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Extra Legal

Checkpoint Consciousness: Exploring Legal Limitations and Inconsistencies in the Religious Use of Entheogenic Drugs

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I. Introduction

Over the past several decades, the legal status of the use of drugs for religious purposes has fluctuated. Some religions employ various intoxicating substances to communicate with God or gods, to promote spiritual growth and contemplation, or to receive visions. Because possession of many of these drugs is criminalized, a growing number of legal cases address the opposing interests of the government and the individuals who use drugs for religious purposes. These cases have so far primarily concerned the use of psychedelic drugs such as mescaline (found in peyote) and dimethyltryptamine ("DMT") (found in ayahuasca tea). While precedent in these cases may apply to related psychedelic

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drugs—such as psilocybin mushrooms—litigation concerning other substances—such as marijuana—has proven less successful.

When addressing cases concerning the use of drugs for religious purposes, federal courts have engaged in constitutionally impermissible analyses in their treatment of different substances. The approach taken by the courts in their legal analysis of these issues demonstrates two critical problems. First, contrary to the directives of the Supreme Court, federal courts frequently fail to incorporate scientific data into their decisions when determining the dangerousness and abuse-potential of drugs, relying instead on judges' unsubstantiated opinions. Second, federal courts regularly flout the Supreme Court's repeated admonitions that the First Amendment precludes court inquiry into the *legitimacy* of a religion, only allowing inquiry into the *sincerity* of a belief when an individual claims that their actions are protected by the First Amendment. This failure to abide by the Court's rulings results in a breakdown of the very meaning of religious freedom, resulting in certain religions being state-sanctioned and leaving other religions without any legal protection.

II. Background

A number of religions feature the use of psychoactive drugs (often referred to as "entheogens" when used in the context of religious ceremonies).[1] Research studies indicate that psychedelics can, in fact, induce distinctly religious experiences.[2] When administered psychedelics, between 25% and 33% of the general population will have a religious

[1] Huston Smith, *Do Drugs Have Religious Import?*, 61 J. PHIL. 517, 518–20 (1964).

[2] *Id.* at 520–21.

experience.[3] Among subjects who report high religiosity already, this number jumps to 75%.[4] If those subjects also take these drugs in a religious setting, the number soars to 90%.[5]

In a Harvard University study, researchers administered psilocybin (the active psychedelic compound in "magic mushrooms") to theology students and professors during a Good Friday service.[6] Conducted as a double-blind study, neither the subjects nor the researchers knew which subjects received psilocybin and which received placebos.[7] Each subject was asked to write about their experience during the service.[8] Researchers gave these statements to another set of subjects, who, with no other information on the study, rated the religiosity of the statements.[9] The results indicated higher degrees of religiosity in the subjects who consumed psilocybin.[10]

Due to its unique legal status, the historically spiritual use of one drug in particular bears singling out. For thousands of years, indigenous North Americans have used peyote in religious ceremonies.[11] A cactus plant native to the southwestern United States and northern Mexico, peyote cacti "buttons" contain mescaline, a psychoactive drug. These indigenous groups consume the buttons because they "produce[] a distinctive sensation of spiritual exaltation" and help them communicate

[3] *Id.* at 520.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 521.

[7] *Id.* at 520.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 521.

[11] ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 79 (2004).

with God and the spirit world.[12]

Although originally used only by Natives[13] indigenous to the deserts where peyote grows, the practice spread to other Native groups around the time the federal government set up reservations in the late nineteenth century.[14] A pan-tribal peyotist organization, the Native American Church (NAC), emerged in 1918 in part to help its members access peyote for sacramental use.[15]

The use of peyote may have positive effects for members of the NAC. For instance, anthropologists have noted that members of the NAC have lower rates of alcoholism than similarly-situated nonmembers.[16] Furthermore, evidence does not indicate negative health effects from the use of peyote.[17]

III. Statutory, Regulatory, and Common Law Framework

Despite the lack of research indicating the risks of consumption, the United States government classifies peyote as a Schedule I substance, placing it on par with heroin.[18] As a Schedule I substance, the federal government considers peyote to have the highest risk of abuse, to have no accepted medical use, and to be dangerous.[19] However, the historical use of peyote by Native tribes has resulted in continuously evolving statutory

[12] *Id.* at 78–79.

