ottawa, Canada
ssikka@uottawa.ca

doi:10.1017/jlr.2023.37

Abstract

Taking *Ktunaxa Nation v. British Columbia* as a focal point, the author argues that the legal framing of Indigenous sacred land claims in terms of religious freedom carries significant costs. It impels courts to bracket consideration of sovereignty and territorial rights, while positioning Indigenous worldviews as nonrational rather than as dynamic intellectual traditions and ways of life that are respectably different from those embodied in settler systems of law. Genuinely fair adjudication of such claims requires not religious exemptions from general laws but recognition of the *sui generis* rights of Indigenous nations in relation to lands they never ceded (acknowledging historical injustice); deep differences between dominant European settler and Indigenous cultures (acknowledging that settler law is also cultural); and the validity of Indigenous environmental philosophies (acknowledging that they are no less rational than Western ones).

Keywords: religious freedom; Indigenous rights; Indigenous sovereignty; Indigenous land claims

Appeals to religious freedom by Indigenous[1] communities seeking to prevent construction or activities on lands held to be sacred have been almost universally unsuccessful in US courts.[2] Recently, the first legal case of this kind in Canada, *Ktunaxa Nation v. British Columbia*, also received a negative verdict.[3] In view of this disappointing jurisprudential history, Nicholas Shrubsole in Canada and Michael McNally in the United States have argued for a more complex and appropriately contextualized appreciation of Indigenous beliefs and practices involving sacred sites.[4] Sacred land cases have not received due justice, they maintain, taking into account all the relevant factors: the history of settler colonialism in which Indigenous peoples were dispossessed of their lands; their consequently unique situation within states into which they were forcibly incorporated; the inseparability of

[1] I generally use the term *Indigenous* in this article but also use other terminology reflecting the language of sources I cite or paraphrase.

[2] See Howard J. Vogel, "The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land," *Santa Clara Law Review* 41, no. 3 (2001): 757–806; Joel West Williams and Emily deLisle, "An 'Unfulfilled, Hollow Promise': *Lyng*, *Navajo Nation*, and the Substantial Burden on Native American Religious Practice," *Ecological Law Quarterly* 48, no. 3 (2021): 809–42.

[3] Ktunaxa Nation v. British Columbia, [2017] 2 S.C.R. 386.

[4] Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019); Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton: Princeton University Press, 2020).

religious and spiritual traditions from other elements of Indigenous cultures; and the mismatch between these cultures and the frameworks of Western law.

Precisely because of these factors, however, an appeal to religious freedom is a poor fit for Indigenous sacred land claims. It impels courts to bracket consideration of Indigenous sovereignty, treating the matter as it would any citizen demanding that their religious beliefs be allowed to trump property rights. More fundamentally, this frame implicitly accepts the equation of purportedly secular liberal principles with a worldview whose own culturally shaped bedrock assumptions are hidden under the mantle of neutrality. It thereby positions Indigenous worldviews as mysteriously religious and meriting faith-based exceptions, rather than as dynamic intellectual traditions and ways of life that are respectably different from those embodied in Western systems of law. Genuinely fair adjudication of Indigenous sacred land claims requires not religious exemptions from general laws but recognition of the *sui generis* rights of Indigenous nations in relation to lands they never ceded (acknowledging historical injustice); the deep differences between dominant European settler and Indigenous cultures (acknowledging that settler law is also cultural); and the validity of Indigenous environmental philosophies (acknowledging that they are no less rational than Western ones).[5]

My analysis is oriented toward the Canadian and US contexts, beginning with a discussion of *Ktunaxa*, which forms the centerpiece of my examination. This case illustrates why the legal frame of religious freedom is inapt for Indigenous claims over sacred lands, leading courts to omit the most crucial considerations, including recognition of indigenous sovereignty and a relation to land that Ktunaxa representatives articulated cogently during the proceedings. Studying that relation also helps to expose colonial biases behind the idea of religion and the secular/sacred binary as it operates within settler law. In defense of the legitimacy of Indigenous claims to political and territorial sovereignty, this history of dispossession makes Indigenous claims over public lands distinctive and not an instance of a generalizable right pertaining to religious citizens.[6] There is an intimate relation between Indigenous cultures, identities, and land, but the logic of settler law cannot allow what it understands as property claims to be resolved through adjudication over religious freedom. The religious freedom framing, moreover, misrepresents what should be recognized as a conflict of worldviews, involving fundamentally different understandings of land and the relation between human and nonhuman beings. Thus, it reinforces the colonial notion that the lifeways and worldviews of Indigenous peoples are irrational, while obscuring the thick presuppositions underlying systems of law descended from European cultures. I acknowledge the reasons for resorting to religious freedom as a pragmatic strategy but point out that success in these cases has come from political measures rather than courts, responding to growing public awareness of the injustices to which Indigenous peoples have been subjected under settler colonial governments, as well as an emerging consensus on the need for a shift in our relation to the nonhuman world.

It is understandable that Indigenous communities have employed one of the few legal strategies open to them under the system of settler law within which they must operate, and my objective is not at all to criticize those efforts, nor even to claim that they stand no chance of success. There have been well-argued dissenting opinions, and, at the time of writing this article, a US appeals court is rehearing *Apache Stronghold v. United States*, a case

[5] Offering a detailed assessment of alternative legal routes lies outside the scope of this article, and I leave it as an open question whether domestic courts could take these factors sufficiently into account within the parameters of existing law or whether the remedies are inescapably political.

[6] My purpose here is only to make this limited point in relation to religious freedom, not to offer a full defense of Indigenous sovereignty or territorial jurisdiction.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

invoking religious freedom to protect a sacred area from destruction by a copper mine.[7] But casting such cases as religious freedom fails to capture the legitimate normative justifications for the claims at issue and fortifies a colonialist frame of perception that needs instead to be dismantled. My primary aim in the following pages is to expose that frame and subject it to critical scrutiny.

Saving Qat'muk: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*

Starting in 2012 with a petition to the Supreme Court of British Columbia, the Ktunaxa Nation appealed to "freedom of conscience and religion," protected under section 2(a) of the Canadian Charter of Rights and Freedoms, in order to prevent the development of a ski resort in an area they call Qat'muk, sacred to them as the home of Grizzly Bear Spirit.[8] The choice of this legal avenue, over a section of the Canadian constitution that protects Aboriginal rights, was deliberate, motivated by the fact that Indigenous land claims relying primarily on spiritual, as opposed to economic, rights had not been successful in the past.[9] Section 35 of the Canadian Constitution Act states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed," but it does not define these rights.[10] While Canadian courts have entertained cultural claims under this provision, they have used a test requiring Indigenous communities to establish that the practice, custom, or tradition they seek to protect is integral to their distinctive culture and continuous with pre-contact times. This test, established in *R. v. Van der Peet*,[11] can pose a high bar, and claims that do manage to meet its criteria will still be weighed against the government's right to dispose over Crown lands. The Ktunaxa's choice of religious freedom meant, though, that factors uniquely pertaining to their status as an Indigenous nation were bracketed. The judgement of the British Columbia Court of Appeals stated: "it is important at the outset to note the Ktunaxa advance their s. 2(a) claim as a standalone right to be determined on the same basis as if it were asserted by a non-Aboriginal group."[12] Reasoning on this basis, the provincial court concluded that "constitutional protection of freedom of religion does not extend to restricting the otherwise lawful use of land" and, further, that preventing the development meant imposing constraints on others who do not share the Ktunaxa's religious beliefs.[13]

The case was then taken to the Supreme Court of Canada, which ruled against the Ktunaxa in 2017. The justices acknowledged that "[i]n many Indigenous religions, land is not only the site of spiritual practices; land itself can be sacred," and "[a]s such, state action that impacts

[7] Darren Thompson, "Apache Stronghold Fights for Entire Way of Life in Oak Flats Case," *Native News Online*, March 24, 2023, https://nativenewsonline.net/sovereignty/apache-stronghold-fights-for-entire-way-of-life-in-oak-flats-case.

