NATIVE AMERICAN RELIGIOUS FREEDOM AND THE PEYOTE SACRAMENT: THE PRECARIOUS BALANCE BETWEEN STATE INTERESTS AND THE FREE EXERCISE CLAUSE

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INTRODUCTION

Somewhere in the magic and mirage of the pre-Columbian Sonoran desert of Northern Mexico, a woman laden with child lies on the sun-drenched ground awaiting the inevitable birth. Separated from her tribe of hunting men and root-gathering women, she is helpless under a low leafy bush watching as the buzzards gather overhead. When the child comes, she cuts the cord with a stone knife taken from the pouch at her waist. Suddenly, out of this desolation and terror, the woman hears a voice. "Eat the plant that is growing beside you," it says. "That is the life and blessing for you and all your people." Weakly, she turns her head and sees a small thornless cactus. The woman uproots the cactus and eats the head.

Miraculously, her strength returns immediately. At dawn, she presses the child to her filling breast and feeds it. Then, gathering as many cactus plants as she can, she stands and begins to walk. Something wonderful must be guiding her, for by evening she reaches the main group of her people. She takes the cactus to the tribe's spiritual leader, who tells her, "This is truly a blessing, we must give it to all the people."[1]

So, according to the Aztecan peoples of Mexico, began the sacramental use of peyote in North America. There are many other legends, each tribe having its own. Consequently, just how the Indians of Northern Mexico learned to use peyote remains an enigma. What is known is that the Indians of Northern Mexico first introduced American Indians to peyote sometime during the late nineteenth century.[2] It is speculated that a displaced Comanche became ill and was treated with peyote by Sonoran Indians and, following his miraculous recovery, introduced peyotism to the Northern tribes.[3] In any event, peyotism has thrived and is now an integral part of American Indian culture.

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1. A. MARRIOTT, PEYOTE 2-3 (1971). This legend has long been told by the Aztecan peoples of Mexico's central Great Valley. *Id.*
2. *Id.* at 5-16.
3. *Id.* at 15-16.

This Note examines the use of peyote among the native people of the United States, focusing primarily on the constitutional issues that arise when a mood-altering drug such as peyote is used as part of a religious sacrament. As it shows, the courts experience great disquietude in addressing chemical sacrament cases in general, and those involving peyote specifically. Consequently, this area of law is fraught with inconsistencies and Indian and non-Indian groups are often treated inequitably regarding the use of drugs in religious practices. Further, this area of law reveals a reluctance on the part of the judiciary to deal uniformly with religions other than those with familiar Judeo-Christian origins. As a result, the often tenuously held first amendment right to the free exercise of religion is dramatically threatened.

This Note attempts to reconcile the morass of incongruent legislation and caselaw. It analyzes the judiciary's constitutional framework for addressing chemical sacrament cases, a framework that is the culmination of years of struggle with the issue of drug use in religious settings. As this Note reveals, there are no simple answers to this complex problem. Moreover, unless or until the Supreme Court determines the constitutionality of using drugs for religious purposes, an unworkable series of inconsistent and misapplied laws will prevail.

EARLY HISTORY

Since its introduction to the American tribes, peyote has been accepted by thousands of Indians as the central element in the vibrant religious movement legally organized as the Native American Church.[4] Peyote's principal ingredient is mescaline. When taken internally peyote produces a hallucinogenic effect.[5] Church members consume peyote at "meetings" designed to give thanks for past good fortune or to find guidance for future conduct.[6] Many users experience a heightened sense of comprehension and good feeling towards other people, coupled with extraordinary visions in which colors or animals are often seen.[7] More importantly, peyote itself constitutes an object of worship for Native American Church members.[8] Prayers are directed to peyote in much the same manner as some Christians pray to the Holy Ghost.[9] Members regard peyote as a teacher which enables the participant to experience the Deity. Members also view peyote as a protector and often carry it in a beaded pouch for such purposes.[10] Finally, the Native American Church strictly forbids the use of peyote for nonreligious purposes, considering such use sacreligious.[11]

4. The Native American Church is a religious organization of American Indians drawn from a variety of Western tribes. Membership in the church is estimated at approximately 300,000. Peyote use is central to the religion of the church. *See* Kennedy v. Bureau of Narcotic and Dangerous Drugs, 459 F.2d 415, 416 (9th Cir. 1972).

5. *See* People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 816-17, 40 Cal. Rptr. 69, 72-73 (1964).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 21, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74.

11. *Id.*

As acceptance of the new peyote religion grew among the Indians, opposition to the use of intoxicants by Indians grew among non-Indians.[12] Early on, the United States government attempted to categorize peyote as an intoxicant.[13] A United States public law strictly prohibited the sale of anything intoxicating to Indians living on allotted or reservation lands.[14] Indians challenged this law, arguing that peyote was not an intoxicant.[15]

Acknowledging that the law prohibiting the sale of intoxicants to Indians failed to mention peyote specifically, the government instead attempted to induce Indians to sign "temperance pledges" to close this loophole.[16] The sole purpose of a temperance pledge was to provide the state with a prosecution tool.[17] Once an Indian signed the document, he could be prosecuted under Alcohol Prohibition laws for any impertinent action including the use of peyote.[18] Indians stoutly maintained that they could not be arrested or prosecuted under these laws because they too failed to mention peyote specifically.[19] The courts frequently found such arguments convincing and few convictions resulted.[20] Accordingly, early efforts to control Indians' use of peyote were only effective as instruments of intimidation, having little substantive influence on the government's efforts to restrict peyote use among the Indians.

THE EVOLVING CONSTITUTIONAL FRAMEWORK

Of the early peyote cases involving constitutional law, *State v. Big Sheep*[21] is perhaps the most notable. In 1924, Montana authorities arrested Big Sheep, a Crow Indian, for the unlawful possession of peyote based on Montana law.[22] Big Sheep claimed he was a member of the Native American Church and that members of that church could use peyote for sacramental purposes.[23] The Supreme Court of Montana held that although the Constitution guarantees the free exercise and enjoyment of religious profession and worship, it does not justify practices inconsistent with the good order, peace or safety of the state.[24] Furthermore, the court stated that it was clearly within the power of the legislature to make a determination re-

12. A. MARRIOTT, *supra* note 1, at 7-8.
13. Legal opposition to peyote began as early as 1897. *Id.* at 47.
14. Act of Jan. 30, 1897, Pub. L. No. 33, 29 Stat. 506. See A. MARRIOTT, *supra* note 1, for a complete discussion of this and other early laws that proscribed the use of peyote on reservation lands.
15. A. MARRIOTT, *supra* note 1.
16. *Id.* at 10.
17. *Id.*
18. *Id.* The eighteenth amendment to the United States Constitution, adopted in 1917, established prohibition designed to rid the entire country of intoxicants. Enforcement of the amendment in toto was practically impossible, but it could be enforced more rigidly in the limited land areas assigned to the Indians. While alcohol was specifically mentioned, peyote was not. Nonetheless, repeated attempts were made to extend its provisions to cover the sale and use of peyote by Indians. Peyotists fought such an extension on the ground that the amendment's language covered only the proven sale and use of alcohol. *See id.*
19. *Id.*
20. *Id.*
21. 75 Mont. 219, 243 P. 1067 (1926).
22. *Id.* at 220, 243 P. at 1068.
23. *Id.* at 221, 243 P. at 1068.
24. *Id.* at 239, 243 P. at 1073.

garding the use of peyote.[25] Thus, the *Big Sheep* court refused to scrutinize the legislature's exercise of its police powers in the area of chemical sacraments.