[13] For the purposes of uniformity, the diverse indigenous groups of the United States and their members will be referred to as Native throughout this essay (except where directly quoting sources that refer to them otherwise) and all others as non-Native.

[14] RENTELN, *supra* note 11, at 79.

[15] *Id.*

[16] Smith, *supra* note 1, at 529.

[17] John Horgan & Jennifer Tzar, *Peyote on the Brain*, DISCOVER MAG., Feb. 1, 2003, at 2, 4–5.

[18] 21 U.S.C. § 812(c) (2019).

[19] Controlled Substances Act, 21 U.S.C. § 812 (2019); RE1 U.S, *supra* note 11, at 79.

and common law exemptions.

First, the American Indian Religious Freedom Act (AIRFA), passed in 1978, permitted "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."[20] A similar regulatory exemption exists in the Code of Federal Regulations, though it specifically refers to the Native American Church rather than to members of a Native tribe.[21]

However, AIRFA took a significant hit in 1990 after the Supreme Court's *Employment Division v. Smith* decision.[22] *Smith* involved two Native plaintiffs, both members of the NAC, who were fired from their jobs when their employer learned that they had consumed peyote at a religious ceremony outside of work.[23] Plaintiffs applied for state unemployment benefits, but Oregon denied them on the grounds that state law criminalized peyote possession.[24] The Supreme Court ruled against the plaintiffs, finding that the law did not unconstitutionally target the NAC and applied equally to everyone.[25] Prior to this case, courts analyzed laws infringing on religious rights under the "strict scrutiny" standard, the highest standard of judicial review.[26] Under this standard, the law must be justified by a "compelling" government interest

[20] 42 U.S.C. § 1996a (2019).

[21] 21 C.F.R. § 1307.31 (2019).

[22] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[23] *Id.* at 874.

[24] *See id.* at 876 (unlike federal law, the Oregon law contained no exception for the NAC).

[25] *Id.* at 877–79.

[26] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (discussing the three levels of judicial scrutiny: rational basis, intermediate, and strict).

and must be "narrowly tailored" to achieve that interest.[27] In *Smith*, however, the Court decided to lower the standard of review to rational basis, which requires only that the law is "rationally related" to a "legitimate" government interest.[28]

In response to this decision, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[29] RFRA requires that free exercise claims (i.e. where a person claims that their actions are an exercise of their religion and are protected by the First Amendment) be examined under the strict scrutiny standard, requiring once again that the law be narrowly tailored to achieve a compelling government interest—even where the law is neutral and targets no particular group.[30] Implementing this exceptionally demanding balancing test,[31] RFRA essentially restored the standard for free exercise claims to the strict scrutiny standard in place prior to *Smith*. Although held unconstitutional when applied to the states in *City of Boerne v. Flores*,[32] the federal government remains bound by RFRA.[33]

In spite of this increased standard, drug-related challenges under

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[27] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("When . . . [an] action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

[28] *See Smith*, 494 U.S at 885; RENTELN, *supra* note 11, at 80.

[29] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2019).

[30] *Id.*

[31] GEORGE BLUM ET. AL, 16A AM. JUR. 2D CONSTITUTIONAL LAW § 446, 4 (2018).

[32] City of Boerne v. Flores, 521 U.S. 507, 533 (1997) ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.").

[33] Mark R. Brown, *Marijuana and Religious Freedom in the United States*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE, 45-64, 54 (Beatriz Caiuby Labate & Clancy Cavnar eds., 2014).

RFRA and the Free Exercise Clause frequently fail, particularly where the challenger is non-Native or where the drug in question is not peyote.

IV. Application of the Framework

Generally speaking, the strict scrutiny test weighs the individual's (or institution's) free exercise rights against the government's interest in prohibiting the drug's use in such circumstances.[34] Typically, the government argues an interest in safety—safety of either the individuals using the drugs for religious purposes or the recreational users who may obtain the drug from the religious users.[35]

The following subsections will examine application of the RFRA to peyote, ayahuasca, and other drugs.

