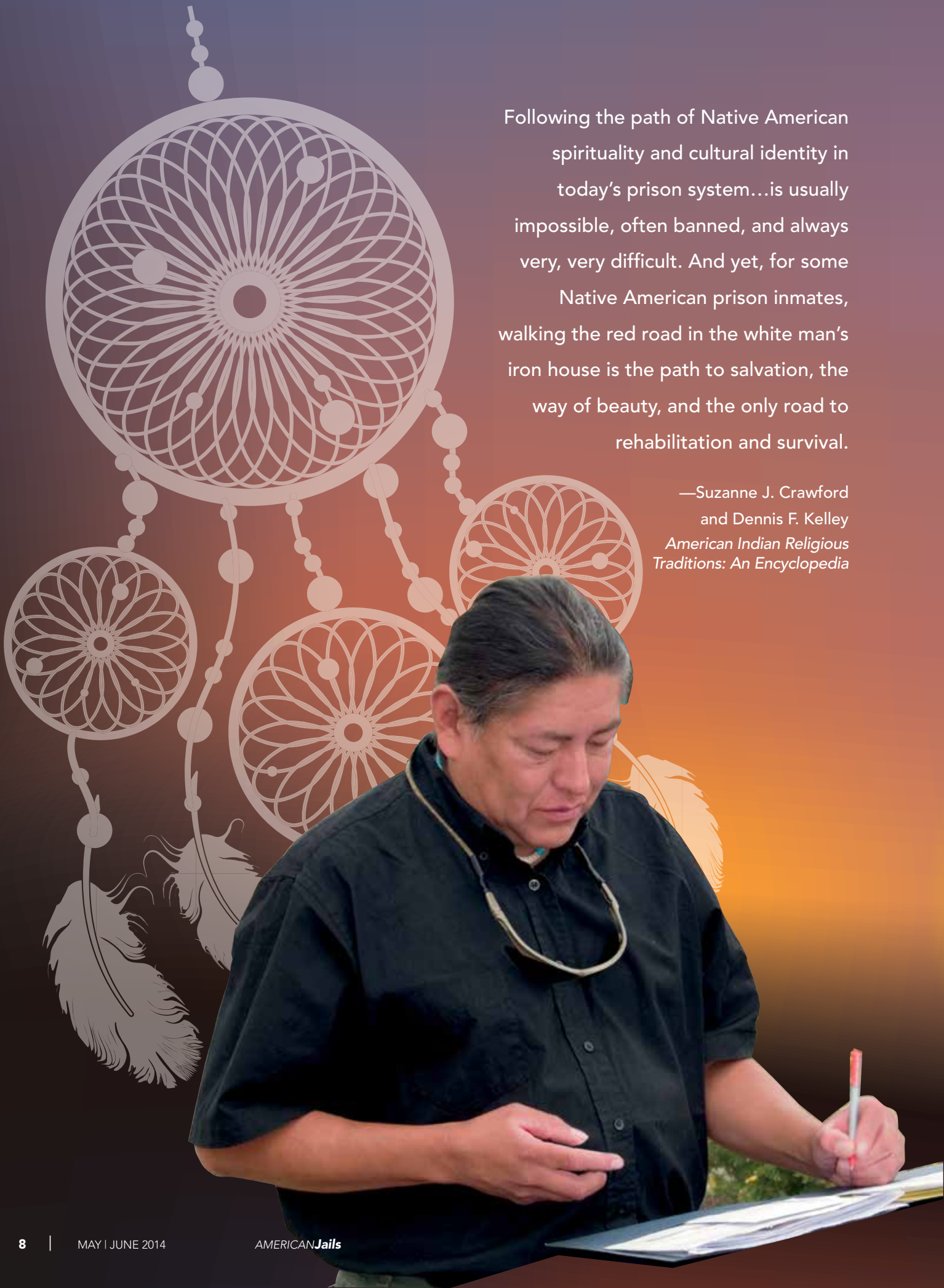
Following the path of Native American spirituality and cultural identity in today's prison system…is usually impossible, often banned, and always very, very difficult. And yet, for some Native American prison inmates, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival.

—Suzanne J. Crawford and Dennis F. Kelley
American Indian Religious Traditions: An Encyclopedia



Walking the Red Road IN THE IRON HOUSE

Joel West Williams

As of midyear 2011, approximately 29,700 American Indian and Alaska Natives were incarcerated in the United States (Montin, 2012). Although Native Americans are incarcerated at a high rate, there remains a persistent misunderstanding among correctional institutions regarding the role of traditional religious practices in American Indian life and the rehabilitation of American Indian inmates. Unfortunately, institutional protection of the exercise of American Indian religion often fails merely because its practice looks different from other religions, and administrators perceive it as threatening to penological interests.