Following *Big Sheep*, a constitutional framework for dealing with chemical sacrament issues in general, and the religious use of peyote specifically, began to evolve. In *People v. Woody*,[26] California authorities arrested and charged members of the Native American Church with the illegal possession of peyote during a religious ceremony conducted in a hogan in the California desert.[27] The participants contended that their possession of peyote was incidental to the observance of their faith and that California could not constitutionally invoke a state statute proscribing the use of peyote without abridging the participants' right to freely exercise their religion.[28]

California authorities adamantly refuted this argument. First, the state cited the deleterious effects of peyote use on the Indian community.[29] Next, in an almost unbelievable display of cultural arrogance, the California Attorney General argued that peyote could be regarded as a symbol that obstructed enlightenment and shackled the Indian to primitive conditions.[30] The state also contended that peyote use by Indians would hinder the states' ability to enforce its other narcotics laws, and would lead to the use of additional drugs by Indians.[31] Finally, the state attempted to draw a parallel between the religious use of peyote and the Mormon practice of polygamy,[32] which was held not to be constitutionally protected in the case of *Reynolds v. United States*.[33]

The *Woody* court rejected the states' arguments finding them wholly speculative, undocumented and without scientific basis.[34] In so doing, the court drew upon a far more enlightened "increased-tolerance" approach for determining whether constitutional protection should be afforded to certain religious practices.[35] In reaching its decision, the court balanced the constitutional right of freedom of religion against the interest of the state in maintaining the uniform and unhindered enforcement of its narcotics laws.[36] The court noted that the state failed to demonstrate any harmful consequences to peyote users or that an exemption allowing Indians to use peyote in religious ceremonies would in any way circumvent California's ability to enforce its

25. *Id.*

26. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

27. At the time of their arrest, the Indians offered evidence that they were in fact members of the Native American Church by displaying a photostatic copy of the Church's Articles of Incorporation in California. The document declared, among other things, that the Church's goal is to work towards unity with the sacramental use of peyote for religious purposes. *Id.* at 717, 394 P.2d at 814, 40 Cal. Rptr. at 70.

28. *Id.* at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.

29. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

30. *Id.* at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.

31. *Id.*

32. *Id.* at 724-25, 394 P.2d 819-20, 40 Cal. Rptr. at 75-76.

33. 98 U.S. 145 (1878) (Mormon practice of polygamy is not protected by the free exercise clause of the first amendment. A party's religious belief cannot be accepted as a justification for his comitting an overt act, made criminal by the law of the land.).

34. *Woody*, at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

35. *Id.* at 726-27, 394 P.2d at 821, 40 Cal. Rptr. at 77.

36. *Id.*

narcotics statutes against non-exempt persons.[37] The court was apparently confident that the trier of fact would have little trouble distinguishing those sincerely using the drug in observance of their faith from those abusing the exemption by feigning a faith in some esoteric religion that required the use of drugs.[38] Moreover, the court observed that other states provide similar exemptions for the religious use of peyote and that the portents of disaster expressed by those opposed to exemptions in such states had not come to fruition.[39] Finally, the opinion outlined an evolving first amendment test for deciding religious drug use cases. It declared that the state may abridge religious practices only upon demonstrating that some compelling state interest outweighs a defendant's interest in religious freedom.[40]

In sum, *Woody* represents a vital link in the process of developing a constitutional framework for analyzing chemical sacrament cases. The court was willing to tolerate the use of peyote so long as the defendant's belief in peyotism is honest and in good faith. This may be characterized as a sincerity test. More importantly, California's prosecutors are now required to show a compelling state interest before a religious practice may be proscribed.[41] This heightened standard of scrutiny reveals the court's recognition of the important religious interests at stake in peyote use cases.

In re Grady, decided the same day as *Woody*, further delineated the constitutional framework for sacramental drug use cases.[42] The defendant, Grady, imprisoned for the illegal possession of peyote, petitioned the California Supreme Court for a writ of habeas corpus, claiming that his use of peyote was religious in nature.[43] In contrast to the defendant in *Woody*, however, Grady failed to establish that he was a member of an organized religion or that he sincerely engaged in the practice of any religion.[44] The California Supreme Court remanded the case to the trial court for such determinations.

Grady and *Woody* differed in several other ways. Grady was a sole practitioner, not an Indian, and touted himself as a "peyote preacher."[45] By contrast, *Woody* involved Indian members of the long-established Native American Church who met the burden of showing that they practiced, in good faith, an organized religion of which peyote use was an essential and central element.[46] *Grady,* therefore, makes it clear that California courts require a showing of good faith religious use of an illegal substance as a prerequisite to a religious exemption from drug laws.[47]

37. *Id.* at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.
38. *Id.* at 726, 394 P.2d at 821, 40 Cal. Rptr. at 77.
39. *Id.* at 721, 394 P.2d at 818, 40 Cal. Rptr. at 74. New Mexico, Montana and Arizona provided exemptions at the time *Woody* was decided. These states did not consider such exemptions an impairment to enforcement of the state's other narcotics laws. *Id.*
40. *Id.* at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.
41. *Id.* at 724, 394 P.2d at 818, 40 Cal. Rptr. at 74.
42. 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).
43. *Id.* at 887, 394 P.2d at 728-29, 39 Cal. Rptr. at 912-13.
44. *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.
45. *Id.*
46. *See supra* notes 26-40 and accompanying text.
47. *Grady*, 61 Cal. 2d at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913. *Grady* was remanded to make such a factual determination. A sufficient good faith religious use requires an inquiry into the

United States v. Kuch[48] demonstrates the lower court's adherence to a "legitimacy of religious use" principle in determining the dimensions of the constitutional framework. *Kuch* involved a member of the Neo-American Church, arrested and charged with violating marijuana and LSD laws.[49] The defendant maintained, among other things, that psychedelic substances such as LSD were the true "host" of the church and that these substances were sacramental foods and "manifestations of the grace of God."[50] The defendant extrapolated these conclusions directly from established church doctrine as enumerated in the church's literature.[51]

The *Kuch* court denied the exemption, holding that in a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must, at the very least, demonstrate adherence to certain ethical standards and spiritual disciplines.[52] The court further observed that the Neo-American Church failed to show any solid evidence of a belief in a supreme being or religious discipline ritual or tenets to guide the daily existence of church members.[53] On the contrary, the *Kuch* court concluded that the group formed merely to use and enjoy drugs and was nothing more than a mockery to other established religions.[54] Recognizing the difficulty in drawing lines between what is and what is not a religion, the court acknowledged the very real need to establish a threshold as to what constitutes a bona fide religion.[55] The *Kuch* court, however, failed to clearly define this threshold.

The Fifth Circuit Court of Appeals echoed the *Kuch* court's call for reasonable line-drawing in the much-publicized case of *Leary v. United States*.[56] As in *Kuch*, the defendant in *Leary* allegedly violated certain laws pertaining to marijuana use.[57] He also raised a free exercise of religion de-

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question of whether the defendant's belief in peyotism is honest and in good faith or whether the defendant seeks to wear the mantle of religious immunity merely as a cloak for illegal activities. In *Grady*, the court was willing to accept the defendant's nontraditional practices and beliefs as religion, the paramount question being a factual one of whether or not he sincerely believed it. The court granted habeas corpus. *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.

48. 288 F. Supp. 439 (D.D.C. 1968).

49. *Id.* at 442. Arthur Kelps, who had a masters degree in psychology and practiced as a clinical psychologist at Sing Sing Prison, founded the Neo-American Church. He claimed that members were not drug addicts or criminals but were merely reacting to persecution, as free men have always reacted to persecution. *The Narcotic Addict Rehabilitation Act of 1966: Hearings on S. 2113, S. 2114, S. 2152 and LSD and Marijuana Use on College Campuses Before A Special Subcomm. of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 423 (1966).

50. *Kuch*, 288 F. Supp. at 443.

51. *Id.* The provisions were found in the church's religious literature, for example, the Boo Hoo Bible. *Id.*

52. *Id.* at 443-44.

53. *Id.* at 444.

