

## The “Peyote Road” and the Violation of Religious Freedom in the US

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*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.*

The First Amendment (1791) of the United States Constitution guarantees – among other things – the freedom of religion for all US citizens. However, for a group of people who had lived on American soil long before the Constitution was written, the long fight to freely practice their religion is ongoing. In 1924 Congress passed the Indian Citizenship Act, also called the Snyder Act, which meant that all indigenous Americans were given US citizenship without having to get rid of their tribal citizenship. Though Native Americans thus became US citizens, their voting rights, land rights and religious rights remained largely unprotected for many years to follow. One particular area is still controversial, and that is the Native American Church’s (referred to in the rest of my essay as NAC) ceremonial ingestion of peyote, a spineless cactus with hallucinogenic properties. The history of peyote consumption is complex and riddled with legal battles and moral questions that divide society even today.

The NAC, also sometimes referred to as Peyotism, was created in 1918 on the foundations of using the sacred peyote cactus as a crucial part of tribal rituals. The followers of this religion worship peyote and pray to it the way they pray to their God whom they sometimes call the Great Spirit. They communicate with this entity using peyote-induced hallucinations.<sup>1</sup> The plant itself is a mescaline containing cactus that has been used since pre-Columbian times for medical and spiritual purposes by various Native nations. The peyote cactus – scientifically called the *Lophophora Williamsii* cactus – is native to the Rio Grande Valley. The plant’s round, plump shape is easily recognizable and its pink flowers bloom in late spring – this innocent-looking, plain plant is the one to have sparked one of the most controversial debates about religious tolerance in the United States today.

The nation that has used peyote for possibly the longest time is the Huichol people, whose homeland is in northwest Mexico. In their language, the Huichol call themselves “Wixáratl,” which translates in English to “the people.” The Huichol take one trip to the sacred Wirikuta

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<sup>1</sup> Louis Fisher: “Indian Religious Freedom: To Litigate or Legislate?” 26. *American Indian Law Review* 1 (2001), 23–35, more specifically 23 and 24: [digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1187&context=ailr](http://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1187&context=ailr)

desert in Mexico in each year, where they collect enough of the cactus to last them the whole year ahead and also ingest some of it on-site. In recent years, this pilgrimage has been made increasingly difficult by factors such as tourism and the looming threat of mining companies invading the land the Huichol hold sacred. They are not the only indigenous nation to use peyote in the country: we must mention the Cora, Tarahumara and Tepehuan people too, whose history with peyote is also well-documented (it is of course likely that other, lesser-known indigenous nations have also used peyote throughout their history and may still use it today, but these four that I have mentioned above are perhaps the most well-known).<sup>2</sup>

While legal limitations in some cases have been an obstacle to the indigenous peoples whose religious traditions are tightly connected to the peyote plant, they have failed to stop the determined Westerners who steadily raid the Mexican deserts each year in the hopes of finding this famous cactus. In some places, for instance San Luis Potosí state in Mexico, the consumption of the plant is legal, though its transportation is not. The area attracts many foreigners seeking out the trip of a lifetime every year. One article on this issue mentions that “the drug is *technically* illegal”<sup>3</sup> – an ironic remark suggesting that the law has failed to keep peyote reserved for the Natives only.

Though psychedelic tourism is a relatively new phenomenon, there are a number of stories from the mid-1900’s onwards that helped popularize peyote: Aldous Huxley’s 1954 novel, *The Doors of Perception*, Beat writer William Burrough’s *Junky*, Hunter S. Thompson’s *First Visit With Mescalito* (note that the symbol of Gonzo journalism, the genre of journalism popularized by Thompson, is a red fist holding peyote buttons) are just a few examples of works openly discussing and detailing the authors’ encounters with the peyote cactus. Today, psychedelic-tourism is much more facilitated and readily available than ever before: the enlightenment-seeking, typically middle-class backpackers who trickle into the Wirikuta desert every year are the prime examples of this specific type of tourist. Some Mexican locals have responded to the increased demand for peyote by building an industry on peyote-tourism and becoming self-proclaimed tour guides, offering their services to masses of foreigners each year. Considering that under Mexican law, the harvesting of peyote is prohibited for anybody who is not a member of the Huichol tribe, the activities of these guides are illegal, though highly sought after. The emergence of peyote-tourism has put peyote in danger and has made it a species highly unlikely to survive the next few decades if the regulations do not change in its favor.