[8] *Ktunaxa Nation*, [2017] 2 S.C.R. at 387; Canadian Charter of Rights and Freedoms art. 2(a), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[9] See Natasha Bakht and Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," *McGill Law Journal* 62, no. 3 (2017): 777–812, at 795. Jennifer Mendoza, writing after the case was eventually decided by the Supreme Court of Canada in 2017, proposes that the claim would have had a greater likelihood of success if presented in terms of Aboriginal rights. "Ktunaxa Nation v. British Columbia: A Historical and Critical Analysis of Canadian Aboriginal Law," *Washington International Law Journal* 29, no. 3 (2020): 685–716, at 708. There were, however, reasons why the Ktunaxa did not choose this route.

[10] Canada Act, sec. 35, 1982, c 11 (U.K.), *reprinted in* R.S.C. 1985, app II, no 44.

[11] R. v. Van der Peet, [1996] 2 SCR 507, 509.

[12] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 35, at para. 45, https://www.canlii.org/en/bc/bcca/doc/2015/2015bcca352/2015bcca352.html.

[13] *Ktunaxa Nation*, 2015 BCCA 35, at paras. 62 (quoting the opinion being appealed), 73.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

land can sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance." They reasoned, however, that "the Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it," which could not be allowed.[14] The majority judged that the Ktunaxa's right to freedom of conscience and religion was therefore not infringed. One judge dissented from this reasoning but argued that the infringement was justified because "[g]ranting the Ktunaxa a power to veto development over the land would effectively give the Ktunaxa a significant property interest in Qat'muk" and thereby the "power to exclude others from developing land that the public in fact owns." In principle, "a religious group would therefore be able to regulate the use of a vast expanse of public land so that it conforms to its religious belief."[15] Thus, the court concluded that the Crown's right to dispose of property falling under its jurisdiction could not be overruled by the right to freedom of conscience and religion, treated as a generalizable right applying equally to all citizens.[16]

The reasoning of the courts adjudicating the Ktunaxa's claim proceeded in terms of the liberal framework underlying Canadian law, with its division between the religious and the secular, its ideas about property, its conceptions of nature and the human-nonhuman relationship, and its prioritization of economic development. The Ktunaxa Nation pointed out that they do not share the worldview in which this framework is rooted. In 2010, they delivered a declaration to the British Columbia legislature, in which they stated, "the Ktunaxa language does not translate well into other languages and consequently our spiritual relationship with Qat'muk may not be fully understood by others." The declaration nonetheless is an effort at translation. It repeatedly employs the notion of stewardship, for instance, claiming at one point: "Qat'muk's importance for the Grizzly Bear Spirit is inextricably interlinked with its importance for living grizzly bears now and in the future. The Ktunaxa have a stewardship obligation and duty to the Grizzly Bear Spirit and Qat'muk."[17]

The Ktunaxa's relation to Qat'muk involves more than an ecological ethic, but it is clear from their words that a key aspect of the area's spiritual significance for them involves a sense of responsibility for care of the land and the other living beings dependent on it. The declaration says the following about a word they use "for the law given to the Ktunaxa by the Creator":

> It is a powerful word and speaks to why we were put on this land. We were born into this and someday we will return through death. The Creator put us here for a reason and that purpose is to take care of the land and its resources.
>
> The law of the land, ʔaknumuɬtitit, is the law for survival. The law protects the values inherent in the land. The land gives us the resources to survive, and in return, we uphold our covenant with the Creator to protect and not overuse the land.

[14] Ktunaxa Nation v. British Columbia, [2017] 2 S.C.R. 386, 391, 388.

[15] *Ktunaxa Nation*, [2017] 2 S.C.R., at 452–53, paras. 150, 152 (Moldaver J.).

[16] The court was also asked to consider whether the Crown had fulfilled its obligation to consult with the Ktunaxa under the constitutional provision protecting aboriginal rights and determined that it had, stating that this obligation guarantees a process, not a result.

[17] Ktunaxa Nation, "Qat'muq Declaration," November 15, 2010, 1, https://www.ktunaxa.org/who-we-are/qatmuk-declaration/.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

> The law is grounded in the fact that all things are connected and must be kept in balance. It is also the foundation of our spirituality—that of being humble in our limited understanding and of being respectful of our role within nature and with other creatures, as well as being respectful and acknowledging the Creator and our ancestors.[18]

Although the Ktunaxa lost their legal cases, the proposed Jumbo Glacier Resort, as the development company seeking the permit had named it, was never built and will not be. The project was abandoned in the face of concerted opposition by the Ktunaxa, joined by nature conservation groups. These groups shared the Ktunaxa's wish to prevent the construction, agreeing with the stewardship values the Ktunaxa had expressed. For example, Wildsight, one of the groups that allied with the Ktunaxa in the effort to protect Qat'muk, says on its website: "Wildsight's vision is to inspire a shared community desire to protect our natural world for future generations. We envision extensive and connected wild spaces for wildlife —from grizzly bears to woodpeckers to trout. We envision clean air and clear water running from mountain watersheds to our lakes. We see thriving and sustainable communities made up of engaged and educated citizens."[19]

Development rights in the area have now been permanently extinguished, and the Ktunaxa, in collaboration with various levels of government and conservation groups, have established an Indigenous Protected and Conserved Area (widely known as an IPCA) covering Qat'muk. "An IPCA," the Ktunaxa note, "is distinguished by Indigenous creation and founded on the Indigenous relationship to land." This IPCA "will serve to protect both cultural values and biological diversity in part of the Central Purcell Mountains for all time."[20]

Public Property and Indigenous Sovereignty

In the courts, the fundamental problem for the Ktunaxa was that their claim demanded authority over land within a legal system that regards all land as owned by some human individual or corporate entity, against the background of a colonial history where the land at issue had been established as *not* belonging to the claimants. Appeals to religious freedom, however, impel judges to balance rights without weighing in on the questions about historical dispossession, let alone the very idea of land ownership, that are at the heart of Indigenous sacred land claims such as that of the Ktunaxa. Howard Kislowicz and Senwung Luk write, "the Ktunaxa claim is challenging in part because it is based in the right to religious freedom but resembles a property claim."[21] They point out that dominant religious groups do not face the same difficulty because they already own the land on which their sacred sites (churches, cemeteries) are located.[22] In the US context, John Rhodes acknowledges this as the reason why Indigenous peoples repeatedly lose sacred site litigation, observing that judges do not consider the history that led to these sites no longer being the

[18] Ktunaxa Nation, "Qat'muq Declaration," 2.

[19] "About," Wildsight, accessed October 3, 2023, https://wildsight.ca/about/.

[20] Ktunaxa Nation, "Jumbo Valley to Remain Wild through Permanent Retirement of Development Rights," press release, January 20, 2020, 1, https://ourtrust.org/wp-content/uploads/downloads/Jumbo-Qatmuk-IPCA-MR-January-20-2020-final.pdf.

[21] Howard Kislowicz and Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom," *Supreme Court Law Review: Osgood's Annual Constitutional Cases Conference*, no. 88 (2019): 205–29, at 207.

[22] Kislowicz and Luk, "Recontextualizing Ktunaxa Nation v. British Columbia," 208.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

domain of the Indigenous claimants in the first place.[23] It is understandable and predictable, however, that judges are unwilling to deliver rulings about the scope of religious freedom that would effectively restrict the government's rights, in perpetuity, over land under its jurisdiction. Writing on the Ktunaxa case prior to the Supreme Court's ruling, Natasha Bakht and Linda Collins argue that "[s]ince economic and property interests are not enshrined in the constitution, freedom of religion should arguably be prioritized and afforded greater importance,"[24] but property rights are deeply embedded in Western legal frameworks. It is significant that the one Supreme Court justice who concluded that the proposed construction *would* infringe on the Ktunaxa's religious freedom nonetheless judged the infringement to be justified in view of the Canadian government's jurisdiction over Crown lands. And this judgement is sound as long as neither existing jurisdiction nor the concept of property are being challenged.