54. *Id.*

55. *Id.* at 443-44. In *Kuch*, the court noted that many religions accepted today were at one time unpopular and even condemned. Nonetheless, the court was left with the impression that the Neo-American Church was an extremist group set up to mock established religious institutions. *Id.*

56. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

57. *Id.* at 853.

fense, claiming that he was a devout believer in Hinduism.[58] The court, following traditional analysis, balanced the state's interest and the religious use issues at stake.[59] More importantly, the *Leary* court advanced the evolving constitutional framework by examining whether Leary's practice of using drugs was sufficiently central to the practice of Hinduism.[60] The court found that the use of psychedelics was not in fact a formal requisite to the practice of Hinduism.[61] Furthermore, Leary drew no distinction between his drug use for religious purposes and his use of drugs in scientific experimentation.[62] For example, while teaching at Harvard, Leary initiated the now famous Good Friday Experiment during which psilocybin was administered to twenty first-year theology students.[63] Lastly, unlike the Indian defendants in *Woody*, Leary did not show any deep-seated traditional use of psychedelics as a central aspect of the exercise of his professed religion.[64]

Thus, *Leary* further evolved the analytical framework by establishing "centrality" as a component in the proper analysis of chemical sacrament cases. Centrality deals with whether drug use is universal among members of a religion seeking exemption, as well as whether the use of drugs is a formal requisite of the religion. Even the issue of whether the group actually regarded the drug as a deity now requires examination. Obviously, such nebulous concepts as these, coupled with a lack of critical judicial guidance, opened the door to the inconsistent decisions which followed in the wake of the *Leary* decision.[65]

For example, a Hawaii court of appeals adopted the now fully devolved constitutional framework in the recent case of *State v. Blake*.[66] In *Blake*, the court outlined the four distinct criteria that must exist when determining the legality of using illegal drugs for religious purposes. First, the party seeking a statutory exemption must do so in connection with a bona fide religious practice or belief.[67] Although what constitutes a bona fide religious practice or belief may be difficult to define, courts should be able to make such a determination as the court in *Kuch* demonstrated.[68] Such an inquiry requires no more judicial sophistication than the average question of fact.

Second, the belief must be one that is sincerely held.[69] In determining sincerity the court may examine, among other things, the individual's lifestyle. In *Blake*, for example, the fact that the defendant used marijuana in a public park with others who were not connected with his religious sect,

58. *Id.* at 857.
59. *Id.* at 860.
60. *Id.*
61. *Id.*
62. *Id.* at 857.
63. *See* W. CLARK, CHEMICAL ECSTACY: PSYCHEDELIC DRUGS AND RELIGION 46-50, 77-81 (1969).
64. *Leary*, 383 F.2d at 861.
65. Six months following his original conviction, Leary founded his own "religion," the League of Spiritual Development (LSD). Members were required to use marijuana daily and LSD weekly. *See* M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 62-65 (1968).
66. 695 P.2d 336 (Haw. App. 1985).
67. *Id.* at 337.
68. *See supra* notes 48-55 and accompanying text.
69. *Blake*, 695 P.2d at 337.

Hindu Tantrism, reduced the credibility of his contention that his marijuana use was strictly religious.[70] Other factors to be considered might include the defendant's precipitous espousal of a belief after his arrest and his demeanor on the witness stand. In short, a court is quite capable of making a factual determination of sincerity and bona fide religious use based upon the relevant evidence available.[71]

Once the court finds a sincerely held and bona fide religious practice or belief, the next question is whether the illegal drug use is central to the individual's expression of his or her religion.[72] In *Woody*, the court had little trouble determining that peyote was central to the religion practiced by the Native American Church. Peyote was found to be more than a sacrament; it was an object of worship itself.[73] Moreover, in bona fide peyotism, the use of peyote is seen as the only means through which one may communicate with the deity.[74] In short, without peyote the Native American Church would not exist. In contrast, the court in *Blake* found that marijuana played only a peripheral role in the practice of Hindu Tantrism, a religion that could be practiced freely without using marijuana.[75]

The next inquiry requires a court to determine whether a compelling state interest justifies the state's refusal to grant an exemption. Due to the sensitive nature of first amendment free exercise claims, a mere rational relationship to any asserted state interest will not be sufficient to justify the refusal to grant an exemption from state drug laws. In fact, only grave abuses, endangering the most important state interests, present a situation suitable for permissible limitation.[76] In determining how vital or compelling a state interest is, a court will examine the degree of harm that would occur if an exemption is granted.[77] Such a standard provides an excellent balancing tool for analyzing free exercise claims. For example, a Satanic group may

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70. *Id.* at 340 n.9.

71. In fact, courts are required to make such judgments in many other areas of law, perhaps most notably in the conscientious objector cases which are based almost entirely on the sincerity of the person seeking exemption from the draft laws. *See, e.g.*, Roberson v. United States, 208 F.2d 166 (10th Cir. 1953) (registrant found to be sincere in his religious belief regarding non-participation in combat service).

72. *Blake*, 695 P.2d at 337.

73. *Woody*, 61 Cal. 2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

74. In *Woody*, the court found that for members of the Native American Church, peyote is both a teacher and a protector, somewhat analogous to the Holy Ghost of Christianity. *Id.*

75. *Blake*, 695 P.2d at 339. In determining centrality of the drug use to the religion, courts should examine factors such as the common practice of followers. However, such an examination should not be determinative, as this would leave open the possibility of members of a fringe element being denied an exemption simply because they do not follow the practices of the group generally. For example, one may sincerely believe that a drug is central to the practice of his or her bona fide religion even though the majority of subscribers to the religion do not agree. When such individualistic expression occurs, the inquiry into centrality should be redirected to one of sincerity. If the individual can provide enough extrinsic evidence to convince the court a practice is sincerely held and central to his or her own religious expression, then the court should allow the individual to pass the centrality test and move on to the issue of whether a compelling state interest exists.

76. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

It is interesting to note that Leary attempted to use this language to have his marijuana conviction reversed. The court rejected this argument, stating "we cannot reasonably equate deliberate violation of federal marijuana laws with the refusal of an individual to work on her Sabbath Day." *Leary*, 383 F.2d at 860.

77. *Leary*, 383 F.2d at 861.

sincerely believe that the practice of human sacrifice is central to the exercise of its religion. Nevertheless, a court would have little trouble finding that the state's compelling interest in protecting the health and safety of its citizens overrides any interest the Satanist has in performing human sacrifices.

Although the compelling state interest standard mandates heightened judicial scrutiny, some commentators claim that such a test still permits the suppression of the free exercise of religion in the name of public health and safety.[78] While this criticism is valid it does not answer questions of how broadly religion should be defined or how narrowly police powers may be exercised in maintaining a peaceful and orderly society.[79] Moreover, the potential for abuse by so-called religions is staggering. For example, what about a religion whose members seek an exemption from prostitution laws because consensual sex of any type is a central tenet of their religion? This group could be granted an exemption under a less restrictive standard than that articulated in *Blake* and *Leary*. After all, prostitution and drug use are arguably both victimless crimes. Few would contend, however, that the state should be prohibited from exercising its police power in such a situation. It is also important to note that those court decisions criticized as overly constrictive do not prohibit the right of a person to hold any religious belief, no matter how unconventional or bizarre.[80] Rather, one is free to believe that drugs are sacred or even that human sacrifices are a proper religious exercise. Accordingly, when denying exemptions to laws based on free exercise of religion, courts do not prohibit the right to hold religious beliefs, but merely the right to act on them.

This analysis, however, denies that some beliefs are integral to the religion. For example, the Native American Church's belief in peyote as deity necessarily merges into practice. Without peyote there simply is no religion. Thus, the belief-practice dichotomy is largely illusory and is of less practical value in the realm of chemical sacrament cases.

In spite of its limitations, the United States Supreme Court adopted the "right to believe but not necessarily practice" dichotomy in *Cantwell v. Connecticut*.[81] That case involved attempts by government authorities to control solicitation activities of Jevovah's Witnesses. Although deciding to protect the solicitation activities, the Court acknowledged that the first amendment

78. *See, e.g.*, Note, *Brave New World Revisited: Fifteen Years of Chemical Sacraments,* 1980 WIS. L. REV. 879. In practice, however, such abuses have not been permitted. *See also* Sample v. Borg, 675 F. Supp. 574 (E.D. Cal. 1987) (There is no compelling state interest in preventing Indian inmates from wearing sacred headbands or from participating in the pipe ceremony.); Wiliansky v. Greco, 74 Misc. 2d 512, 344 N.Y.S.2d 77 (1973)(State has no compelling interest in performing autopsies on individuals killed in automobile accidents when their relatives object on religious grounds.).