A similar occurrence can be seen in South and Central America, where Ayahuasca-tourism has become a well-known industry (in fact, ayahuasca is legal in Peru, Ecuador, Colombia and Brazil, which are the main destinations of ayahuasca seeking tourists). The commercialization of Indigenous culture is a controversial thing that can (and often does) disturb the ways of life in local communities. This relatively new demand has resulted in the

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<sup>2</sup> Beatriz Caluby Labate – Kevin Feeney: “Paradoxes for Peyote Regulation in Mexico: Drug Conventions and Environmental Laws.” *ABC-CLIO/Praeger, sine loco* (2016) 216–221, more specifically 220.

<sup>3</sup> “Mexico’s Peyote Casts Mind-bending Spell on Tourists.” *The Tico Times | Costa Rica News | Travel | Real Estate*, 31 July 2013, [ticotimes.net/2013/07/31/mexico-s-peyote-casts-mind-bending-spell-on-tourists](http://ticotimes.net/2013/07/31/mexico-s-peyote-casts-mind-bending-spell-on-tourists).

building of resorts and retreats all over South and Central America, where mostly white American and European crowds pay significant amounts of money to experience the effects of the bitter ayahuasca brew. However, the question of exploitation and whether these resort centers really benefit the locals in any way or are only built for clueless Westerners who can pay top dollar for a whitewashed ayahuasca experience remains a central issue. The rituals are known to be inauthentic in most cases, and have been significantly altered to fit the expectations of the visiting tourists – at this point, the rituals the visitors take part in are almost nothing like the traditional Native practices they are usually advertised to be. For the vast majority of foreigners, the religious element of the ritual is completely missing, and the subject of their interest lies in the spiritual healing process that has become widely associated with ayahuasca over the years. The same can be said for peyote, which is an object of worship for the NAC and is used to establish a channel of communication between man and God or the spiritual universe, but in the hands of an outsider, it is nothing more than a small plant that holds within itself the possibility of a long, nauseating spiritual awakening. The promise of an “instant fix” to the problems of the modern world is tempting enough to lure in tens of thousands of tourists annually. Ayahuasca-tourism has grown into a booming industry by now, but peyote-tourism is much more limited for several reasons. To make the brew we know as ayahuasca, one needs a mixture of two plants (the *Banisteriopsis caapi* vine and the *Psychotria viridis* shrub that contains the main psychoactive ingredient of ayahuasca, DMT): these plants are now commercially grown to meet the demands. However, the commercial growing of peyote is problematic for multiple reasons, one of them being the fact that the cactus takes a long time to grow – while in the wild, peyote would take about a decade or so to reach its matured age, cultivated peyote can grow in about 3 years – still a relatively long time.<sup>4</sup> Because of its slow growth (even when it is cultivated) and specific environmental needs, peyote tourism has slowly put this cactus on the brink of extinction. The long list of regulations surrounding peyote are aimed at protecting the American public but not the plant itself, which is currently perhaps in the greater danger of the two. As Vine Deloria Jr. put it in his book *God is Red*, peyote is “culturally and theologically foreign to American culture and consequently is seen as a threat to social stability.”<sup>5</sup>

Native Americans have seen their religions hindered, regulated or downright prohibited ever since the beginning of their history with colonizers. In 1883, the American government began enforcing a series of laws in an attempt to force Native Americans to assimilate to the white American society that was gradually squeezing them out of their ancestral homelands. This process of forced assimilation involved prohibiting Native American religious traditions, including peyote rituals. The first instance of prohibiting peyote happened in 1888 on the Kiowa–Comanche Reservation (Oklahoma). In 1918, the Native American Church was created in Oklahoma, forming an established church recognized by Western standards that

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<sup>4</sup> C. M. Stork – S. M. Schreffler: “Peyote.” *Peyote – an Overview* | *ScienceDirect Topics*, Encyclopedia of Toxicology, 2014, [sciencedirect.com/topics/neuroscience/peyote](https://www.sciencedirect.com/topics/neuroscience/peyote).