A. Peyote

Because of its ancient use by Native religions and the resulting AIRFA and regulatory exemptions, peyote is among the most litigated entheogens. In 1972, the Church of the Awakening, a non-Native church, sought protection under the peyote exemption.[36] Although the government conceded that the Church was a valid religious organization and that peyote use was a bona fide part of their religion, they attempted to distinguish the NAC from the Church of the Awakening because the latter was not a traditionally Native church.[37] They argued that a number

[34] Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003).

[35] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 426 (2006); United States v. Christie, 825 F.3d 1048 (9th Cir. 2016); Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1220-21 (D. Or. 2009), *vacated in part on other grounds*, Church of the Holy Light of the Queen v. Holder, 443 F. App'x (9th Cir. 2011).

[36] Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415, 415–16 (9th Cir. 1972).

[37] *Id.* at 416.

of laws and regulations treat Natives and non-Natives differently because the government has a special relationship with Native tribes, contending that AIRFA was no exception.[38] However, the court failed to find that the exemption served the government's interest: "We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it has in protecting the health of non-Indians."[39] The court found that the regulation was an arbitrary classification.[40] The court, however, declined to rule for the church—apparently concerned that if they extended the exemption to the Church of the Awakening, they would be forced to also include less sincere religious institutions or risk other constitutional challenges.[41]

Seven years later, a New York district court extended the exemption's reach. In *Native American Church of New York v. United States*, the Native American Church of New York ("NACNY") petitioned the Drug Enforcement Agency ("DEA") for the right to use peyote in religious ceremonies under the peyote exemption.[42] Contrary to its name, most members of the NACNY were non-Native.[43] Citing the legislative history of the peyote exemption, the district court held that the

[38] *Id.*

[39] *Id.* at 417.

[40] *Id.*

[41] *See id.* ("Petitioners' effort to expand the regulation to include the Church of the Awakening avoids the classification it has attacked, but it suffers the same constitutional infirmity as the present regulation. As petitioners would amend the regulation, it would create one classification for its church and the Native American Church, both of which would be exempt, and a second classification for all other churches that use peyote in bona fide religious ceremonies, which would be nonexempt. The new classification fares no better constitutionally than the old one.").

[42] Native Am. Church of N.Y. v. United States, 468 F. Supp. 1247, 1248 (S.D.N.Y. 1979).

[43] *Id.* at 1248.

exemption applies to all bona fide religious organizations that use peyote for religious purposes, including the NACNY, so long as the religion believes that peyote itself is a deity.[44] If a religion recognizes peyote as a deity, the court reasoned, then its consumption qualifies as a central part of the religion and government prevention of such consumption constitutes a substantial burden on their right to freely exercise their religion.[45]

Peyote Way Church of God, another non-Native church, was less successful. Decided after *Smith* but prior to the enactment of RFRA, the Fifth Circuit scrutinized the *Peyote Way* case under a rational basis standard.[46] The court held that the peyote exemption as applied only to the NAC is rationally related to "the legitimate governmental objective of preserving Native American culture."[47] Therefore, the court ruled that the peyote exemption applied only to traditional Native religions.[48]

However, in *United States v. Boyll*—a case that, like *Peyote Way*, was decided between *Smith* and RFRA—the Tenth Circuit alternatively upheld the dismissal of an indictment against the non-Native defendant for possession of peyote.[49] Boyll, a non-Native member of the NAC for over a decade, mailed peyote from Mexico to his home in New Mexico.[50] After he was indicted, Boyll argued that the regulatory exemption for the NAC

[44] *Id.* at 1251.

[45] *Id.*

[46] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

[47] *Id.*

[48] *Id.*

[49] United States v. Boyll, 968 F.2d 21 (10th Cir. 1992).

[50] *Id.* at *1.

applied to him and moved to dismiss the case.[51] Unlike the Fifth Circuit in *Peyote Way,* the Tenth Circuit agreed with the lower court's finding that most chapters of the NAC do not exclude members based on race and that non-Native members like Boyll are accepted.[52] The court quoted with approval of the lower court's opinion:

> To exclude individuals of a particular race from being members of a recognized religious faith is offensive to the very heart of the First Amendment. . . . In fact, there can be no more excessive entanglement of Government with religion than the government's attempt to impose a racial restriction to membership in a religious organization. The decision as to who can and who cannot be members of the Native American Church is an internal church judgment which the First Amendment shields from governmental interference.[53]

If the government effectively prevented Boyll from being a member of the NAC by prohibiting him from using peyote, they would substantially burden his free exercise rights.[54] Because the government failed to provide any evidence demonstrating the dangerousness of peyote, the court could not "simply assume that the psychedelic is so baneful that its use must be prohibited to a group of [non-Indian] members but poses no equal threat when used by [Indian] members of the Native American Church."[55]

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[51] *Id.*

[52] *Id.* at *5.