79. To illustrate, Neo-American Church members called themselves Boo Hoos and reported their motto to be "victory over horseshit." In addition, the church symbol was a three-legged toad. The church bulletin was called "Divine Toad Sweat" and the official church songs were *Puff the Magic Dragon* and *Row Row Row Your Boat. Kuch*, 288 F. Supp. at 444-45. Clearly, if the first amendment protects such a farcical group, all sorts of undeserving groups and their illegal acts will be protected by the free exercise clause. Society will then be subject to all sorts of expanded tolerance and perversion in the name of the free exercise of religion.

80. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

81. 310 U.S. 296 (1940).

embraces two concepts: freedom to believe and freedom to act.[82] The first, the Court ruled, is absolute.[83] The right to act, on the other hand, may not always be upheld.[84] Presumably, the Court was alluding to the possibility that an organized society would degrade into anarchy if no limits existed. This dichotomy led the Court to promulgate a compelling state interest standard for religious practice cases. As noted above, this standard of scrutiny requires a court to balance the right of the individual to pursue a sincerely held religious belief that is central to the practice of his religion against the right of the government to intervene. As long as the government's interest protecting the health and safety of its citizens is not compelling, the religious practice must be allowed under the free exercise clause.

THE FRAMEWORK APPLIED: A STUDY IN INCONSISTENCY

As the constitutional framework for analyzing free exercise chemical sacrament claims evolved, so did inconsistencies in its application.[85] At least the denial of exemptions in *Kuch* and *Leary* can be reconciled on good faith grounds. Kuch and the Neo-American church portray a radical fringe group whose proclamations prevented the court from finding a sincerely held religious belief or practice.[86] Similarly, the court recognized Leary, a self-described proponent of LSD, as an insincere leader of the anti-establishment youth of the mid-1960s whose goal was simply to perpetuate illicit drug use.[87] In short, neither Kuch nor Leary exhibited the requisite good faith sincerity grounded in deeply rooted religious traditions exhibited by the defendant in *Woody*. Nor did they show their use of illicit drugs was central to their religions. Thus, *Leary* and *Kuch* are consistent under the traditional constitutional framework; subsequent cases, however, are more troubling.[88]

Inconsistencies in chemical sacrament cases surface in three areas. The first involves the Native American Church or its members.[89] The second area involves non-Indian groups attempting to ride the Native American Church's coattails to obtain exemptions.[90] The last group includes cases in which the issue of the religious use of peyote arises within the employment context.[91]

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82. *Id.* at 303-04.

83. *Id.*

84. *Id.*

85. *See infra* notes 92-213 and accompanying text.

86. *See supra* notes 48-55 and accompanying text.

87. *See supra* notes 56-65 and accompanying text. The *Leary* court may have been reluctant to grant an exemption to someone such as Timothy Leary, who could influence the actions of a large, volatile segment of society. Moreover, at the time of *Leary*, many hoped to suppress the "radical element" whose actions and philosophy were seen as hostile to ordered society that was the status quo of the two preceding decades. In fact, the court recognized such fears, noting the threat that granting religious exemptions to use psychedelics would pose to the youth of the nation. According to the court the psychedelic experience was too tempting to subscribe to such a dangerous doctrine. *Leary*, 383 F.2d at 861.

88. *See infra* notes 92-213 and accompanying text.

89. *See infra* notes 92-120 and accompanying text.

90. *See infra* notes 121-159 and accompanying text.

91. *See infra* notes 160-210 and accompanying text.

The Native American Church Cases

State v. Soto[92] and *Whitehorn v. State*[93] illustrate how a constitutional standard can be applied very differently depending on the jurisdiction. These cases, decided contemporaneously, have nearly identical facts. Both defendants were Indian members of the Native American Church, stopped for routine traffic violations and charged with the illegal possession of peyote under state drug laws.[94] The only material difference between the two cases is that Soto's arrest took place in Oregon and Whitehorn's in Oklahoma.

Theoretically, the same constitutional framework should have been applied in both *Soto* and *Whitehorn* and should have resulted in similar outcomes. The first amendment of the United States Constitution guarantees the free exercise of religion and applies to the states through the fourteenth amendment.[95] However, the Oregon court sentenced Soto to three years probation for possession of the illegal drug mescaline.[96] By contrast, the Oklahoma trial court convicted Whitehorn of the illegal possession of peyote, but the appellate court reversed his conviction.[97] Thus, as these cases demonstrate, states often interpret the free exercise clause differently.[98]

State v. Soto

The *Soto* court cited specific conclusions from *Sherbert v. Verner*[99] requiring the state to show more than a mere rational relationship to some "colorable" state interest before abridging a right in the highly sensitive area of first amendment freedoms.[100] *Sherbert* held that the state may not force an employee to choose between following a religious precept or abandoning it in order to accept work.[101] The *Soto* court accepted the holding in *Sherbert* that only a violation of the most important state interest gives rise to permissible limitations of the free exercise clause.[102] Nevertheless, the court refused to allow the introduction of any evidence demonstrating that Soto's possession of peyote was for religious purposes.[103] In so doing, the court ignored the guideline established by the Supreme Court in *Sherbert* for analyzing such cases that requires the state to show a compelling state interest before abridging the free practice of religion. By this omission, the *Soto* court prevented any possible application of a legitimate balancing test. In effect, the court deferred entirely to the judgment of the Oregon legislature

92. 21 Or. App. 794, 537 P.2d 142 (1975).
93. 561 P.2d 539 (Okla. Crim. App. 1977).
94. *Id.* at 540-41; *Soto*, 21 Or. App. at 799, 537 P.2d at 144.
95. *Cantwell*, 310 U.S. at 303.
96. *Soto*, 21 Or. App. at 794, 537 P.2d at 142.
97. *Whitehorn*, 561 P.2d at 548.
98. Both courts cited conclusions reached in *Sherbert* and *Cantwell* and adopted the constitutional standard presented in those cases. *Soto*, 21 Or. App. at 796-97, 537 P.2d at 144-45; *Whitehorn*, 561 P.2d at 549-50.
99. 374 U.S. 398.
100. *Soto*, 21 Or. App. at 797, 537 P.2d at 143.
101. *Sherbert*, 374 U.S. at 410.
102. *Id.* at 406. *See Soto*, 21 Or. App. at 794-95, 537 P.2d at 143-44.
103. Soto wanted to show that he was a good faith member of the Native American Church, that he used peyote only for religious purposes and that the particular peyote button seized was sacred to him, having great religious significance. *Soto*, 21 Or. App. at 799-800, 537 P.2d at 144.

that peyote was a "dangerous drug" under any circumstance. Furthermore, in *Soto*, the state did not have to provide any evidence showing that a religious exemption for using peyote would hinder enforcement of state drug laws or pose a threat to the public health.[104] Apparently, in Oregon it is enough that the legislature classes peyote as "dangerous" to prevent the application of the balancing test. No further fact finding is necessary.

In addition, the *Soto* court did not even recognize a United States Department of Justice decision making the use of peyote in religious ceremonies of the Native American Church exempt from federal regulation of peyote.[105] In light of this exemption and the Supreme Court's holding in *Sherbert* requiring a compelling state interest, it seems unusual that Oregon refused to examine whether *Soto* was a subscriber to the Native American religion or whether he used peyote for religious pursuits alone.

Under a proper application of the constitutional framework, the court in *Soto* should have addressed whether the defendant's possession of peyote was in connection with a sincerely held and bona fide religious belief. In

104. *Id.* Arguably, this omission was intentional because California held in *Woody* that no such threat existed. Moreover, of the states that provide exemptions for the religious use of peyote, none has found it necessary to rescind the exemptions.