<sup>5</sup> Vine Deloria Jr.: *God is Red: A Native View of Religion*. Sine loco: Fulcrum, 2003.

would be more resilient against a possible federal prohibition of peyote rituals.<sup>6</sup> The NAC contains many congregations and different beliefs and rituals, but the one common element is the use of peyote as a sacrament. Can religious freedom outweigh drug laws? Should one be exempt from these tight regulations if they are using these substances for religious purposes? This question at the intersection of law and religion became a central issue in 1964. The case that would bring the tensions to the surface was the *People v. Woody* California Supreme Court case. In 1962, a group of Navajo people, all members of the NAC, gathered in a desert near Needles, California, to perform a religious ritual and were subsequently arrested there for unauthorized possession of peyote. The California Supreme Court reversed the conviction and decided that it was within the rights of the defendants to use peyote as a part of their religious ceremonies and to convict the defendants would be a violation of their rights under the First Amendment. It is worth noting that the First Amendment would not apply to Indian nations until 1968, while it still did apply to the state of California.<sup>7</sup> *People v. Woody* was the first major case to protect the right of Native Americans to use peyote for sacramental purposes.<sup>8</sup> It is partly thanks to this decision that when in 1971 Congress passed the Controlled Substances Act (CSA), which defined mescaline – the psychoactive substance in the peyote cactus – as a Schedule I substance, NAC members were exempt from this federal decision.

Another case I would like to mention is *People v. Mitchell*, a 1966 case in California involving a man who claimed to have a religious right to growing and smoking marijuana. The defendant, Leroy Wilson Mitchell quotes in his testimony several passages from the Bible and refers to some Hindu practices but admits he is not a member of any organized religion.<sup>9</sup> Public records of the case mention Mitchell's references to the *People v. Woody* case, as the man seemed to have been under the false impression that the *Woody* case proved that religious motivation could excuse crimes. Mitchell's case is just one of several where the defendant would cite the *Woody* case and claim that their use of illegal substances should be excused as it was also due to religious reasons. In most of these cases, including *People v. Mitchell*, it quickly becomes evident that what one calls religion often only refers to a personal philosophy or habit and not dedication to an established church of any kind.

The issue of the difference between religious motivation and personal conviction came up again in the *Employment Division v. Smith* Supreme Court landmark case of 1990.

Alfred Leo Smith started working at a drug rehabilitation clinic (Douglas County Drug and Alcohol Treatment Center) in Roseburg, Oregon in 1982. He and his colleague Galen Black were later fired from the clinic for having used peyote during a religious ceremony within the Native American Church. After they were sent away from the nonprofit

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<sup>6</sup> Kevin Michael Feeney: "Peyote & The Native American Church: An Ethnobotanical Study at the Intersection of Religion, Medicine, Market Exchange, and Law." PhD thesis in Cultural Anthropology, Washington State University, May 2016, 48–76, more specifically 51.

<sup>7</sup> Fisher: "Indian Religious Freedom: To Litigate or Legislate?," 26.

<sup>8</sup> *People v. Woody*, 61 Cal.2d 716

<sup>9</sup> *People v. Mitchell* 244 Cal. App. 2d 176.

organization, both men applied for unemployment benefits from the Employment Division and their applications were quickly denied, the reason being that they had been fired for a work-related misconduct.<sup>10</sup>

At this time, the use of peyote as a part of religious rituals was not an exception from the law in Oregon, and the two men's consumption of peyote was regarded as simple drug use, regardless of its sacramental purposes. The case was a question of free religious exercise versus Oregon drug laws; the Oregon Court of Appeals ruled that the two men's rights to freely practice their religion was violated by the state when they were denied unemployment compensation. The case was brought to the Oregon Supreme Court and then the U.S. Supreme Court. While Smith and Black argued that their sacramental use of peyote should have been protected by the Free Exercise Clause, the U.S. Supreme Court Justices ruled in a 6 to 3 majority against their claims.<sup>11</sup> U.S. Supreme Court Justice Antonin Scalia delivered the majority opinion of the U.S. Supreme Court, in which he concluded that religious groups cannot be exempt from "generally applicable laws"<sup>12</sup> in the name of free exercise of religion. Though Scalia recognized the fact that this decision would put minority religions at a disadvantage, he called this an "unavoidable consequence of democratic government."<sup>13</sup> Furthermore, an argument in favor of the majority was that Oregon's ban on peyote consumption was a general law rather than a law directly aimed at hindering religious practices – in other words, the ban did not target Native Americans specifically but placed a general ban on peyote possession applicable to everybody. In this case, similarly to other landmark cases where religion was faced with the limitations of the law (such as the infamous Reynolds case of 1878), it was decided that religious doctrines cannot outweigh the laws of the United States, as it would allow for each individual to create their own laws in the name of religion. Indeed, these are all strong claims, but from the point of view of the Native Americans (whose practices are older than the Constitution itself), the decision was a devastating loss of religious liberty.