[53] *Id.* at *3 (citations omitted).

[54] *Id.* at *4.

[55] *Boyll*, 968 F.2d at *4 (quoting Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193, 201 (5th Cir. 1984)).

B. Ayahuasca

Ayahuasca, also referred to as "hoasca" or "yage," is a drink or tea composed of several plants which together produce psychoactive effects.[56] Because ayahuasca contains DMT (a Schedule I substance), possession is illegal.[57] Plant-based and used by indigenous groups for religious purposes for centuries, ayahuasca is in many respects similar to peyote.

A 2006 Supreme Court case offers modest hope that ayahuasca may be the entheogen which cracks open the peyote exemption to other similarly used substances.[58] In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the plaintiff, a church in New Mexico, sued the DEA for the right to use ayahuasca in their ceremonies after U.S. Customs seized a large quantity of the church's ayahuasca tea.[59] Uniao Do Vegetal ("UDV") was an offshoot of a religion based in Brazil.[60] While conceding that the UDV's use of ayahuasca constituted a sincere exercise of religion, the government maintained that they had compelling interests in the uniform application of the Controlled Substances Act, in protecting the health and safety of UDV members, and in preventing the diversion of ayahuasca to recreational users.[61] In response, the UDV cited studies indicating the lack of significant side effects from ayahuasca and emphasized the relatively small recreational market for the drug, the small amount

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[56] Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009), *vacated in part on other grounds sub nom.* Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011).

[57] 21 U.S.C. § 812 (2019).

[58] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[59] *Id.* at 425–26.

[60] *Id.* at 425.

[61] *Id.* at 426.

imported by the church, and the lack of diversion problems in the past.[62]

The Court rejected the government's claims.[63] First, the Court determined that the existing peyote exemption inherently disproved the government's claim that they had an interest in a "uniform application" of the Controlled Substance Act.[64] Second, the Court found that the simple fact of ayahuasca's classification as a Schedule I drug did not demonstrate its inherent dangerousness.[65] Accordingly, the Court affirmed the lower court's decision, granting a preliminary injunction for the UDV against the government, noting:

> We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one . . . but Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.[66]

Another case involving the use of ayahuasca, though by a different religious institution, yielded a similar outcome. In *Church of the Holy Light of the Queen v. Mukasey*, the plaintiff, a branch of another Brazilian religion, sued for the right to use ayahuasca in religious ceremonies after the church's leader was arrested and the government seized a quantity of ayahuasca tea from the church.[67] Finding that consumption of ayahuasca

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[62] *Id.*

[63] *Id.* at 434, 439.

[64] *Id.* at 434.

[65] *Id.* at 439.

[66] *Id.*

[67] Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009), *vacated in part on other grounds sub nom.* Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011).

was a central part of the Church of the Holy Light of the Queen ("CHLQ") religion and that the church could not exist without the tea, the court held that prohibiting members from consuming the tea would thus substantially burden their religion.[68]

Having established the burdening of rights, the court then examined government interests at stake—primarily, their interests in promoting the health of CHLQ members who consume the tea and in preventing diversion to non-members for recreational use.[69] Considering these claims in light of evidence presented by the CHLQ that no CHLQ members or members of the Brazilian parent religion had suffered ill effects from the tea,[70] that the religion's strict admittance rules meant that diversion to non-members was unlikely,[71] and that ayahuasca had a low potential for danger or abuse,[72] the court found that neither of these government interests were sufficiently compelling under *Gonzales*.[73]

C. Other Drugs: Marijuana and Heroin

Courts have been less open to other drugs in free exercise cases. Many such decisions focus on the dangerousness of drugs or the potential for abuse.[74] Other decisions focus on the centrality of the drug's use to

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[68] *Mukasey*, 615 F. Supp. 2d at 1219.

[69] *Id.* at 1219–20.

[70] *Id.* at 1215.

[71] *Id.* at 1216–20.