105. The possession, consumption and sale of peyote was first controlled by Congress in 1965. Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, § 3(a), 79 Stat. 226 (1965). These amendments, as first passed by the House, contained a provision that exempted from control "peyote (mescaline) but only insofar as its use is in connection with the ceremonies of a bona fide religious organization." H.R. 2, 89th Cong., 1st Sess. 111 CONG. REC. 14608 (1965). The Senate Committee on Labor and Public Welfare recommended that the House exemption for peyote be deleted. S. REP. No. 89-337, 89th Cong., 1st Sess., 111 CONG. REC. 14609 (1965). The Committee determined that drugs other than barbiturates and amphetamines should be brought under control of the bill on a case-by-case basis by the Secretary of Health, Education and Welfare. *Id.* The Committee expected that peyote would be subject to the same consideration as all other drugs in determining whether it should be included under the provisions of the legislation. *Id.* Senator Yarborough stated on the Senate floor that the deletion of the peyote exemption had been endorsed by the administration. *Id.* at 14611. The Senate passed the House bill as amended by the Committee with the peyote exemption deleted.

The Drug Abuse Control Amendments of 1965 were superseded in 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). *See also* 1970 U.S. CODE CONG. & ADMIN. NEWS 1439. During hearings on that legislation, Mr. Sonnenreich of the Bureau of Narcotics and Dangerous Drugs was asked whether the new legislation would affect the religious use of peyote. He replied that the existing administrative exemption for the Native American Church, at that time in 21 C.F.R. § 320.3 (c)(3) (1970), would be continued. "We consider the Native American Church to be sui generis," he said. "The history and tradition of the church is such that there is no question but they regard peyote as a deity as it were, and we will continue the exemption." *Drug Abuse Control Amendments of 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 117-18 (1970) (Statement of Mr. Sonnenreich, Bureau of Narcotics and Dangerous Drugs).

Under sections of the new drug abuse act, 21 U.S.C. §§ 821, 822(d), 871(b) (1976), the Attorney General was authorized to promulgate rules and regulations for the control of drugs. Under that authority, the Drug Enforcement Administration of the Department of Justice concluded that Congress had not intended the 1970 Act to prohibit the use of peyote in religious ceremonies of the Native American Church:

> The listing of peyote as a controlled substance in Schedule One does not apply to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31 (1980).

sum, the *Soto* decision reflects a narrow-minded philosophy that works a grave injustice. By refusing to grant a defendant the opportunity to assert a religious belief defense, a court sacrifices the constitutional framework. More troubling, however, is the *Soto* court's apparent intolerance of practices outside of mainstream religions with Anglo-Saxon origins.

Whitehorn v. State

The *Whitehorn* case illustrates a more moderate approach than *Soto*. In *Whitehorn*, the Oklahoma court was willing to adhere to the analytical framework promulgated in *Sherbert*, thereby refusing to defer to the legislature. After acknowledging that peyotism is a bona fide religious practice, the court limited its inquiry to issues of sincerity and compelling state interests.[106] Whitehorn convinced the court that he was a sincere subscriber to peyotism, having involved himself in the rituals of the Church on a sporadic basis for thirty years.[107] As for a compelling state interest, the *Whitehorn* court looked to the experiences of other states granting exemptions.[108] The court was quickly convinced that a compelling state interest sufficient to warrant the abridgement of the rights of Native American Church members did not exist.[109]

Whitehorn represents a more equitable application of the constitutional framework for dealing with chemical sacrament cases. By allowing the religious use defense, the court was able to balance accurately the state's interest against Whitehorn's first amendment right of freedom of religious expression. As demonstrated, *Whitehorn* and *Soto* present striking examples of how a standard of review can be applied differently in similar circumstances.

Other Progenies of Woody

Unfortunately, these are not the only inconsistencies that emerged in the wake of *Woody*. Arizona, for example, denied the Native American Church corporate status because of its unabashed use of peyote.[110] Even in California, members of the Native American Church continued to engage in legal battles over the use of peyote.[111] Ten years after the California court granted an exemption to the Native American Church in *Woody*, police stopped a member of the Native American Church and arrested him for the illegal possession of peyote.[112] The Indian defendant, Golden Eagle, repeatedly offered during his month-long incarceration to verify his membership in the Church, but was not permitted to do so.[113] At trial, he argued that

106. *Whitehorn*, 561 P.2d at 544-45.
107. *Id.* at 541.
108. *Id.* at 544-45.
109. *Id.*
110. Native American Church of Navajo Land v. Arizona Corp. Comm'n., 329 F. Supp. 907 (D. Ariz. 1971). *But see* State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973) (The issue of the church being denied a corporate charter became moot when the Arizona Court of Appeals followed the *Woody* court and granted the church an exemption from state drug laws. Because the church was no longer in violation of state law it was granted a corporate charter in Arizona.).
111. *See, e.g.*, Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974).
112. *Id.* at 1181.
113. *Id.*

certain pre-trial procedures should be instituted to prevent similar harassment of Church members in the future.[114] First, an adversarial hearing concerning good faith peyote use for religious purposes could be held prior to arrest or seizure of peyote.[115] Next, given California's recognition of the church's first amendment right to use peyote,[116] a special warrant procedure should be instituted to prevent unjustified or precipitous state action.[117] Lastly, Golden Eagle argued that, at the very least, the arresting officer should make a reasonable effort to confirm an assertion of good faith religious use prior to formal arrest.[118] The Ninth Circuit refused to adopt any of these pre-trial procedures, holding that California's requirement of an expeditious hearing before a magistrate was adequate protection.[119] That holding, however, provided little consolation for Golden Eagle who had already suffered the effects of an unwarranted thirty-one day incarceration.

This case provides another example of the inconsistency that pervades first amendment free exercise claims involving chemical sacraments. It illustrates the lack of fairness delivered by our ethnocentric court system. Something is judicially amiss when a man is held for thirty-one days for participating in an activity that has been sanctioned as legal by the state for ten years.[120] Perhaps the courts' inability to comprehend the importance of using peyote to the Native American faith best explains these inconsistencies.

The "Non-Indian" Cases

Like members of the Native American Church, non-Indian groups are being subjected to inconsistent judicial decisions concerning the free exercise clause as well. One of the most glaring examples of this is the case of *Kennedy v. Bureau of Narcotics and Dangerous Drugs.*[121] In *Kennedy*, the Church of the Awakening sought inclusion within the religious exemption already accorded to the Native American Church.[122] The church offered evidence that members of the Church of the Awakening used peyote only in connection with bona fide religious ceremonies.[123] The Director of the Federal Bureau of Narcotics and Dangerous Drugs, however, discounted this evidence and denied the exemption. On appeal to the Ninth Circuit, the Church challenged the Director's ruling on due process grounds, claiming that the regulation created an arbitrary classification distinguishing the members of the two churches who used peyote for essentially the same pur-

114. *Id.* at 1182.
115. *Id.*
116. *See Woody*, 61 Cal. 2d at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.
117. *Golden Eagle*, 493 F.2d at 1181.
118. *Id.*
119. *Id.* at 1184-85.
120. The court legalized the use of peyote among members of the Native American Church ten years earlier in *Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69.
121. 459 F.2d 415 (9th Cir. 1972).
122. The petitioners attempted to amend the religious exemption regulation simply by adding the words "and the Church of the Awakening" after the words "Native American Church." *Id.* at 416.
123. *Id.*

pose.[124] The court conceded that the Church of the Awakening was, in fact, a valid religious organization and that the use of peyote by Church members was part of bona fide religious ceremonies conducted by the Church.[125] Further, the court readily acknowledged that the regulation containing the exemption did create an arbitrary classification that could not withstand a substantive due process attack.[126] Nonetheless, the majority affirmed the denial of the exemption, reasoning that granting an exemption to the Church of the Awakening would serve only to perpetuate arbitrary classifications.[127] Thus, according to the *Kennedy* court, only the Native American Church is exempt while all other churches using peyote in bona fide religious ceremonies are not.[128]

The court's reasoning in *Kennedy* is troubling. If more than one group is deserving of an exemption the court should acknowledge this and rule accordingly. At the very least, the court should have predicated its decision on a proper application of the framework for analyzing such cases rather than circumventing it entirely.[129]

Another example of the unpredictable nature of judicial decisions in the non-Indian area is illustrated by *Native American Church of New York v. United States.*[130] The plaintiff group in this case is in no way affiliated with the Native American Church involved in *Woody* and only a few of its roughly one thousand members are American Indians.[131] Thus, the name "Native American Church of New York" is potentially misleading.