In addition, prisons are not part of traditional American Indian society. Longtime advocate for American Indian inmates Walter Echo-Hawk (1996) observed:

"For the indigenous people of the New World, penal institutions were alien criminal justice institutions. Traditional Native American societies did not rely upon imprisonment to punish social offenders. Many of the first Native American experiences with European-style incarceration came when chiefs, warriors, families and, sometimes, entire Tribes were confined as prisoners of war or criminals in the so-called 'Indian wars'…."

Not only are prisons alien to traditional American Indian culture, but they have also been instruments of cultural genocide, used as punishment for American Indians who practiced their traditional religion. "In 1892 and 1904, Federal regulations outlawed the practice of tribal religions entirely and punished Indian practitioners by either confinement in agency prisons or by withholding rations" (Inouye, 1992).

Although some say this is "water under the bridge," this view ignores the fact that the waters continue to flow (Echo-Hawk, 2010). Remarkably, it was not until 1978 that traditional American Indian beliefs were protected by law (Federal Bureau of Prisons, 2002). Still, some prisons and jails continue to disregard the religious needs of American Indians. Unfortunately, they must continually turn to the courts and Congress to force correctional facilities to accommodate their religious practices. It is hoped that the information provided in this article about the unique religious practices of American Indians and the law protecting them in the correctional setting will lead to better accommodation of their needs.

American Indian Religious Practices

American Indians have a unique religious tradition. For American Indian inmates, religious practice has a powerful, rehabilitative effect (Johnson, 1997; Sumter, 2000). Moreover, access to their religious items and ceremonies can be accommodated without undermining a facility's security needs, instead greatly contributing to indigenous inmates' rehabilitation (The Pluralism Project, 2005). Yet a persistent issue has been that correctional facilities do not recognize American Indian needs as religious, or they fear interference with a facility's safety and security interests.

Because facets of American Indian religion look different from those of more mainstream religions, it may be difficult for non-Indian people to recognize and understand the significance of some beliefs and practices. During a hearing on amendments to the American Indian Religious Freedom Act, one U.S. Senator (Wellstone, 1993) described the problem well:

> "[O]ur traditional understanding of how to protect religious freedom, based on a European understanding of religion, is insufficient to protect the rights of the First Americans…. What we are talking about here is not religion in the sense it is traditionally understood in the United States. 'Religion,' for traditional Native Americans, is not some set of practices easily distinguished from everyday life, accomplished in specific buildings, with particular religious authorities presiding. Instead, religion is deeply intertwined with the very fabric of Native American cultural identities…. I think that it is clear that when we talk about religious freedom for Native Americans, our first problem is to clear up the obvious misunderstandings about what is under consideration. For Native Americans, religion means something different than it does for the dominant religions in this country. But once we understand what that meaning is, it should be a simple matter for us to understand that their freedom to worship ought to be guaranteed."

It is also important to recognize that American Indian religion is not homogeneous. As of January 2013, 566 Indian tribes were federally recognized in the United States. Although there are similarities and commonalities, each tribe is a culturally distinct sovereign nation with a unique history, culture, and religious tradition. Keeping in mind the diversity of religious beliefs and practices among tribes, many share certain aspects. For example, group ceremony plays a central role in American Indian religious life. Although these ceremonies may vary among tribes, they frequently involve fire, pipe smoking, smudging, songs, and dancing. Sacred objects—such as drums, rattles, pipes, and bags—are often required for ceremonies.

Further, although American Indian inmates come from various tribal backgrounds, two predominant religious traditions have emerged in the correctional setting. Many American Indian inmates follow the Native American Church tradition, which incorporates Christianity into traditional Native religion (Federal Bureau of Prisons, 2002). However, most incarcerated American Indians—especially those across the Great Plains—follow a "Pan-Indian" religion predicated on the Lakota Sioux tradition, frequently referred to as "The Way of the Pipe" (Grobsmith, 1994).

Three aspects of American Indian religion commonly burdened in the correctional setting are tobacco use, sweat lodge, and hair length (or style). Many tribes and practitioners of The Way of the Pipe share these three aspects.