The US Supreme Court reasoned in a similar manner in *Lyng v. Northwest Indian Cemetery Protective Association*, where it determined that building a logging road through a national forest containing sites sacred to several Native nations did not violate their constitutional right to free exercise of religion. Justice Sandra Day O' Connor, delivering the opinion of the court, stated that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[25] *Lyng* has been widely criticized for its conclusion that there is no constitutional remedy, even assuming that government action would "virtually destroy the Indians' ability to practice their religion,"[26] but the judges reasoned in terms of generalizable principles regarding religious freedom, as they are bound to do. Similar cases launched since the *Lyng* decision have been equally unsuccessful in US courts.[27] In *Navajo Nation v. U.S. Forest Service*, for instance, an appeals court deciding against the Navajo and other nations cited *Lyng* while noting that "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[28] This judgment is likewise premised on the assumption that decisions over state-owned lands are the prerogative of the government and cannot be overridden by protections for religious freedom.

Notice that the judges in the Ktunaxa case in Canada acknowledged the sacredness of land to Indigenous peoples. Yet they reached the same verdict as did the US court in *Lyng*, which concluded that "whatever rights the Indians may have to the use of the area ... those rights do not divest the Government of *its right to use what is, after all, its land.*"[29] The problem, in these cases, has been that courts will not overturn the current legal status of land in order to protect religious beliefs, and that is what the claimants are asking. It is what a holistic and genuinely fair adjudication of sacred land claims requires but for reasons that the legal paradigm of religious freedom sets aside. There is, first and foremost, the issue of political and territorial jurisdiction. Historically, in the not very distant past, jurisdiction over their societies and traditional territories was taken from Indigenous peoples by unjust means under the system of settler colonialism. The dissenting judge in *Navajo Nation* pointed this out: "In part, the majority justifies its holding on the ground that what it calls 'public park land' is land that 'belongs to everyone.' ... There is a tragic irony in this justification. The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest

[23] John Rhodes, "An American Tradition: The Religious Persecution of Native Americans," *Montana Law Review* 52, no. 1 (1991): 13–72, at 45, 54, 60.

[24] Bakht and Collins, "The Earth Is Our Mother," 809.

[25] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 452 (1988).

[26] *Lyng*, 485 U.S. at 451 (internal ellipses and citation omitted).

[27] For an overview, see McNally, *Defend the Sacred,* 94–126.

[28] Navajo Nation v. US Forest Service, 535 F.3d 1058, 1072 (9th Cir. 2008).

[29] *Lyng*, 485 U.S. at 453.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

of the Indians' holy mountains, and for refusing to recognize that this action constitutes a substantial burden on the Indians' exercise of their religion."[30]

John Borrows, discussing the *Ktunaxa* decision, rightly questions the court's assumption that "the land under dispute is Crown land, when no treaties have been signed with any Indigenous Party in the region."[31] We should notice that this assumption is not evidently in accord with the majority culture's own longstanding principles of justice regarding territory and nationhood. On those principles, a relatively recent history of unjust dispossession is surely relevant to assessing what is owed to Indigenous peoples by the states in which they now reside, even if full restoration of sovereignty is no longer feasible, given intervening demographic shifts. Michael Walzer suggests that Indigenous peoples "stand somewhere between a captive nation and a national, ethnic, or religious minority," where "something more than equal citizenship is due to them, some degree of collective self-rule."[32] Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007, affirms a right to self-determination, in virtue of which Indigenous peoples "freely determine their political status and freely pursue their economic, social and cultural development."[33]

Jeremy Waldron contends, on the other hand, that claims based on historical injustice can in principle be superseded and demands for full aboriginal restitution—the rare demand among Indigenous people for a return to precolonial conditions—fall in this category.[34] But such demands are rare among Indigenous peoples. Arguing that many actual Indigenous claims can be justified using Waldron's own principles, Kerstin Reibold points out the need to distinguish between different types of land. Undeveloped land can be fully restored to Indigenous peoples, she argues, as settlers are not living on it and "it is not crucial for securing decent living conditions for settler descendants."[35] After all, it is not as if Western nations currently distribute land according to need, with no regard for historical title. That Indigenous peoples did not enclose land or practice precisely the forms of settled agriculture that were the norm in Europe does not entail that they had no moral and political claim over their traditional territories. They did, and, as Margaret Moore writes, unilateral settlement arguably constitutes the central wrong of the colonial project in relation to Indigenous peoples.[36] Moore notes that all people have an interest in control over the places where they live, which are preconditions for their plans of life and sites of emotional attachment.[37] This interest is especially powerful in the case of Indigenous peoples, whose cultures, values, and lifeways are intimately linked to land.[38]

[30] *Navajo Nation*, 535 F.3d at 1113 (Fletcher, J., dissenting).

[31] John Borrows, *Law's Indigenous Ethics* (Toronto: Toronto University Press, 2019), 80.

[32] Michael Walzer, "Notes on the New Tribalism," in *Political Restructuring in Europe: Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994), 182–95, at 187.

[33] G.A. Res. 61/295, *Declaration on the Rights of Indigenous Peoples* at 6 (Sept. 13, 2007), https://www.un.org/development/desa/Indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf. McNally notes that "In the eyes of US law since *Cherokee Nation v. Georgia* (1831), Native peoples are 'domestic, dependent nations' exercising what courts have since come to call 'quasi-sovereignty.'" McNally, *Defend the Sacred*, 228.

[34] Jeremy Waldron, "Supersession and Sovereignty," Julius Stone Address, August 3, 2006, NYU School of Law, Public Law Research Paper No. 13-33, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205708. While Waldron acknowledges that these claims are a rarity, he argues that they are nonetheless rhetorically important and philosophically interesting. Waldron, "Supersession and Sovereignty," 3–4. Making this genre of rhetoric the focal point of an argument on supersession, while leaving aside the vast majority of actual claims based on assertions of Indigenous sovereignty, is, however, unhelpful and even misleading.

[35] Kerstin Reibold, "Why Indigenous Land Rights Have Not Been Superseded–A Critical Application of Waldron's Theory of Supersession," *Critical Review of International Social and Political Philosophy* 25, no. 4 (2022): 480–95, at 484.

[36] Margaret Moore, "The Taking of Territory and the Wrongs of Colonialism," *Journal of Political Philosophy* 27, no. 1 (2019): 87–106.

[37] Moore, "The Taking of Territory and the Wrongs of Colonialism," 94.

[38] Reibold, "Why Indigenous Land Rights Have Not Been Superseded," 489.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

Under the system of settler colonialism, the bulk of their territories were taken from Indigenous peoples by force and through treaties often negotiated under unfair conditions. There was then no "discovery" of "wilderness," as per popular settler colonial ideology, and so, John Borrows points out, citing a 1905 US Supreme Court case, "treaty rights are a grant of rights *from* the Indians, not *to* the Indians."[39] That nations have a right to self-determination and control over their territories was recognized in reasoning about political justice in European nations that were at the same time busy colonizing and enslaving non-white peoples. It is likely no coincidence that scientific racialist theories developed in Europe at the same time as universalist moral and political principles were being articulated by Enlightenment thinkers such as Immanuel Kant.[40] Certainly, the treatment of Indigenous peoples by European settler colonists in the Americas, Australia, and New Zealand, including their removal from lands they had occupied for centuries, was heavily supported by racist typologies, needed to excuse its otherwise glaring hypocrisy.[41]

In addition, as many scholars have noted, Indigenous peoples generally did not understand their rights over land in terms of a transfer of ownership, in part because they did not conceive of that land as "property."[42] In his account of Indigenous legal traditions, Borrows explains that, under Anishinabek law, "land does not belong to a person or people in the sense that they have absolute discretion and control; land is provisionally held for present sustenance and for the sustenance of those yet unborn."[43] Cultural differences of this sort informed Indigenous interpretations of the treaties they signed, which they understood as agreements to share the land, not to transfer political authority over it.[44] Gina Starblanket and Heidi Kiiwetinepinesik ask, responding to Borrows, "if Indigenous peoples were not ceding lands, as Indigenous knowledge posits, but instead creating a shared territory that would enable peaceful and mutually beneficial

[39] John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006), 94, https://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf.

[40] Kant himself also formulated theories advancing biological racism. See Mark Larrimore, "Sublime Waste: Kant on the Destiny of the Races," in *Civilisation and Oppression*, ed. Catherine Wilson (Calgary: University of Calgary Press, 1999), 99–125; Robert Bernasconi, "Kant as an Unfamiliar Source of Racism," in *Philosophers on Race: Critical Essays*, ed. Julie K. Ward and Tommy L. Lott (Malden: Blackwell: 2002), 145–59.