[72] *Id.* at 1216, 1218.

[73] *Id.* at 1211–12.

[74] *See, e.g.*, United States v. Anderson, 854 F.3d 1033 (8th Cir. 2017) (risk of heroin establishes the governmental interest in preventing its use); United States v. Christie, 825 F.3d 1048 (9th Cir. 2016) (risk of diversion to recreational users was high because marijuana has a larger market than peyote or ayahuasca); Whyte v. United States, 471 A.2d 1018 (D.C. 1984) (same); McBride v. Shawnee County, 71 F.Supp.2d 1098 (D. Kan. 1999) (same).

the religion.[75]

Some courts, however—notably the Tenth Circuit, though others have also approached the question—have looked away from the drug itself and have focused on an entirely different issue: whether or not the religion in question is "legitimate."[76] In *United States v. Meyers,* the defendant was charged with conspiracy to possess with intent to distribute and conspiracy to distribute marijuana, but argued that the First Amendment protected his actions because he possessed and distributed the drugs as part of his religion.[77] The Tenth Circuit adopted the lower court's test to analyze whether a claimed religious belief is part of a legitimate religion such that it warrants protection from the Free Exercise Clause.[78] The court examined the following factors, or "indicia of religion": (1) whether the religion involves "ultimate ideas"; (2) incorporates "metaphysical beliefs"; (3) has a moral or ethical system; (4) has a "comprehensive" set of beliefs; and (5) whether the proposed religion has the typical "accoutrements of religion," namely (a) a founder, prophet, or teacher; (b) important writings; (c) gathering places; (d) "keepers of knowledge"; (e) ceremonies and rituals; (f) structure or

[75] *See, e.g.*, United States v. Barnes, 677 F. App'x 271 (6th Cir. 2017) (holding that there is no substantial burden where religion incorporated marijuana in a few but not most ceremonies); Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012 (9th Cir. 2016) (holding that there is no substantial burden where cannabis was only a substitute for the primary sacrament, peyote).

[76] United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996); Sutton v. Rasheed, 323 F.3d 236, 251, 251 n. 30 (3d Cir. 2003) (stating, "[w]e have tried our hand at defining 'religion'" and describing the three indicia of religion as "(1) an attempt to address 'fundamental and ultimate questions' involving 'deep and imponderable matters'; (2) a comprehensive belief system; and (3) the presence of formal and external signs like clergy and observance of holidays").

[77] *Meyers*, 95 F.3d at 1479.

[78] *Id.* at 1483–84.

organization; (g) holidays; (h) diet or fasting; (i) appearance and clothing mandates; and (j) involves its members propagating the religion.[79]

Another Tenth Circuit case, *United States v. Quaintance,* illustrates how courts apply this test.[80] After being charged with possession and intent to distribute marijuana, the Quaintances, leaders of the Church of Cognizance, argued that their use of marijuana qualified as a legitimate exercise of their religion.[81] The court applied the *Meyers* test to determine whether the religious beliefs in question were legitimate such that they were protected by the Free Exercise Clause.[82] The court found that the church minimally satisfied the "metaphysical beliefs" factor (the Quaintances believed cannabis to be part of the spiritual force).[83] However, the Church did not satisfy the "ultimate ideas" factor (their beliefs were confined to material world and church members were entitled to their own beliefs of the afterlife);[84] have an ethical or moral system (where a phrase alone does not constitute a moral system, their moral system was confined only to the belief that "having good thoughts, produces good words, produces good deeds");[85] have comprehensive beliefs (religion was monofaceted in that it centered around marijuana);[86] or have "accoutrements of religion."[87] The only "accoutrements of religion" subfactor that the Church satisfied was that for a

[79] *Id.*

[80] United States v. Quaintance, 471 F. Supp. 2d 1153 (D.N.M. 2006).

[81] *Id.* at 1155.

[82] *Id.* at 1155–70.

[83] *Id.* at 1159.

[84] *Id.* at 1156–58.

[85] *Id.* at 1160–61.

[86] *Id.* at 1162.