Tobacco Use

For many tribes, the Sacred Pipe is the cornerstone of spiritual

teaching (Federal Bureau of Prisons, 2002). For Lakota-based faiths, the pipe represents life and is used to offer prayers to the Great Spirit. When Native Americans smoke the pipe, the resulting smoke conveys their prayers. Tobacco, which is considered a sacrament, is smoked in the pipe and is sometimes blended with other herbs, such as red willow bark. Many American Indians also make tobacco ties, which are small bundles of tobacco hung from the inside of a sweat lodge or trees and later burned as prayer offerings (*Native American Council of Tribes v. Weber*, 2012).

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Sweat Lodges

Virtually every American Indian tribe has some form of sweat lodge ceremony; it is the most widespread ceremony in correctional facilities. Its intention for cleansing and purification has come to play an important role in drug and alcohol rehabilitation for American Indians. Moreover, in the correctional setting it is a unifying religious expression despite the variability of tribal affiliation among Native inmates (Grobsmith, 1994).

Representing life and family, the sweat lodge "is the anchor and the livelihood of a family to prayer" (*Native American Council of Tribes v. Weber*, 2012). The lodge is a dome-shaped structure made by lashing together willow or other saplings indigenous to an area. The structure is then covered with a tarpaulin, blankets, or canvas to make it lightproof. A small pit is dug in the center of the lodge to hold the rocks (Federal Bureau of Prisons, 2002).

Outside the lodge is a fire pit for heating the rocks. A rake and scoop are needed to carry the rocks into the lodge at the beginning of the rounds. Water is sprinkled on the hot rocks, producing steam and heat. There are generally four "rounds" of sweat, and the sweat lodge ceremony may last up to eight hours (Federal Bureau of Prisons, 2002).

Hair Length and Style

Hair has religious significance for all American Indian tribes, and uncut hair is of particular religious significance (Walker, 2008). Uncut hair symbolizes and embodies the knowledge a person acquires during a lifetime and may be cut only upon the death of a close relative (*Warsoldier v. Woodford*, 2005). Also, it is common for specific hair preparations to be part of American Indian religious rituals and ceremonies (Walker, 2008).

Historically, involuntary, forced hair cutting was a means by which Federal officials and missionaries contracted by the Federal government coerced American Indians away from their traditional religion and attempted to Christianize them during the 19th and 20th centuries (Martin, 1990; Walker, 2008). Hair has also played an important role in the enforcement of American Indian prisoners' religious rights since 1972.

Objections

In refusing to accommodate American Indians' unique practices, correctional facilities cite a specific set of penological interests fairly consistently. Particularly in tobacco-free facilities, the compelling interests typically cited are contraband tobacco trafficking leading to violence, assaults, and coercion; that tobacco could be used to pay off gambling debts; gang activity; and payment for sexual favors (*Native American Council of Tribes v. Weber*, 2012).

Regarding the sweat lodge, correctional facilities cite not only the use of fire, sharp objects, and stones, but also the fact that inmates are secluded in the lodge during the ceremony and cannot be monitored visually. Also, jails and prisons frequently cite cost containment, asserting that additional staffing is required to monitor sweat lodges.

Some facilities have grooming policies that ban long hair. Although many allow religious exceptions, the facilities that ban without exception frequently cite safety, identification, and hygiene as the primary reasons. They claim that inmates can use long hair to alter their appearance, thus impeding officers' ability to quickly identify inmates. It can also provide an additional place for inmates to conceal weapons and contraband, which makes searches more dangerous, difficult, and lengthy. Correctional facilities also fear the perception that those with long hair are a separate group, leading to identification as a gang. In addition, they claim there is the danger of pulling long hair during fights. Finally, correctional facilities cite a need for discipline and uniformity that would be undermined if exceptions were granted.

Certainly the concerns cited by correctional facilities are important. However, it is undeniable that the free exercise of religion is a fundamental right that cannot be left outside the walls. How courts resolve this tension has changed over time and an understanding of this evolu-

tion provides a deeper understanding of current legal protections given the religious practices of American Indian inmates.

Before RLUIPA

The genesis of the modern movement to secure religious rights for American Indian inmates was in 1972 in the Nebraska prison system. Nebraska's prisons, like many other State facilities, provided no accommodation for American Indian religious practices. Some American Indian inmates forced this issue by cutting their hair into traditional Mohawk styles. The styles offended the deputy warden, and the inmates were threatened with solitary unless they cut their hair. In response, the inmates filed a class action lawsuit. The resulting consent decree, issued in 1974, continues to protect American Indian inmates' rights in Nebraska and is a touchstone for how correctional facilities elsewhere accommodate the religious needs of American Indians (Grobsmith, 1994).