Pauline Kleingeld argues that Kant revised his views in later works, citing the following passage in *Toward Perpetual Peace*: "If one compares with this [viz the idea of cosmopolitan right] the inhospitable behaviour of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as *conquering* those lands and peoples) takes on terrifying proportions. America, the negro countries, the Spice Islands, the Cape, etc., were of their discovery lands that they regarded as belonging to no one, for the inhabitants counted as nothing to them." Immanuel Kant, "Zum Ewigen Frieden [Toward perpetual peace]," *Gesammelte Schriften* [Collected works], vol. 8 (Berlin: de Gruyter, 1923), 341–86, at 358, as quoted and translated in Pauline Kleingeld, "Kant's Second Thoughts on Race," *Philosophical Quarterly* 57, no. 229 (2007): 573–92, at 586.

[41] Evident enough to some Europeans, who were appropriately outraged; Bartolomé de las Casas is a well-known example. See *Bartolomé de las Casas and the Defense of Amerindian Rights: A Brief History with Documents*, ed. Lawrence A. Clayton and David M. Lantigua (Tuscaloosa: University of Alabama Press, 2021).

[42] "Aboriginal people did not own their lands as 'property' until the came face to face with European colonial expansion. This is not to say that they did not engage in complex sets of relationships with one another and with the land, broadly conceived, which gave them a moral claim to the land on which they lived (especially vis-à-vis Europeans) … But they did *not* relate to the land in the specific ways that Europeans recognized as constitutive of property relations." Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations," *American Anthropologist* 104, no. 1 (2002): 247–61, at 252.

[43] Borrows, "Indigenous Legal Traditions in Canada," 39.

[44] Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future," in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, ed. Michael Asch, John Borrows, and James Tully (Toronto: University of Toronto Press, 2018), 29–48, at 35.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

coexistence of separate nations, how must our understandings of treaty rights be transformed to account for these interpretations?"[45]

They must include commitment to sharing the land, rather than dividing up "property," accompanied by recognition that Indigenous lifeways involve "a different way of relating to and with the world," in Glen Coulthard's words, with "ancestral obligations to protect the lands that are core to who we are as Indigenous peoples."[46] That is precisely what the Ktunaxa's declaration on Qat'muk sought to communicate to the British Columbia court. Its language can be described as "religious" in that it refers to a creator, but its account of creation expresses a worldview, embedded in distinct lifeways, where people have a responsibility to look after the earth for current and future generations of the community belonging to this land. Borrows describes a common sense, across Indigenous communities in Canada, of the interrelatedness of plants, animals, and humans, with reciprocal duties of care, communicated through stories and enacted within rituals and ceremonies.[47]

Claims over sacred sites and areas must be situated within this context. McNally argues for "eliding what's *religious* about Native claims to sacred lands, practices, ancestors, and material heritage into notions of sovereignty and peoplehood,"[48] but doing so means that sacred land cases presenting themselves as protecting religious freedom are asking courts to reach decisions about what the law conceives as property rights. That is genuinely unreasonable, within the logic of settler law.[49] Required, rather, is recognition of Indigenous sovereignty and the history of unjust dispossession, which is *unique* to Indigenous claims over sacred sites. Also required is understanding that the dispute involves a conflict between different worldviews and lifeways. The former falls outside the scope of religious freedom protections; the latter is positively distorted by the category of religion.

A Conflict of Worldviews

Benjamin Berger criticizes stories about law and religion that depend on "the conceit of law's autonomy from culture, history and politics," suggesting that "the paragon of this

[45] Gina Starkblanket and Heidi Kiiwetinepinesiik Stark "Towards a Relational Paradigm—Four Points for Consideration: Knowledge, Gender, Land, and Modernity," in Asch, Borrows, and Tully, *Resurgence and Reconciliation*, 175–208, at 181; see also Asch, "Confederation Treaties and Reconciliation," 34–40.

[46] Glen Sean Coulthard, *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press: 2014), 169.

[47] John Borrows, "Indigenous Legal Traditions in Canada," 40–69. To say, in the words of an editorial supporting the Ktunaxa decision, that "government can't get into deciding where a non-material bear lives" is simplistic, offering a highly reductive understanding of the web of beliefs, rituals, and ceremonies connected with the Ktunaxa's relation to this area. "In a Ruling on Indigenous Rights, the Supreme Court Gets Religion," *Globe and Mail*, November 5, 2017, https://www.theglobeandmail.com/opinion/editorials/globe-editorial-in-a-ruling-on-Indigenous-rights-the-supreme-court-gets-religion/article36836421/.

[48] McNally, *Defend the Sacred*, 19.

[49] McNally claims that in the United States, "religious freedom discourse seems to grow in stature with a rightward shift on the Supreme Court," but that shift also tends to be inversely correlated with respect for the rights of Indigenous peoples. McNally, *Defend the Sacred*, 187. Witness the recent narrowing of Indigenous land rights by the now majority right-wing US Supreme Court in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). *Castro-Huertra* sharply limits the ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which had affirmed Indigenous sovereignty over a large part of eastern Oklahoma. Neil Gorsuch, a Republican appointee, had voted with the more liberal judges in this decision and wrote a strongly dissenting opinion in *Oklahoma v. Castro-Huerta.* However, Gorsuch's history of siding with Native American tribes is rare among conservative judges. See McNally, *Defend the Sacred*, 95–96. I also wonder whether Indigenous nations are truly well served, in the long run, by joining forces with conservative Christians using religious freedom to escape laws that mandate equality for LGBTQ individuals and reproductive rights for women and girls.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

impulse is over-reliance on the concept of secularism."[50] Brian Burkhart likewise points out that "there is a common practice in the justifying of colonial power to turn what is based in particular and localized religious points of view into something that is described as 'secular,'" where "the description of 'secularity' often veils coloniality of power and religious bigotry."[51] To present Indigenous claims over sacred land as religion in the first place is to say that the beliefs on which these claims rest are of a different sort than the ones forming the basis for general—purportedly neutral and secular—laws. It means affirming that the claimants' beliefs are the product of faith or some other nonrational basis and that they involve metaphysical commitments of a sort that liberal political reasoning sets aside. These implications obscure the extent to which the fundamental premises of Western legal regulations concerning land are equally the product of specific lifeways, values, and economies. They are not *rational* all the way down. Historically, they even have religious roots, although Western property law is no longer couched in theological language. The language of the sacred within which Indigenous relations to land are often expressed, including creation narratives and stories involving supernatural beings, reflects a contrasting relation to land that is misrepresented when Indigenous land claims are cast as demands for accommodation of religious belief within a legal framework whose foundation is supposedly *not* religious.

In their statement on Qat'muk to the British Columbia legislature, the Ktunaxa Nation explained that they live by a law grounded in the fact that "all things are connected and must be kept in balance," and that their "covenant with the Creator" involves an obligation to protect the land that gives them the resources to survive. Indigenous activists and scholars have frequently underlined this clash between traditional Indigenous and dominant Western relations to "nature" (using a Western concept) when discussing sacred land claims.[52] Commenting on the *Lyng* decision, Vine Deloria Jr. notes the irreplaceable significance of specific sites at which traditional "world renewal" ceremonies were conducted by certain tribes, while also pointing out that these "were done on behalf of the earth and all forms of life."[53] Sacred places, he writes, "properly inform us that we are not larger than nature and that we have responsibilities to the rest of the natural world that transcend our own personal desires and wishes."[54] Deloria holds up this view as an antidote to the looming global ecological crisis, finding in it "a more mature view of the universe as a comprehensive matrix of life forms."[55]

Winona Laduke writes, in a similar vein: "Teachings, ancient as the people who have lived on a land for five millennia, speak of a set of relationships to all that is around, predicated on respect, recognition of the interdependency of all beings, an understanding of humans' absolute need to be reverent and to manage our behavior, and an understanding that this

[50] Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press: 2015), 20.

[51] Brian Burkhart, *Indigenizing Philosophy through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures* (East Lansing: Michigan State University Press: 2019), 15.