[87] *Id.* at 1164–70.

founder/teacher (the Quaintances were regarded as prophets or teachers).[88] The subfactors not satisfied included: important writings (court decided the church's "bible" was not a sacred book); gathering places (no central place where members gathered; rather each member's residence was an "individual orthodox member monastery"); ceremonies and rituals (none offered by the Quaintances); holidays (same); diet or fasting (no evidence members were required to fast or eat a certain diet); appearance and clothing (no restrictions other than wearing what is "appropriate"); and propagation (one of Quaintances specifically testified that members of the church "are not out proselytizing").[89] Based on the fact that the Quaintances had marginally satisfied only one factor (and marginally at that), the court held that the defendants' beliefs were not a "religion" and therefore merited no free exercise protections.[90]

V. Problems with the Courts' Approach to Claims for Substance-Use Protection under the First Amendment

The diverse and, at times, inconsistent ways in which federal courts handle different religions and substances merit exploration. Some of these inconsistencies are probably explained by regional or cultural biases of judges—areas with diverse religions may be more receptive to, and more willing to accommodate under the law, the unfamiliar practices of others.

Academics also identify another possible explanation—the historical tradition attached to certain entheogens in particular religions

[88] *Id.* at 1164, 1166.

[89] *Id.* at 1166–70.

[90] *Id.* at 1170.

and the relatively new introduction of others.[91] Peyote, ayahuasca, and marijuana are all organic drugs with mild hallucinogenic effects, are neither narcotics nor stimulants, and do not seem to be generally dangerous drugs.[92] Peyote and ayahuasca, however, have been far more accepted by the courts.[93] This is possibly due to the ancient roots of peyote and ayahuasca in their respective religions whilst marijuana does not have as visible a lengthy history as an entheogen.[94] Free exercise cases concerning marijuana largely concern younger religions rather than ancient traditions.[95]

As discussed in several of the cases mentioned above, courts express concern when the drug in question is commonly used recreationally.[96] Peyote and ayahuasca have some unpleasant side effects

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[91] BROWN, *supra* note 33, at 56.

[92] *Id.*

[93] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); United States v. Boyll, 968 F.2d 21 (10th Cir. 1992); Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009), *vacated in part on other grounds*, Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011); Native Am. Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979).

[94] There is evidence marijuana was used in ancient times as an entheogen in the Middle East and Southern Asia, but few cases have been litigated by religious groups with ancient roots in cannabis. *See* Smith, *supra* note 1 at 518; Mia Touw, *The Religious and Medicinal Uses of Cannabis in China, India and Tibet*, 13 J. PSYCHOACTIVE DRUGS 23 (1981).

[95] United States v. Christie, 825 F.3d 1048, 1052 (9th Cir. 2016); McBride v. Shawnee Cty., 71 F. Supp. 2d 1098 (D. Kan. 1999); Whyte v. United States, 471 A.2d 1018 (D.C. 1984).

[96] United States v. Carlson, 959 F.2d 242 (1992) (comparing the greater risk for recreational use of marijuana as compared to peyote); United States v. Anderson, 854 F.3d 1033 (8th Cir. 2017) (explaining that the increased risk of heroin increases the governmental interest in preventing its use); *Christie*, 825 F.3d at 1048 (emphasizing that the risk of diversion to recreational users was high because marijuana has a larger market than peyote or ayahuasca); *McBride*, 71 F. Supp. 2d 1098 (emphasizing that the risk of diversion to recreational users was high because marijuana has a larger market than peyote or ayahuasca); *Whyte*, 471 A.2d 1018 (emphasizing that the risk of diversion

that make it less appealing for use than marijuana and thus less likely recreational users will seek them out. In addition, marijuana has broader market potential than peyote or ayahuasca.[97] Such discussions suggest that courts are concerned about the consequences of permitting any number of cannabis-centered religions to import and possess marijuana legally.

Regardless of the reasons behind the haphazard way of handling these cases, the current system poses some serious rights-infringing issues. These issues are explored more fully below.

A. Inquiries into the Validity of Religious Beliefs

Courts regularly make invasive and unconstitutional inquiries into the validity of certain religious beliefs.[98] When the legitimacy of a religion is left to the whim of judges with personal prejudices, freedom of religion loses its meaning. If only certain religions—ones which are mainstream or resemble mainstream religions enough to satisfy a panel of judges—merit the protection of the First Amendment, then the Free Exercise and Establishment Clauses are empty parchment.