A great deal of litigation followed in the next decade, but with mixed results. Perhaps most highly publicized was a lawsuit filed by Utah inmates in 1984. Remarkably, prison officials across the country came to the defense of American Indian inmates seeking accommodation, including Joseph Vitek, the warden-defendant in the Nebraska case.

However, in 1987, the Supreme Court closed the courthouse door for most inmates with religious liberties claims. In *Turner v. Safley*, the Court said: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" (*Turner v. Safley*, 1987). This was an articulation of the "rational basis" test, which imposes the lowest level of judicial scrutiny on government regulations burdening a person's rights. Under this test, "a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government's actual purpose"—a declaration that caused Justice Stevens to later lament that this amounts to no review by the Court whatsoever (Chemerinsky, 2001).

Thus, despite growing recognition that American Indian religious practice did not threaten penological interests, the *Turner* standard meant that American Indian inmates rarely received judicial protection. By 1990 a pronounced lack of judicial protection for minority religious exercise—especially traditional American Indian religious exercise—emerged, even outside the Iron House (Echo-

With Respect…

Last fall, within the span of a few weeks, the American Jail Association (AJA) received several e-mails related to inmate requests for the provision of such Native American ceremonies as smudging, sweat lodges, and pipe and drum ceremonies. The writers asked whether other jails had had similar requests and how they had handled them. They also inquired about the legal requirements to afford such ceremonies to inmates.

Answering the inquiries was AJA Board of Directors member Darwin Long, Sr., Facility Administrator of the Pine Ridge Adult Offenders Facility in Pine Ridge, South Dakota, and a Native American.

"With respect," Administrator Long responded, "the inquiry should not be 'What is our legal requirement to afford these ceremonies to inmates?' The answer is definitely yes. You are required to afford Native Americans their right to religion. I believe the question should be 'Is the rehabilitation of Native American inmates advanced by these ceremonies?'"

Administrator Long contacted Gabe Galanda, a lawyer and expert in Native American rights, who cited a Harvard University study confirming that these ceremonies—most notably the sweat lodge—contribute to the rehabilitation of Native American inmates (The Pluralism Project, 2005).

Galanda said to consider the words of State corrections officials like Joseph Vitek, former Director of the Nebraska Department of Correctional Services and a defendant in a Nebraska Federal court case:

> [W]hat I did see specifically…[was] that a lot of Indians, not all of them, developed a great deal of self-esteem and pride in themselves. There was an apparent increase in what I call good grooming, the clothing…there seemed to be a prideful thing that was kind of fun to watch. Sense of identity, if you will. (Grobsmith, 1994)

Consider, too, the testimony of George Sullivan, a 30-year veteran of the Oregon prison system, who was asked in a Utah Federal court case whether sweat lodges posed a security risk or threatened other penalogical objectives. He responded:

> I can't believe you're asking this question. Fifteen years ago in Oregon we allowed our first [sweat lodge] and it was the most valuable, least offensive problem for administrators of anything we do…[Utah's] imagined torment is simply that.

The Native American Religious Freedom Act was passed in 1978. It states that the United States is to protect and preserve for Native Americans their inherent right to freedom to believe and exercise their traditional religions. This includes using ceremonial items and practicing their traditional ceremonies.

Hawk, 1996). Two cases, *Employment Division v. Smith* and *Lyng v. Northwest Indian Cemetery Assn.* made it clear that, even for those not incarcerated, government burdens on religious exercise were subject to the lowest level of judicial scrutiny.

As Congress later noted, during this post-*Turner/Smith* era "some correctional facilities restrict[ed] religious liberty in egregious and unnecessary ways" (*Cutter v. Wilkenson*, 2005). One case exemplifying the "frivolous and arbitrary barriers" erected by prisons during this time is *Kemp v. Moore* (1991). There, a Chickasaw inmate challenged the Missouri prison system's ban on sweat lodges and long hair. He was confined to a maximum security prison for the first four years of his incarceration and was allowed to wear long hair pursuant to a regulatory exception for American Indians. After four years, his security level was reduced and he was transferred to a minimum security prison, where he was ordered to get a haircut. He refused and presented verification of his exemption. Despite this, the superintendent ordered officers to forcibly shear his hair. Additionally, disciplinary charges resulted in a reduction of his work wages. Despite his valid exemption, the low bar set by *Turner* meant the courts gave him no protection and he was forced to abandon a core tenet of his traditional religion.