[52] See, for example, Lori Beaman's argument that "It is the difference over the meaning of land that presents the most perplexing dilemmas in the confrontation between Native American religious communities and the dominant culture.... The profound differences between colonizer and Native American understandings of land, and humans' relationship to it, are impossible to overstate, and result in the desecration of sacred Aboriginal sites for the convenience of the colonizer." Lori G. Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion," *Journal of Church and State* 44, no. 1 (2002): 135–49, at 142.

[53] Vine Deloria Jr., *God Is Red: A Native View of Religion*, 30th Anniversary Edition (Wheat Ridge: Fulcrum, 2003), 274.

[54] Deloria Jr., *God Is Red*, 285.

[55] Deloria Jr., 288.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

relationship must be reaffirmed through lifeways and through acknowledgement of the sacred."[56]

At the same time, Laduke notes the difficulty of translating this understanding of the sacred into the language demanded by non-Indigenous courts: "Everywhere there are Indigenous people, there are sacred sites, there are ways of knowing, there are *relationships.* The people, the rivers, the mountains, the lakes, the animals, and the fish are all related. In recent years, US courts have challenged our ability to be in these places, and indeed to protect them. In many cases, we are asked to quantify 'how sacred it is … or how often it is sacred.' Baffling concepts in the spiritual realm."[57] Laduke thus expresses the frustration of trying to press this understanding of relationality through the sieve of a legal concept—religious freedom—that is the product of a very different culture from the one she represents as an Anishinabe activist.

The settler courts in which Indigenous defenses of sacred places must be presented adopt the default position that land is the property of some individual or corporate human entity and a resource for human industrial or recreational use, unless some overriding reason can be given, in terms of individual or collective rights, for why it should not be thus used in a particular instance. The bearers of those rights are exclusively human agents. The health of the environment[58] matters insofar as it affects them, but human beings are not regarded within this framework as forming a community with the more-than-human world, let alone responsible for safeguarding its elements and inhabitants. In liberal democracies descended from European cultures, that is the *secular* position. In his *Letter Concerning Toleration*, John Locke draws a division between the sacred and the secular that has become paradigmatic, consigning the sacred to a private sphere that is no business of the state and the secular to affairs of the commonwealth over which churches should have no power.[59] At the same time, his conception of property provides a justification for the appropriation of Indigenous lands.[60] Locke imagines that his views on property fall firmly on the secular side of the division, but his justifications for them appeal to a creation narrative: "God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the Earth, *i.e.* improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his *Property*, which another had no Title to, nor could without injury take from him."[61]

And yet now, in settler perceptions of Indigenous perspectives, if land is *not* seen as property serving human interests, the relation to it is deemed *religious* or *spiritual*, worthy perhaps, yet involving something other than a neutral, secular, rational view. What justifies this assumption that the human world is sharply distinct from the earth and that nonhuman entities as a whole are available for human subjects to utilize in accordance with their needs and wants? Lynn White's 1967 essay, "The Historical Roots of Our Ecological Crisis," was the first widely influential analysis arguing that the current ecological crisis has its roots in a

[56] Winona Laduke, "In the Time of the Sacred Places," in *The Wiley Blackwell Companion to Religion and Ecology*, ed. John Hart (Hoboken: John Wiley and Sons: 2017), 71–84, at 72.

[57] Laduke, "In the Time of the Sacred Places," 73.

[58] The word literally means "surroundings," reflecting its anthropocentric perspective.

[59] John Locke, *A Letter Concerning Toleration*, trans. William Popple, 2nd ed. (London: Awnsham Churchill: 1689), 8–9.

[60] James Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights," in *Locke's Philosophy: Content and Context*, ed. G. A. J. Rogers (New York: Oxford University Press: 1994), 165–96.

[61] John Locke, "The Second Treatise," in *Two Treatises of Government*, ed. Peter Laslett, 2nd ed., repr. (1690; Cambridge: Cambridge University Press: 1970), 5.32, at 308–09.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

view of the relation between humanity and the nonhuman world that finds expression in the Christian mythos, according to which humanity has dominion over all other beings.[62] White's analysis is perhaps somewhat crude, and the idea of dominion can be interpreted in more than one way.[63] Nevertheless, it remains significantly different from the sense of belonging to "an ecological system, of interacting humans, nonhuman beings (animals, plants, etc. and entities (spiritual, inanimate, etc.) and landscapes (climate regions, boreal zones, etc.)" reflected in many Indigenous traditions and narratives.[64]

Both perspectives constitute thick worldviews grounded in bedrock premises and sensibilities. Discussing the relation between religious and nonreligious language in ethical discourses, Maeve Cooke points to "the dependency of reasoning on what could be called collective lived experience or a socio-cultural vocabulary," noting that *all* practical reasoning rests on a bedrock of core fundamental insights, for which no further reasons can be given.[65] That is true whether the core insights are expressed in what Western discourses describe as religious language or they are not. Indigenous relations to sacred places do involve specific rites linked to ontologies referencing spiritual and supernatural beings. But these ontologies are not merely descriptive: they express a land ethic involving a fundamentally different relation to the earth and its inhabitants than the one embodied in systems of law descended from European ideas once linked to Christianity. Vine Deloria is right that "many Christian doctrines have now passed into the sphere of Western civilization's general beliefs,"[66] including the notion of a sharp divide between humanity and nature and the attribution of dignity and intrinsic worth only to human beings. That these ideas have been secularized, eliminating reference to creation myths and divine commands, tends to conceal the fact that they rest on core convictions belonging to a particular set of cultural traditions. Jeremy Waldron writes that "our theories of basic rights, of property and justice, of the respect due to the human person, are all rooted historically in theories of natural law and in conceptions that were specifically theistic and, indeed, Christian in approach,"[67] without asking whether there might be alternative, morally respectable views that take a different shape, that do not conceive of land as property, for example, or that name human and other-than-human entities as interrelated kinds of people. The latter views, found across a range of Indigenous traditions, are no more or less religious than the ones descended from Christianity named by Waldron.[68] And they are also dynamic, as all living traditions are, adapting and evolving in response to changing circumstances. In his argument for supersession, Waldron worries that "the fetishization of culture, including political culture can be a principled impediment to evolution and change"[69] but never

[62] Lynn White, "The Historical Roots of our Ecological Crisis," *Science* 155, no. 3767 (1967): 1203–07.

[63] It can be read as involving a responsibility of stewardship, for instance, as proposed in the second encyclical of Pope Francis, *Laudato Si'* [Encyclical on care for our common home] (May 24, 2015), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

[64] Kyle Whyte, "Settler Colonialism, Ecology and Environmental Injustice," *Environment and Society: Advances in Research*, no. 9 (2018): 125–44, at 133.

[65] Maeve Cooke, "Violating Neutrality? Religious Validity Claims and Democratic Legitimacy," in *Habermas and Religion*, ed. Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen (Cambridge: Polity Press: 2013), 249–76, at 251–52.

[66] Deloria, *God Is Red*, 287.

[67] Jeremy Waldron, "Religious Contributions in Public Deliberation," *San Diego Law Review* 30, no. 4 (1993): 817–48, at 846.

[68] Cooke points out that "the Kantian moral principle, which rests on the conviction that the dignity of every human being is inviolable, is as dogmatic as the Christian idea that human beings are made in the image of God," though without exploring the historical connection between the two. Cooke, "Violating Neutrality, 251. Here, she means "dogmatic" not in the pernicious sense of being immune to rethinking, but in the sense of constituting basic perceptions rooted in collective lived experiences. Cooke, 251.

[69] Waldron, "Supersession and Sovereignty," 18.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

considers that the assumptions of the political and moral perspective he takes for granted are also culturally rooted.