In this case, the church attempted to match the facts of *Woody* point-for-point, hoping to avoid being denied an exemption on centrality or bona fide religious practice grounds.[132] The group claimed that it regarded all psychedelics as deities and wished its exemption to include a wide variety of drugs including peyote.[133] The Drug Enforcement Administration denied the petition.[134]

In its ruling granting the Church's motion for summary judgment, the federal district court opened the door to the possibility of other churches

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124. *Id.*

125. *Id.*

126. *Id.* at 417.

127. *Id.*

128. *Id.* at 416.

129. The concurring opinion in *Kennedy* applied the correct framework. The concurring judge rationalized the denial of granting the exemption on centrality grounds, stating that peyote was only a means to an end for the Church of the Awakening. Members used the drug to bring them closer to the deity. The Indians, on the other hand, worship the drug itself. There would be no Native American Church without peyote, whereas the Church of the Awakening utilized peyote merely to obtain desired mystical experiences more quickly. *Kennedy*, 459 F.2d at 418 (Crocker, J. concurring). Although the outcome of *Kennedy* may be correct, it illustrates the capricious, and often paralogistic, reasoning employed by courts in deciding chemical sacrament cases among both Indian and non-Indian groups who seek religious exemptions from drug laws.

130. 468 F. Supp. 1247 (S.D.N.Y. 1979).

131. *Id.* at 1248.

132. *Id.* at 1249-50.

133. The group also sought exemptions to use LSD, marijuana, peyote, mescaline, psilocybin and other assorted hallucinogens. *Id.* at 1248.

134. *Id.*

gaining an exemption for peyote only.[135] The court noted that at the time the original exemption was granted to the Native American Church, it was the only religious organization that regarded peyote as a deity.[136] If other non-Indian religious organizations established later also regarded peyote as a deity, the court stated that they too could obtain an exemption.[137] Apparently, the court realized that in applying the constitutional framework, it would be difficult to justify a ruling that the state's interest was more compelling when Indians used peyote than when non-Indian members of the Native American Church of New York used the drug.

The court next applied the additional framework criteria of sincerity, bona fide religious practice and centrality, holding that if the non-Indian Native American Church of New York could meet the criteria, it also could be granted a peyote exemption.[138] The court remanded the case to determine whether the church could meet the requirements. The *Native American Church of New York* case conflicts sharply with *Kennedy* where the court would not even consider that the Church of the Awakening might legitimately qualify for an exemption under the constitutional framework.[139]

The most recent group to attempt to qualify for an exemption to state and federal peyote laws was the Peyote Way Church of God.[140] Like the Native American Church, this church made the declaration that it considers peyote divine and an embodiment of its deity.[141] Not surprisingly, the thrust of the church's position was an equal protection attack.[142] The *Peyote Way* court, however, viewed the issue much differently and adopted a holding that threatened to alter radically the framework used to evaluate peyote sacrament cases.

The *Peyote Way* court circumvented the church's equal protection arguments by declaring that the Native American Church deserved special treatment because it was made up of Indians.[143] The court relied on the American Indian Religious Freedom Act[144] which sets out the policy of the United States government in protecting and preserving the inherent rights of American Indians to exercise their traditional religions. The Act specifically includes the right to possess sacred objects and the freedom to worship through ceremonial and traditional rites.[145] The *Peyote Way* court stated

135. The court found that the other drugs have no established safety record and have a high potential for abuse. *Id.* at 1249.

136. *Id.* at 1251.

137. *Id.*

138. *Id.*

139. *Kennedy*, 459 F.2d 415.

140. Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632 (N.D. Tex. 1983).

141. *Id.* at 635-36.

142. *Id.* at 637.

143. *Id.* at 638-39.

144. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978). Section 1 of the act reads as follows:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

145. *Id.*

that the only issue was whether it was permissible for federal and state governments to allow exemptions for members of the Native American Church and not for others professing a belief in peyote as a central sacrament.[146] In holding that such inconsistent treatment was permissible, the court reasoned that Congress had the power and duty under the Act to preserve the Indian Nations until such time as they become assimilated so they no longer were a "people apart."[147] The court reasoned that preserving an integral part of Native American culture such as the peyote sacrament was necessary to ensure the survival of Indian religions and culture.[148]

Unlike the Native American Church in *Woody*, the Peyote Way Church was not viewed as a distinct cultural entity. Moreover, the Peyote Way Church was made up of partial blood Indians and non-Indians. The group simply did not possess the cohesiveness and deep-seated tradition that the Native American Church did. Therefore, the group did not qualify for an exemption.[149]

The *Peyote Way* court's rationale that Indians should be treated differently than non-Indians regarding the peyote sacrament seems reasonable in the face of express congressional recognition of Indian religious freedom.[150] That contention is supported by other decisions where Indians have been granted privileges not afforded others based strictly on their unique cultural heritage.[151] Moreover, the federal government owes a duty to protect the interests of the independent and sovereign Indian Nations.[152] It makes sense therefore to treat Indian members of the Native American Church not as members of a distinct racial group, but as members of a people "set apart" culturally and politically who owe no duty to conform to American customs, especially where the failure to follow those customs causes no disruption of White society. The *Woody* court, in fact, recognized the need to preserve the precious heritage of the Indian nations and encouraged the protection of self-expression in the form of peyotism.[153] In this historical and legal context, it is correct to give constitutional validity to the Native American Church's practice of peyotism, while denying protections to non-Indian groups that cannot meet the rigorous constitutional standards.[154]

The Peyote Way Church criticized the traditional federal policy which

146. *See Peyote Way*, 556 F. Supp. at 638.
147. *Id.* at 639.
148. *Id.*
149. *Id.* at 640.
150. *See* American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978).
151. For example, Indians have been allowed to kill eagles and use their body parts in religious ceremonies and to take game out of season for use in certain ceremonial rights. *See, e.g.*, United States v. Thirty-Eight Golden Eagle Parts, 649 F. Supp. 269 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987)(holding that the permit system by which Indians may take and possess eagle parts satisfies the requirement of the Native American Religious Freedom Act); Frank v. State, 604 P.2d 1068 (Alaska 1979)(The Native American practice of providing moose meat at religious funeral ceremonies could not be proscribed without a compelling state interest.). *See also* Morton v. Mancari, 417 U.S. 535 (1974); *infra* notes 154-56 and accompanying text.
152. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (The notion that the United States government should act as a guardian to the less powerful yet sovereign Indian Nations is expressed in this early case.).
153. *Woody*, 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.
154. *See Morton*, 417 U.S. 535.

treats Indian nations as *sui generis*. The Church argued that, in pursuing the goal of becoming a nation free of racial and political barriers, it is more logical to reject separatist notions in favor of accommodation of minority groups into the mainstream, while still protecting the distinct religious and cultural beliefs that are products of a heterogeneous society.[155] In the Peyote Way Church's view, any distinction between itself and the Native American Church violated equal protection. This egalitarian argument is relatively attractive until one realizes that, under federal law, Indian people are not considered a separate racial group, but are instead deemed a separate political group. Therefore, because this distinction fails to create a "suspect class" or even a "quasi-suspect class," traditional equal protection simply does not apply.[156]

The Peyote Way Church appealed the court's decision to treat Indian and non-Indian groups differently.[157] The Fifth Circuit did not rule on the lower court's "separatist" reasoning and remanded the case to determine whether a compelling state interest existed to justify the denial of the Peyote Way Church's exemption.[158] In so doing, the court took pains neither to acknowledge nor deny the unique political status of Indians as recognized by traditional federal Indian jurisprudence.