Much like the ayahuasca brew, peyote is also considered a sacrament rather than a drug by the Native tribes that ingest them. As a result of the Controlled Substances Act (CSA), peyote was classified as a Schedule I drug, in the same category as psilocybin (the psychoactive substance found in magic mushrooms), heroin and LSD. Schedule I substances have "no currently accepted medical use in treatment in the United States" and "have a high potential for abuse," according to the official website of the Drug Enforcement Administration (DEA). There is a new surge of scientific evidence suggesting psychedelics, including ayahuasca and peyote could be beneficial in the treatment of addictions and certain

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<sup>10</sup> Kristie Pospisil: "Employment Division, Department of Human Resources v. Smith: What Remains of Religious Accommodation Under the Free Exercise Clause?" *Louisiana Law Review* 52 (1991), 231–235, more specifically 233. Available at: [digitalcommons.law.lsu.edu/lalrev/vol52/iss1/10](http://digitalcommons.law.lsu.edu/lalrev/vol52/iss1/10).

<sup>11</sup> Robert S. Alley: *The Constitution & Religion: Leading Supreme Court Cases on Church and State*. Amherst, NY: Prometheus Books, 1999, 483–484.

<sup>12</sup> Toby Golick: "Justice Scalia, Poverty and the Good Society." *Cardozo Law Review* Vol. 12 (1991), p. 1817.

<sup>13</sup> Ibid.

mental illnesses.<sup>14</sup> However, scientific research in this field has been restricted by safety concerns and regulations, slowing down further clinical trials that could prove the effectiveness of psychedelics as medicine. Studies have shown that psychedelics are not known to elicit addiction or violence.<sup>15</sup> Oregon's claim that the protection of the health and safety of its citizens was of outmost importance in bringing their decision in the *Employment Division v. Smith* case is therefore flawed from a scientific perspective. Many have recognized that Schedule I substances are not inherently dangerous and according to modern scientific findings, they may even function as medicine in the future.

This landmark case and the decision of the Supreme Court had outraged both some public and political groups that wanted to support the NAC and help them sustain their traditions. Justice Harry Andrew Blackmun, in his dissenting opinion, expressed his concerns that the decision of the Court is “incompatible with our nation's fundamental commitment to individual religious liberty.”<sup>16</sup>

As a result of the *Smith* case the Religious Freedom Restoration Act (RFRA) was born in 1993 but was later deemed unconstitutional and was changed to only apply to individual states and their governments. Today, 21 US states have their own versions of the RFRA.

In Oregon, the laws were changed in 1991 to defend those who use hallucinogens during sacred religious practices. This decision was made in order to counteract the Oregon Supreme Court decision which did not allow the sacramental use of peyote.

In Mexico, where the peyote plant is native, the regulations remain very tight. In 1984, the plant was deemed a public health risk (General Health Law, still in force). The Mexican state promoted a policy of respect regarding Indigenous traditions and granted the peyote plant “special protection” in order to preserve it. However, today, as I have mentioned in connection with psychedelic tourism, the situation of the peyote cactus is getting increasingly worrying and in 2013, it was classified vulnerable by the International Union for the Conservation of Nature (IUCN).

In Texas (where the peyote cactus grows in the southern areas), NAC members are sold peyote by distributors who have to renew their license every year and work under tight regulations to ensure they are only selling to Indigenous Americans who will use it for ceremonial purposes. In many other states, such as California, there are no exemptions, and peyote remains an illegal substance in all circumstances.

Whether in the future religious tolerance will increase and members of the Native American Church will be allowed to freely use peyote during their ceremonies in every state is questionable. For now, most states are still regulating peyote very strictly and Native Americans' fight to maintain their traditions continues.

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<sup>14</sup> Michael Winkelman: “Psychedelics as Medicines for Substance Abuse Rehabilitation: Evaluating Treatments with LSD, Peyote, Ibogaine and Ayahuasca.” *Latest TOC RSS*, Bentham Science Publishers, 2014, 4-5.

<sup>15</sup> Teri S. Krebs – Pål-Ørjan. Johansen: “Psychedelics and Mental Health: A Population Study.” *PLOS One* 2013, available at: [doi.org/10.1371/journal.pone.0063972](https://doi.org/10.1371/journal.pone.0063972).

<sup>16</sup> “*Employment Division, Department of Human Resources of Oregon, Et Al., Petitioners v. Alfred L. Smith et al.*” Legal Information Institute, [law.cornell.edu/supremecourt/text/494/872](http://law.cornell.edu/supremecourt/text/494/872).