Stressing the need for epistemic justice toward Indigenous peoples, Yann Allard-Tremblay complains that the categorization of Indigenous worldviews as religions "downgrades a cosmological difference to a cultural/religious one and thereby subsumes it under the rationalist worldview."[70] By "rationalist worldview," he means a modern ontology that "proffers a radical difference between humans and the natural world," where "without rational beings to value nature, it would be axiologically void."[71] I would state the matter differently. This supposedly rational cosmology, the basis of settler law, is a historical construction, no less cultural and religious than the Indigenous worldviews Allard-Tremblay has in mind. The idea that nature acquires value only through rational beings was expressly formulated by Kant.[72] It is not justified through further reasons. It is a bedrock premise, a philosophical articulation of the relation between humanity and nature that the creation story in Genesis presents in the form of myth. Epistemic justice does not require setting reason aside but understanding the advantage of power in what passes for reason under conditions of historical and present inequality, while working to offer a fair and sympathetic hearing to disadvantaged voices.

At the social and consequently governmental levels, there is growing appreciation for Indigenous voices regarding land, as the political success of the Ktunaxa's claim reveals. This outcome, the result of decades of activism by the Ktunaxa Nation, supported by conservationists and gaining public sympathy, is not an isolated one. The logging road at issue in *Lyng* was also not built, because the US government intervened while the case was pending to designate much of the area a protected wilderness, thereby diminishing the value of the road. After *Lyng* was decided, the government redesignated the area the Smith River National Recreation Area, putting a conclusive end to the logging road.[73] Furthermore, a bill is currently before Congress to repeal the transfer of Oak Flat—a site sacred to the Western Apache—to Resolution Copper for the creation of a copper mine.[74] In the main, support from conservationists and the wider non-Indigenous public in these cases is not motivated by protective attitudes toward religious freedom. Nor has it been entirely the result of increased sensitivity to justice for Indigenous peoples, although the latter plays a role. Rhodes suggests, writing in 1991, that the greatest judicial hurdle in cases where Indigenous communities assert sacred site claims is a cultural clash that makes it "impossible for some individuals to appreciate the existence of non-Western views of land."[75] Non-Indigenous people *have* come to appreciate those views, however, and that appreciation can move governments, as demonstrated by measures enacted in the wake of both *Ktunaxa* and *Lyng*.

[70] Yann Allard-Tremblay, "Rationalism and the Silencing and Distorting of Indigenous Voices," *Critical Review of International Social and Political Philosophy* 24, no. 7 (2021): 1024–47, at 1036–37.

[71] Allard-Tremblay, "Rationalism and the Silencing and Distorting of Indigenous Voices," 1038.

[72] See the *Groundwork of the Metaphysic of Morals*, where Kant maintains that only *persons* are ends in themselves and therefore worthy of respect, while all other beings are *things*, possessing only a relative worth as means. Immanuel Kant, *Groundwork of the Metaphysic of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1998), 37.

[73] See Dana Lloyd, "Storytelling and the High Country: Reading Lyng v. Northwest Cemetery Protective Association (1988)," *Journal of Law and Religion* 36, no. 2 (2021): 181–201, at 183n7.

[74] Save Oak Flat Act from Foreign Mining Act, H.R. 1351, 118th Congress (2023). For further discussion of the Oak Flat controversy and the way it illuminates the ongoing challenge of religious freedom as a paradigm for sacred land cases, see Tisa Wenger, "Fighting for Oak Flat: Western Apaches and American Religious Freedom," *Journal of Law and Religion* 39, no. 2 (forthcoming).

[75] Rhodes, "An American Tradition," 47.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

The Lens of Culture

The basis of Western law concerning land rests on conceptualizations rooted in specific values and ways of life, and the positioning of Indigenous relations to land as religious in relation to this law misrepresents what is actually a cultural difference. Fair consideration of Indigenous claims requires unsettling sedimented ways of understanding that form the bedrock of settler property law[76] and that are perceived as evidently rational only because the culturally relative assumptions of majorities tend to be invisible to them.[77] Granted, multiculturalism, as a political theory, fails Indigenous peoples by offering them "profoundly *asymmetrical* and *non-reciprocal* forms of recognition"[78] and by not dealing with the absolutely central question of land.[79] Nonetheless, it is the concept of culture, not religion, that captures the difference at issue when the vocabulary of the sacred is used in the course of articulating the contrast between Indigenous and settler relations to land.

Sensitive analyses of cases such as *Ktunaxa* and *Lyng* acknowledge that traditional Indigenous worldviews and lifeways do not translate well into the concept of religion used by Western courts. Shrubsole writes that "many Indigenous language systems do not possess adequate or equivalent terms for what 'religion' has come to represent," which exacerbates the general difficulty that "religion and culture are intimately tied together, and the idea that religion can be distilled and separated from politics, economy, law, and even culture is part of the processes of the secular state that seeks to categorize and differentiate different aspects of human existence."[80] McNally likewise observes that the Ojibwe people with whom he has worked have no word for religion and that Native American peoples express "a shared reluctance to think of their having religion in the sense of a discrete aspect of life segmented off from other aspects of their traditional lifeways."[81]

Indeed, responding to (friendly) criticisms, McNally acknowledges that *culture* might be a better descriptor for what Indigenous peoples have a right to protect. Only, in the United States, he points out, the law protects religion:

> 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.[82]

[76] I am drawing loosely on Maurice Merleau-Ponty's analysis of embodied reason in the *Phenomenology of Perception*: "If it were possible to lay bare and unfold all the presuppositions in what I call my reason or my ideas at each moment, we should always find experiences which have not been made explicit, large-scale contributions from past and present, a whole 'sedimentary history' which is not only relevant to the genesis of my thought, but which determines its significance." Maurice Merleau-Ponty, *The Phenomenology of Perception*, trans. Colin Smith (London: Routledge & Kegan Paul, 1958), 459.

[77] Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press: 2007), 62–63.

[78] Glen Sean Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," in *Home and Native Land: Unsettling Multiculturalism in Canada*, ed. May Chazan et. al (Toronto: Between the Lines, 2011), 31–50, at 32.

[79] See Brian Egan, "Recognition Politics and Reconciliation Fantasies: Liberal Multiculturalism and the 'Indian Land Question,'" in Chazan et al., *Home and Native Land*, 123–41.

[80] Shrubsole, *What Has No Place, Remains*, xvi–xvii.

[81] McNally, *Defend the Sacred*, 5.

[82] Michael McNally, "Author's Response," in "Book Review Symposium on *Defend the Sacred*," *Journal of Law and Religion* 37, no. 1 (2022): 199–206, at 202.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

As pointed out earlier, however, a problem in Canada has been that the dedicated constitutional protection for Indigenous peoples requires them to trace cultural rights to pre-colonial times, which significantly limits what can be considered for protection.[83] This could have posed a problem for the Ktunaxa, had they sought to protect Qat'muk via Aboriginal rights. During the consultative process between them and the responsible government minister, they did not initially take the position that no proposed accommodations could be accepted. That position was adopted after an elder claimed to have experienced a revelation that no compromise was possible. Thus, it resulted from a process of *ongoing* interpretation, following Ktunaxa traditions, of what was required to preserve Qat'muk, this place to which their identity as a people is intimately connected and for which they feel responsible. Michael Carroll writes that Indigenous cultures follow a "web-of-interconnections" model, whose "ongoing role in creating newer and more precise understandings of the world" is overlooked by Canadian courts, as it "cannot be reduced easily to a particular 'practice, custom or tradition.'"[84] The process of "creating newer and more precise understandings of the world" is a characteristic of *all* cultures, though, and it always includes response to changing circumstances as well as intercultural dialogue. The problem, in this context, is the unreasonable demand that Indigenous cultures in particular remain static in order to receive legal protection.[85]

To be sure, Shrubsole and McNally are both offering pragmatic strategies within the parameters of current Canadian and US law. In the Preface to *What Has No Place, Remains*, Shrubsole says he will not "weigh in on prevailing discussions of whether to discard frameworks such as 'religion' or 'religious freedom.'"[86] McNally worries that "the distinctive rhetorical and legal force of the language of religious freedom in US law," risks being lost if the claims are framed as culture and peoplehood.[87] Yet, to date, it is the claims of culture and peoplehood that have been lost in cases where sacred land claims were advanced through the legal avenue of religious freedom, because the lens of religious freedom brackets the uniqueness of Indigenous claims involving territory, picturing the situation as one where claimants are asking for accommodation of beliefs in a way that could open the door to all manner of spiritual and faith-based petitions over public property. Yes, *religion* is a "power word" in the United States,[88] but it is also a word that raises the specter of a potentially ungovernable multiplication of nonrational demands.