Clearly, the most tolerable stance is to allow an exemption to the Native American Church considering the unique cultural and political status of Indians. At the same time, non-Indian groups should be granted exemptions not on equal protection grounds, but rather, only when such groups meet the requirements of the traditional constitutional framework as articulated in *Blake*.[159] Under this scheme of analysis, the standard for all groups is the same, quelling equal protection claims. The burden is to demonstrate a bona fide and sincere religious practice that is central to the exercise of the religion and practiced in good faith. That burden is simply met more easily by Indian groups who possess a long history of sacramental drug use that is undeniably unique to their cultural and political posture.

The Employment Cases

Not only have inconsistent judicial decisions pervaded Indian and non-Indian exemption cases, inconsistency is also evident in cases where the religious use of peyote is raised within the context of employment. Frequently, the laws in question are those pertaining to state unemployment compensation practices.[160] The same basic framework used to analyze free exercise claims is also applied to the employment cases. First, the person claiming entitlement to compensation must show that the application of the relevant law significantly burdens the free exercise of a sincerely held religious belief

155. *Peyote Way*, 556 F. Supp. at 638.

156. *See Morton*, 417 U.S. at 551-54.

157. Peyote Way Church of God v. Smith, 742 F.2d 193 (5th Cir. 1984).

158. *Id.* at 202.

159. 695 P.2d 336 (Haw. App. 1985).

160. *See, e.g.*, Warner v. Graham, 675 F. Supp. 1171 (D.N.D. 1987); Smith v. Employment Div., 301 Or. 209, 721 P.2d 445 (1986), *aff'd*, 307 Or. 68, 763 P.2d 146 (1988).

or practice.[161] Once an individual meets this threshold, the state must demonstrate that the constraint on the religious activity is the least restrictive means of achieving a compelling state interest.[162]

The case of *Sherbert v. Verner*[163] illustrates the application of the balancing test in an employment setting. In that case, an employee discharged for her refusal to work on Saturdays was denied state unemployment benefits.[164] The state unemployment board justified its denial, arguing that the refusal to work on Saturdays did not constitute a legitimate reason for failing to find work.[165] The Supreme Court observed that denial of the benefits forced the claimant to choose between following the precepts of her religion and forfeiting her benefits.[166] The government's imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against her for worshiping on Saturdays.[167] The *Sherbert* Court accordingly held that South Carolina must exempt workers with a legitimate religious motivation from its requirement that they be available for Saturday work.[168]

The Court has since reaffirmed *Sherbert* in *Thomas v. Review Board of the Indiana Employment Security Division.*[169] There, the Court held that a Jehovah's Witness who quit his job after being transferred to a department that manufactured munitions could receive unemployment benefits.[170]

Despite the Supreme Court's holdings in *Sherbert* and *Thomas*, courts have ruled that states do not have an obligation to make an individual's exercise of religion entirely cost-free.[171] Nevertheless, the state may not make the exercise of religion unreasonably costly.[172] Thus, the constitutional framework allows for one to exercise a sincerely held religious belief or practice without fear of losing the right to unemployment benefits if discharged for such an exercise. This is true unless the state can demonstrate that the constraint on the religious activity is the least restrictive means of achieving a compelling state interest.[173]

Theoretically, courts should apply the same framework when analyzing similar cases dealing with peyote use by employees. In practice, however, the courts have often failed to do that.

Two recent cases, *Warner v. Graham*[174] and *Employment Division v.*

161. *See* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981).
162. *Id.*
163. 374 U.S. 398 (1963).
164. *Id.* at 399-401.
165. *Id.*
166. *Id.* at 404.
167. *Id.*
168. *Id.* at 410.
169. 450 U.S. 707 (1981).
170. *Id.* at 720.
171. Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1034 (7th Cir. 1982)(Jewish basketball players were not allowed to wear traditional headcoverings during play, but were allowed to propose an alternative headcovering which conformed with Jewish law and met safety requirements.).
172. *Id.*
173. *See Warner*, 675 F. Supp. 1171.
174. *Id.*

Smith,[175] provide an excellent illustration of how the inconsistent application of the constitutional framework for chemical sacrament cases creates inconsistencies in other areas of the law. The common question in both cases was whether an employee, discharged from his job for using peyote in connection with a bona fide religious practice, may receive unemployment benefits.[176]

Warner v. Graham

In *Warner*, the defendant, an alcohol and drug rehabilitation counselor in North Dakota, lost her job because of her admitted use of peyote at religious ceremonies.[177] Following a grievance hearing, the state personnel board recommended that Warner be reinstated to other duties pending a determination of her ability to function effectively as an alcohol and drug counselor.[178] Upon her reinstatement, Warner submitted her resignation and thereafter applied for unemployment benefits. She claimed she was dismissed from her original position for attempting to exercise her religious beliefs and therefore was entitled to benefits even though she had resigned. After the state denied her claim for benefits she brought an action seeking a declaratory judgment that the state violated her right to the free exercise of religion.[179]

In applying the balancing test, the United States District Court for North Dakota held that the state violated Warner's first amendment free exercise rights by requiring that she choose between practicing her religious beliefs and losing her job.[180] The court noted, however, that Warner's reinstatement ended the constitutional violation and that the state was therefore liable only for the period from her termination until her reinstatement.[181] Further, the state's refusal to reinstate Warner to her previous duties was appropriate in light of its compelling interest in the continuing viability of its drug and alcohol education program.[182] Moreover, reinstatement to other duties, not termination, was the least restrictive means available to the state to protect its interests while preserving Warner's first amendment right to practice peyotism.[183]

Warner represents a reasonable application of the balancing test. However, some aspects of the case warrant criticism. For instance, although the state did not force Warner to choose between her religious beliefs and no job at all, it did force her to choose between practicing her religion and her chosen profession. Her education and training was in drug and alcohol counseling. Reinstatement to other duties is hardly an adequate remedy in this situation. Furthermore, if the state protects the right to use peyote in connection with the exercise of religion, it can not logically deny an individ-

175. 301 Or. 209, 721 P.2d 445 (1986).
176. *Id.* at 211, 721 P.2d at 445; *Warner*, 675 F. Supp. at 1174.
177. *Warner*, 675 F. Supp. at 1173.
178. *Id.* at 1174.
179. *Id.* at 1172.
180. *Id.* at 1178.
181. *Id.*
182. *Id.* at 1179.
183. *Id.*

ual the right to employment in a given field because of the exercise of that right. This is especially true if it cannot point to some identifiable public harm. For example, there are effective alcohol abuse counselors who drink, perhaps even to the point of intoxication on occasion, yet few would say these non-addicted persons should be prevented from counseling alcoholics. Apparently, the court in *Warner* was unwilling to recognize the obvious and crucial disparity between use and abuse. Warner's use of peyote was not shown to impair her ability to act as a drug counselor, nor was her use of the drug shown to be abusive.[184] Moreover, peyote has not been found to be addictive.[185]

Employment Division v. Smith

In *Smith*,[186] the Oregon court reached a very different result. The state discharged the plaintiffs from their positions as drug and alcohol counselors for ingesting small amounts of peyote during a religious ceremony of the Native American Church.[187] The state denied them unemployment benefits under an Oregon statute disqualifying employees discharged for work-related misconduct. The only asserted state interest was the state's financial commitment in paying unemployment benefits to the counselors. In applying the federal constitutional standard adopted in *Sherbert* and *Thomas*,[188] the Oregon Supreme Court held this interest less than compelling when balanced against the individual religious interest at stake. The court overruled the state's withholding of benefits, reasoning that such a decision was proper under Oregon state law but not under the federal test.[189] While the *Smith* court acknowledged that the ruling denying benefits violated the free exercise clause,[190] it observed that the plaintiffs' entitlement to unemployment benefits must be determined with reference to the state unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote.[191] Thus, the Oregon court successfully dodged the issue of the constitutionality of peyotism by basing its decision on the state's unemployment laws.[192]