Congress took notice of cases like *Kemp* and eventually passed the Religious Freedom Restoration Act (RFRA) and its sister statute applying to States, the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA forbids a correctional facility from substantially burdening the exercise of an inmate's religion unless the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." Congress sought to preserve traditional American Indian and Alaska Native religious ways of life by passing RFRA and RLUIPA. This is why RLUIPA provides broad protection to the "maximum extent possible" (Inouye, 1992; Martin, 1990; Simpson, 1993). Thus, Congress replaced the *Turner/Smith* rational basis standard with the "compelling interest" or "strict scrutiny" standard, which is the most rigorous standard applied to government action interfering with a person's rights (*City of Bourne v. Flores*, 1997).

The shift caused by RLUIPA was significant. Institutions may no longer interfere with an inmate's religious practice unless it articulates a particular evidentiary basis that the specific inmate in question poses an actual or threatened risk to the State's compelling penological interests (Sidhu, 2012). Thus, in jurisdictions that did not promulgate regulations allowing practices such as tobacco use, sweat lodges, and long hair during the pre-RLUIPA era—either by their own initiative or in response to court orders—RLUIPA has helped ensure that American Indians are not prevented from following the Red Road while incarcerated.

Many institutions now accommodate tobacco use, sweat lodges, and American Indian hair styles. For example, 39 States, the District of Columbia, and the Federal Bureau of Prisons—the largest prison system with more than 208,000 inmates—have adopted permissive grooming policies or grant religious exemptions from their policies. Jurisdictions that have permissive hair policies and actively accommodate sweat lodges and tobacco use have done so without undermining the same penological concerns that nonaccommodating correctional facilities cite (Sidhu, 2012). This suggests that the restrictions imposed by some institutions either do not actually further a compelling interest or nonaccommodating institutions may not be employing the least restrictive means.

To be sure, some facilities still unduly burden American Indian inmates' religious exercises. For example, 11 States apply restrictive grooming policies to inmates with religious beliefs that require long or unshorn hair (Sidhu, 2012). Even institutions that have rules generally tailored to accommodate American Indian religious practices sometimes erect barriers to American Indians in specific instances. For instance, citing cost and security concerns, in *Native American Council of Tribes v. Weber,* South Dakota recently forbade an American Indian in protective custody from using a sweat lodge accessible to the general population. A case from Texas (*Chance v. Texas Department of Criminal Justice*) illustrates how tobacco and sweat lodges remain difficult for American Indian prisoners to access. Litigation in the 11th Circuit Court of Appeals, *Knight v. Thompson*, addresses Alabama's ban on wearing long hair for male inmates.

Finally, it is important to recognize that in addition to American Indians, other indigenous inmates in the United States face barriers to the exercise of their traditional religion. *Davis v. Abercrombie* involves Native Hawaiian prisoners housed in a facility in Arizona operated by Corrections Corporation of America (CCA). They seek access to a Pohaku O' Kane (a stone altar) as well as other important religious items and ceremonies. The Native Hawaiians face much the same resistance as American Indians, but with an

added claim: a sacred space for Native Hawaiians is not provided for in Hawaii's contract with CCA.

Conclusion

Not only do American Indian inmates have a right to practice their traditional religion; it is often their best hope for rehabilitation. Although American Indians inmates must often seek judicial intervention to secure their religious rights, some corrections officials have realized that traditional religious practice does not threaten penological interests. The Coconino County Jail in Arizona is one of the facilities to accommodate sweat lodges most recently (Knochel, 2013). Jim Bret, program coordinator of detention services at the jail, commented that it gives inmates there hope and motivation. He added, "They're at a place where they want to reconcile with themselves... I think that's the first step to reconciling with their families, with friends or with society at large." ■

Native American Rights Fund

Founded in 1970, the Native American Rights Fund (NARF) is the oldest and largest non-profit law firm dedicated to asserting and defending the rights of Indian tribes, organizations, and individuals nationwide. NARF's practice is concentrated in five key areas:

- Preservation of tribal existence.
- Protection of tribal natural resources.
- Promotion of Native American human rights.
- Accountability of governments to Native Americans.
- Development of Indian law and educating the public about Indian rights, laws, and issues.

More information can be found at *www.narf.org*.

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Joel West Williams is a citizen of the Cherokee Nation and Staff Attorney with the Native American Rights Fund. He holds a bachelor's degree in Religious Studies and Psychology from Naropa University, a Juris Doctor from Widener University School of Law, and is a Master of Laws candidate at Vermont Law School. He may be contacted at *williams@narf.org*.