In his critique of special protections for religion, Brian Leiter asks why the state should ever grant "exemptions to general laws with neutral purposes" for beliefs that are "insulated from evidence *and* issue in categorical demands on action."[89] The question is a fair one in principle. But in the case of Indigenous communities approaching courts to preserve traditional lands, the supposed neutrality of general laws masks both the injustices of settler

[83] Nicholas Shrubsole, "Raising Indigenous Religious Freedom to a Higher Standard: Michael McNally's *Defend the Sacred* and the Canadian Legal and Legislative Landscapes," in "Book Review Symposium on Michael McNally's *Defend the Sacred*," *Journal of Law and Religion* 37, no. 1 (2022): 182–90, at 186.

[84] Michael P. Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us about Indigenous 'Religion' and Indigenous Rights," *Studies in Religion/Sciences Religieuses* 49, no. 1 (2020): 32–49, at 47.

[85] This is a transnational problem. As Karen Engle notes, "perhaps the most commonly invoked and accepted meaning of culture in the context of indigenous rights is that culture is comprised of the practices, knowledge, and ways of seeing and relating to the world (cosmovision) of those societies that predated the settlers, primarily in the so-called New World … In this usage, culture is often something to be preserved, much like a museum piece or a scarce natural resource." Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010), 142.

[86] Shrubsole, *What Has No Place, Remains*, 11.

[87] McNally, *Defend the Sacred*, 261.

[88] McNally, 261.

[89] Brian Leiter, *Why Tolerate Religion?*, revised edition (Princeton: Princeton University Press, 2014), 4, 59.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

colonialism and the contestability of the law's own cultural presuppositions, whose basic premises are no less categorical and insulated from empirical evidence than those of Indigenous claimants.[90] The law is not neutral; it is "a culturally locatable order carried out by culturally positioned people,"[91] and these are "clashes of culture" between communities, "not simply conflicts *between individual rights and government power.*"[92] Recognition of cultural difference captures the situation more accurately, provided that it does not essentialize or freeze culture and, crucially, is accompanied by due recognition of Indigenous sovereignty.[93]

These are the factors that have been recognized in successes achieved outside the courts. There is in the United States and Canada a greater awareness among the non-Indigenous population of the historical injustices Indigenous peoples have suffered at the hands of colonial governments.[94] Majority acceptance of Indigenous rights to sovereignty remains a work in progress (to put it mildly), but public sympathy for claims linked to stolen lands and deliberate attempts to destroy Indigenous cultures has increased. The other important direction of public support is rooted in the achievement of a partial consensus[95] with Indigenous worldviews. The beliefs and identity attachments of Indigenous communities to particular regions are specific to them, but many non-Indigenous allies agree in considerable measure with expressed Indigenous views on responsibility for land communities that include more than human persons and extend to future generations. That involves in its own way a recognition of cultural difference in tandem with genuine dialogue, which always

[90] I sympathize with John Borrows's skepticism "about spiritual claims as an ultimate guide to broader public policy" and his view that such claims should not dominate public life. Borrows, *Law's Indigenous Ethics*, 111. However, his characterization of "the metaphysics of the Ktunaxa" as faith in the presence of the Spirit Bear in Qat'muk (111) is, in my view, rather shallow. See, Borrows, 111. I am not denying that the Ktunaxa have these literal beliefs about Grizzly Bear Spirit but, rather, highlighting the relationship to place and inhabitants, with associated values and obligations, expressed in these beliefs, to make the point that this relationship conflicts with the one underlying Western law. The latter is no less (or more) metaphysical than the position of the Ktunaxa.

[91] Shrubsole, *What Has No Place, Remains*, 15. The law is then decidedly *not* like a fire brigade, as Waldron maintains, where "it doesn't matter *whose fire brigade it is*, or whose traditions it matches, or who set it up or how; what matters is that we have it and it works." Waldron, "Supersession and Sovereignty," 24. It works better for some than for others, precisely due to factors Waldron wants to dismiss as irrelevant.

[92] Vogel, "The Clash of Stories at Chimney Rock," 777.

[93] Multicultural theories to date have arguably been lacking on this latter point, failing adequately to acknowledge and thematize the distinctive political standing of Indigenous nations. Dale Turner maintains, for instance, that, while Will Kymlicka's defense of self-government for Indigenous people constitutes a significant accomplishment in Canadian liberal thought, it is still "not a peace pipe" because Kymlicka assumes the sovereignty of the Canadian state. Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), 7; see also Brian Egan, "Recognition Politics and Reconciliation Fantasies," 127 ("multiculturalism, at least in its official formulation, was not devised or well equipped to tackle the Indian problem, which is deeply rooted in the colonial constitution of the nation itself and in questions about attachments and rights to land and territory"); and Avigail Eisenberg, "Multiculturalism and Decolonization," in *Assessing Multiculturalism in Global Comparative Perspective: A New Politics of Diversity for the 21st Century?*, ed. Yasmeen Abu-Laban, Alain-G Gagnon, and Arjun Tremblay (London: Routledge, 2023), 83–98, at 84 ("Whereas multiculturalism is premised on the public accommodation of minorities, decolonization requires that states and publics recognize the political authority of Indigenous people.").

[94] This is an ongoing process. Note the public horror in Canada over the recent discovery of hundreds of unmarked graves of children on the grounds of Indian residential schools. See Phil Heidenreich, "'The Story was Hidden': How Residential School Graves Shocked and Shaped Canada in 2021," *Global News*, December 31, 2021, https://globalnews.ca/news/8458351/canada-residential-schools-unmarked-graves-Indigenous-impact/.

[95] I use the term *partial consensus* to mean shared agreement about reasons and conclusions, as opposed to the idea of an overlapping consensus on the basis of what might be different reasons. See Charles Taylor, "Conditions of an Unforced Consensus on Human Rights," in *The East Asian Challenge for Human Rights*, ed. Joanne R. Bauer and Daniel A. Bell (New York: Cambridge University Press: 1999), 124–44.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

holds the possibility of learning and finding common ground. McNally expresses an understandable worry in this regard about perceptions that transmute tribe-specific Native American traditions into a "universal piety of nature religion" via the language of "spirituality."[96] It is true that romanticizing colonial views of the "noble savage" persist,[97] and one should be careful not to homogenize Indigenous cultures or assume that all communities will make the same decisions when faced with choices about economic developments on traditional lands. Furthermore, Indigenous relations to sacred lands are "profoundly local—that is, profoundly tied to particular, specific places in complicated and sophisticated ways."[98] That said, many Indigenous peoples have sought dialogue and found common ground by expressing their sense that human beings form an interdependent community with other nonhuman inhabitants of a place and have a responsibility toward them and the shared land that sustains all. Although the Ktunaxa lost in court, they won their struggle. The creation of an Indigenous-led mode of governance for the newly protected area is an important development. It resembles, in both process and outcome, the creation of Bear Ears National Monument by the Obama government, described by McNally as "a new experiment in cooperation, even collaboration, between the United States and Native nations in safeguarding sacred lands."[99]

I also question characterizations of non-Indigenous "spiritual" relations to nature and the activism that springs from them as motivated by a wish to preserve natural areas as sites of aesthetic enjoyment and subjective fulfillment. Responses to nature expressed through terms such as *nature spirituality* or *eco-spirituality* often involve a sense of connection, dependence, and responsibility.[100] On Indigenous sacred places, McNally says that, although Indigenous traditions do not neatly fit the category of religion, "sacred is not such an ill-fitting term to describe the sense of duty and obligation to such places, the sense of reciprocity with those places, and the moral standing or spiritual subjectivity of the places themselves, or the plants and animals that people them."[101] This description has much in common with the vision of Wildsight mentioned above, a group that allied with the Ktunaxa. Non-Indigenous people do not have the same relations to specific places, but many have come to agree with a core element of this sense of the sacred: the understanding, in Vine Deloria's words, "that we are not larger than nature and that we have responsibilities to the rest of the natural world that transcend our own personal desires and wishes."[102]

Following Burkhardt, I see no reason to call this *religion* any more (or less) than the belief that only human beings have intrinsic value is religion. Burkhardt describes creation stories expressing the intimate relation between Indigenous communities and specific areas as "merely the attempt to convey in English the epistemic practices of locality, the relationship that people have to land that is not constructed by people but constructs the people."[103] Indigenous relations to land and to the more-than-human world in these places embody a different worldview, with different fundamental sensibilities and judgments, than the one lying at the basis of Western systems of law. Justice requires unsettling those systems, which

[96] McNally, *Defend the Sacred*, 108.