Smith was appealed to the United States Supreme Court[193] which held that a necessary predicate to a correct evaluation of the plaintiff's federal claim is an understanding of the legality of his or her conduct under state law.[194] Since Oregon law prevented the use of peyote for religious purposes, a prohibition that may be consistent with the federal constitution, then there was no federal right to engage in such conduct in Oregon, and Oregon was

184. There was no showing that she was any more impaired than if she had sipped sacramental wine on Sundays.
185. *See Woody*, 61 Cal. 2d at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.
186. 301 Or. 209, 721 P.2d 445 (1986).
187. *Id.* at 211, 721 P.2d at 446.
188. *See supra* notes 61-170 and accompanying text.
189. *Smith*, 301 Or. at 216-17, 721 P.2d at 449.
190. *Id.*
191. *Id.* at 219, 721 P.2d at 450.
192. *Id.*
193. Employment Div. v. Smith, 108 S. Ct. 1444 (1988).
194. *Id.* at 1452.

free to withhold unemployment compensation from the counselors.[195]

With this decision, the Court avoided giving any guidance whatsoever regarding the constitutionality of peyotism. By refusing to decide the relevant constitutional issues, the Court only increased the confusion of the state courts. Clearly, peyote use, even for religious purposes, is illegal in Oregon. Therefore, the Court reasoned, the state's decision to deny benefits should stand. On the other hand, the Oregon Supreme Court determined that the religious use of peyote was protected by the federal Constitution.[196] If this is true then Oregon's decision to deny benefits violates constitutional standards and should be overturned. The Court's decision, therefore, creates a paradox. Moreover, the Court had the opportunity to determine the constitutional issue of the religious use of peyote, but declined to do so.

Toledo v. Nobel-Sysco, Inc.

Toledo v. Nobel-Sysco Inc. further compounded the confusion in the state of the law.[197] Toledo, a member of the Native American Church, brought a discrimination claim against Nobel for its refusal to hire him as a truck driver because of his religious use of peyote.[198] The issue before the court was whether an employer's duty to accommodate an employee's religious practices extends to hiring a truck driver whose religious practices may present a safety hazard to the public.[199] Nobel vigorously argued its case, citing regulations prohibiting the operation of a motor vehicle while under the influence of drugs.[200] Additionally, Nobel was concerned about the possible imposition of negligent entrustment liability for hiring a known drug user.[201]

Toledo, however, convinced the court that the accommodation of his religious practices would not present a safety threat to the public.[202] The court found that the New Mexico Department of Transportation regulation prohibiting the use of drugs while operating a motor vehicle did not prohibit the possession or use of peyote while off-duty.[203] The court dispelled Nobel's claim of potential increased liability by holding that the religious use of peyote was not illegal and that Toledo would not likely be on duty while under the influence.[204] According to the court, Nobel could accommodate Toledo's drug use without fear of increased liability, by requiring him to take off the day following his peyote use.[205] Furthermore, such accommodation did not constitute an undue hardship on the company. Therefore, the initial decision not to hire Toledo because of his religious use of peyote was

195. *Id.*
196. *Smith*, 301 Or. at 218, 721 P.2d at 449.
197. 651 F. Supp. 483 (D.N.D. 1986).
198. *Id.* at 485.
199. *Id.*
200. *Id.* at 489.
201. *Id.* at 491.
202. *Id.* at 489.
203. *Id.* Alcohol provides a useful analogy here. One may use alcohol while off-duty, but driving while under its influence is strictly forbidden.
204. *Id.* at 491.
205. *Id.* at 489.

discriminatory.[206]

The employment cases display the inconsistent application of the standard of review for cases involving the religious use of peyote. In New Mexico, the courts have gone so far as to require the employer to accommodate the practice of peyotism unless he can show an undue hardship.[207] In contrast, in North Dakota, one may not be terminated for exercising the recognized first amendment right to use peyote for religious purposes.[208] However, one may be precluded from participating in certain professions if the court finds incompatibility between peyote use and tasks required in the job.[209] Finally, in Oregon, one may be terminated and denied unemployment benefits for the religious use of peyote so long as Oregon state law prohibits the religious use of peyote and the prohibition is not unconstitutional under federal standards.[210] This spectrum of inconsistent decisions demonstrates how the constitutional standard governing employment cases is being applied inequitably.

CONCLUSION

There is no question that the pervasive use of drugs in the United States presents important ethical and social problems. It is also clear that the state bears considerable responsibility for the development and implementation of potential solutions to these problems. The cases discussed in this Note illustrate the inconsistency prevalent in the state courts' attempts to address religious drug use.[211]

It is undeniable that evolution in law is an on-going process and what are first viewed as inconsistencies are perhaps merely stages in the law's development. However, if the law is continuing to evolve, the injection of new criteria and issues is expected. As this Note demonstrates, in the case of the first amendment framework for dealing with chemical sacrament cases, no influx of new standards is evident. Rather, the standard remains the same in recent cases.[212] Variation has emerged only in the application of the standard.

The resulting inconsistent caselaw is particularly troubling when viewed within the context of the fundamental first amendment right of freedom of religious expression. This is an area where uniform and equitable application is crucial and expected. Unfortunately, uniformity has not resulted and the right to exercise one's religion freely is threatened. Furthermore, and perhaps even more disturbing, is the refusal of the Supreme Court to cure these inequities by failing to give sufficient guidance to the lower courts. Thus, the issue of whether the constitution protects the use of peyote within the context of a sincerely held religious practice or belief that is central to the expression of a religion is continually circumvented in both the state and

206. *Id.* at 491-92.
207. *Id.* at 492.
208. *See Warner*, 675 F. Supp. at 1182.
209. *Id.* at 1179.
210. *See Smith*, 301 Or. at 216, 721 P.2d at 445-49.
211. *See supra* notes 92-210, *infra* notes 212-13 and accompanying text.
212. *See supra* notes 92-210 and accompanying text.

federal arena. Also contributing to the confusion are the differences between states' tolerances of religious practices outside the American mainstream. This is especially evident where those practices involve the use of otherwise illegal drugs.

Many of the decisions are difficult to justify. Often, religious claims are not taken seriously and are summarily dismissed without even weighing them against the interests of the state. In other cases, the state's interest is not clearly articulated or is given a nebulous definition. In *Woody*, for example, the state argued that peyote use obstructed enlightenment and shackled the Indian to primitive conditions.[213] Statements such as this serve to exemplify the ethnocentric state of first amendment jurisprudence.[214] After all, those strong yet undefined assertions came from a representative of the same culture "enlightened" enough to subjugate an entire race of people using tactics such as genocide, deception, and fraud. The current state of the law is nearly impossible to articulate beyond noting that, in some jurisdictions, peyotism among members of the Native American Church is permitted and in others it is not. Although the Constitution itself remains unchanged regarding peyote use, it apparently takes on different meanings depending upon the jurisdiction, facts and group seeking its protection. A right so precious and fundamental as the free exercise of religion cries out for more consistent application. A workable framework that can be consistently applied in all religious freedom cases involving drugs exists and should be employed.[215] Nevertheless, even when presented with the opportunity, the Supreme Court has declined to settle the issue of the constitutionality of peyotism and the appropriateness of applying that framework to chemical sacrament cases.

213. *Woody*, 61 Cal. 2d at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.

214. One plausible theory is that judges often protect only that which is familiar to them. Thus, the ethnocentricity of first amendment jurisprudence is likely the result of the dominance of mostly Christian peoples in the United States judiciary. Apparently, a vast majority of the judiciary is ignorant of indigenous American culture and religion. As a result, when Indian beliefs are translated into more mainstream ideals, such as presenting the peyote sacrament as synonymous to the Catholic ritual of taking the blood and body of Christ, they are viewed more favorably by the courts. This concept was tacitly referred to in *Woody*, 61 Cal. 2d at 721, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74. Unfortunately, even when efforts are made to overcome the lack of judicial understanding of the Indian religion, many courts still refuse to acknowledge the right of Indians to practice peyotism.

215. *See Blake*, 695 P.2d 336 (Haw. App. 1985).