[97] McNally, 120.

[98] McNally, 107–08.

[99] McNally, 297. Another example is the return of land to the Rappahannock Tribe in eastern Virginia, also the result of partnerships between the Indigenous community and nature conservation groups. See Jenna Kunze, "After 350 Years, the Rappahannock Tribe Gets Land Back," *Native News Online*, April 2, 2022, https://nativenewsonline.net/sovereignty/after-350-years-the-rappahannock-tribe-gets-land-back.

[100] See, for example, some of the essays in Llewellyn Vaughan-Lee, ed., *Spiritual Ecology: The Cry of the Earth* (Point Reyes: Golden Sufi Center, 2013), 85–102.

[101] McNally, *Defend the Sacred*, 8.

[102] Deloria Jr., *God Is Red*, 285.

[103] Burkhardt, *Indigenizing Philosophy through the Land*, 91.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

in turn means recognizing that they are also cultural, not neutral laws from which Indigenous peoples are asking for faith-based exemptions. At the same time, understanding that cultures are not static monads is critical. Dominant Western conceptions of nature have come under considerable internal strain over the last several decades, opening space for dialogue between Indigenous and Western philosophies.[104] When Rhodes writes that Native Americans perceive an "interdependency between life forms" and see themselves as "caretakers of the earth, not as developers,"[105] he is not so much communicating an alien worldview as presenting appealing alternatives to ideas with which a significant segment of non-Indigenous people are dissatisfied. The result has been partnerships between Indigenous peoples, environmentalists, and nature conservationists, a process that alarm over climate change has intensified. In fact, the realities of climate change mean that even granting jurisdictional claims over traditional territories will not suffice to enable Indigenous peoples to live by their own land ontologies as long as there is no change to "a settler ethnogeography which is inscribed into the legal, political, and economic system of settler states." [106]

Conclusion

Freedom of religion as a dedicated right is premised on the notion that religion is especially valuable or vulnerable and therefore warrants a buffer against laws and policies enacted through the normal deliberative and decision-making processes of liberal democratic societies. It is sometimes argued that this special protection is needed because the content of faith and the demands of religious obligation cannot be clearly stated within the terms of rational debate. Paul Horwitz writes that "what is incontrovertible and evident to the religious adherent may seem vague, mysterious, or simply inconceivable when examined from a secularist standpoint," which leaves religion at a disadvantage within the liberal state, for "the language of liberalism is the language of rationalism, and whatever cannot be approached rationally is bound to meet with skepticism, at best."[107] Jeremy Webber similarly maintains that "the core phenomenon" protected by freedom of religion "is mysterious, the claimed reality ineffable, inaccessible to unbelievers and embedded with broader cultural phenomena."[108] Because of this ineffability, "there is no common scale along which religious and secular interests can be arrayed," he argues, giving the example of

[104] By *internal*, I mean they have been criticized using the resources of Western traditions. Environmental concerns have led to influential challenges in the form of biocentrism, ecocentrism, and ecofeminism, while animal ethicists have contested the view that we have moral obligations only to human beings. For a comparative study of Indigenous perspectives and ecofeminism, see Joan McGregor, "Toward a Philosophical Understanding of TEK and Ecofeminism," in *Traditional Ecological Knowledge: Learning from Indigenous Practices for Environmental Sustainability*, ed. Melissa K. Nelson and Dan Shilling (Cambridge: Cambridge University Press), 109–128. For a sympathetic Indigenous approach to animal rights, see Linda Hogan, "The Radiant Life with Animals," in Nelson and Shilling, *Traditional Ecological Knowledge*, 188–210.

[105] Rhodes, "An American Tradition," 19.

[106] Kerstin Reibold, "Settler Colonialism, Decolonization, and Climate Change," *Journal of Applied Philosophy* 40, no. 4 (2023): 624–41, at 636, https://doi.org/10.1111/japp.12573.

[107] Paul Horwitz, "The Sources and Limits of Freedom of Religion in Liberal Democracy: Section 2(a) and Beyond," *University of Toronto Faculty of Law Review* 54, no. 1 (1996): 1–64, at 24.

[108] Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion," in *Diversity and Equality: The Changing Framework of Freedom in Canada*, ed. Avigail Eisenberg (Vancouver: University of BC Press, 2006), 178–200, at 193. Jürgen Habermas makes a similar point in a less sympathetic spirit, writing that, because of "the dogmatic authority of an inviolable core of infallible revelatory truths, religiously rooted existential convictions evade that kind of unreserved discursive deliberation to which other ethical orientations and world views, i.e., secular 'concepts of the good' expose themselves." Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays*, trans. Ciaran Cronin (Cambridge: Polity Press: 2008), 129.

https://doi.org/10.1017/jlr.2023.37 Published online by Cambridge University Press

Lyng. "The only way to resolve the dispute is to inquire into the spiritual significance of the place for the First Nation, weigh the force of that interest by attempting to understand the interest in its own terms and by attempting to translate that interest into terms more familiar to the decision maker, consider the importance of the governmental interest, and then decide what degree of deference is due to a religious interest that must remain, in great measure, unfathomable."[109]

That is precisely how judges *have* reasoned in cases such as *Lyng*, however, when arriving at negative verdicts. Justice in these cases requires, instead, recognition of indigenous sovereignty and an understanding of the difference between Indigenous and dominant Western relations to land. Neither of these points is mysterious or unfathomable, and both are obscured by the architecture of religious freedom, which casts the situation as a demand for faith-based exemption from neutral secular laws. The laws are not neutral: they are the product of European cultures whose assumptions are taken to be self-evident, operating within a history of settler colonial injustice. Admittedly, these laws are de facto the law of the land, and Indigenous peoples must therefore work with them. As Kristen Carpenter writes, "Indigenous Peoples and their lawyers quite often find themselves in the position of having to use the settler-colonial law, even while they try to reform it toward a concept of justice informed by Indigenous norms and values."[110] Attempts to protect sacred lands through religious freedom protections have done that and have often been followed by positive outcomes outside the courts. They have thus helped to unsettle the prevailing law of the land, while raising public awareness and gaining allies.[111] This framing also distorts the claims at issue, however, and, as a matter of political justice, Indigenous claims over sacred sites are legitimated not by special regard owed to religious beliefs but by the sovereignty rights of Indigenous peoples, combined with respect for cultural perspectives expressing a different relation to land than the one underlying settler law. As it happens, the latter also seems increasingly questionable to many non-Indigenous peoples, offering an opportunity for resolutions that reflect agreement on the need to protect our shared human and more-than-human world.

Acknowledgments and Citation Guide. *This article draws on research supported by the Social Sciences and Humanities Research Council of Canada. The author has no competing interests to declare. This article is cited according to the* Chicago Manual of Style*, 17th edition.*

[109] Webber, "The Irreducibly Religious Content of Freedom of Religion," 185–86.

[110] Kristen A. Carpenter, "Living the Sacred: Indigenous Peoples and Religious Freedom," review of *Defend the Sacred*, by Michael McNally, *Harvard Law Review* 134, no. 6 (2021): 2103–56, at 2123.

[111] Brian Hutler argues that "religious exemptions are not an appropriate means for bringing about religious or political change." Brian Hutler, "Against the Political Use of Religious Exemptions," *Philosophy and Public Affairs* 47, no. 3 (2019): 319–42, at 320. But there are cases, such as this one, where legal appeals to religious freedom can help to raise awareness of social inequities.

Cite this article: Sikka, Sonia 2023. "Religious Freedom and Sacred Lands." *Journal of Law and Religion* 1–19. https://doi.org/10.1017/jlr.2023.37