The Supreme Court acknowledges this problem and has, in several cases, expressly forbidden courts to examine whether a religious belief itself is legitimate.[99] These cases make it clear that the Supreme Court understands the concept of "religion" broadly—recognizing anything

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to recreational users was high because marijuana has a larger market than peyote or ayahuasca).

[97] BROWN, *supra* note 33, at 61.

[98] Thomas v. Review Bd. of the Ind. Emp't. Sec. Div., 450 U.S. 707, 714–15 (1981); United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78, 86 (1944).

[99] *Thomas*, 450 U.S. at 714–15; *Seeger*, 380 U.S.163; *Ballard*, 322 U.S. at 86.

from belief in a supreme being too ethical or moral guiding beliefs.[100]

But the Court has gone even further than defining religion and has prohibited courts from forcing individuals to prove their religion's legitimacy.[101] In *Thomas v. Review Board of the Indiana,* the Court soundly rejected the Indiana Supreme Court's attempt to determine the philosophical soundness or internal consistency of the beliefs of a Jehovah's Witness:

> However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection . . . We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[102]

In the earlier case of *United States v. Ballard,* the Court reiterated the importance of refraining from demanding believers from justifying their belief:

> It embraces the right to maintain theories of

[100] *Ballard*, 322 U.S. at 86.

[101] *Thomas*, 450 U.S. at 714–15; *Ballard*, 322 U.S. at 86; *see* United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) ("[T]his question is a matter of delicacy and courts must be ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.").

[102] *Thomas*, 450 U.S. at 714–15.

> life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."[103]

But this strict admonition of the Court has been lost in translation in the lower courts, which have employed, with great creativity, means of shrouding this forbidden inquiry with acceptable language around the "sincerity" of the beliefs.[104] This technique is especially effective with non-traditional or emerging religions which, under the Supreme Court's clear directive, are no less worthy of First Amendment protection even if they offend the doctrines of traditional orthodoxy.[105] Take, for example, Rastafarianism, a religion that emerged in mid-twentieth century Jamaica.[106] Even though Rastafarianism has used marijuana for religious purposes since its inception, their bids for marijuana use have soundly failed.[107]

Even relatively accepted religions may fail such narrow and Christianized understandings of religion under the factors set out in *Meyers*. The Religious Society of Friends, commonly known as Quakerism,

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[103] *Ballard*, 322 U.S. at 86–87.

[104] BROWN, *supra* note 33, at 49.

[105] *Id.*

[106] *See generally* D.A. Dunkley, *The Politics of Repatriation and the First Rastafari, 1932–1940*, 20 SOULS 178-197 (2018).

[107] *See* RENTELN, *supra* note 11, at 82.

is a nearly 400 year-old religious institution but is still unlikely to pass muster under the *Meyers* test. A theologically diverse group, Quakers' beliefs may range from Evangelical Christianity to no recognition of a distinct supreme being at all.[108] Quakerism typically rejects hierarchical structures and obligatory beliefs.[109] The religion does not recognize holidays and encourages members to treat every day as equally worthy of attention.[110] Their ethical system primarily focuses on guidance from one's own conscience rather than a set of rules.[111] Quakerism, a centuries-old (and much persecuted) religion, would thus fail the following *Meyers'* factors: "ultimate ideas;" moral or ethical system; comprehensive set of beliefs; and "accoutrements of religion" (by failing to pass the subfactors of: founder or prophet; hierarchy; ceremonies and rituals; structure or organization; holidays; diet; and appearance and clothing, as well as arguably "important writings" and "propagation").[112]

Nor, arguably, should the result of a free exercise case hinge on the age or popularity of a religion or its traditions. The plaintiff in *Thomas*, for instance, espoused a belief which, according to other Jehovah's Witnesses who testified, was non-standard in the religion.[113] The Supreme Court,

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[108] *See* Os Cresson, *Roots and Flowers of Quaker Nontheism (Abridged)*, NONTHEIST FRIENDS (July 19, 2016), http://www.nontheistfriends.org/article/roots-and-flowers-of-quaker-nontheism-abridged.

[109] *See* Chuck Fager, *The Trouble With "Ministers"*, QUAKER THEOLOGY, http://quakertheology.org/ministers-1.htm (last visited April 21, 2019); *Quakers*, BBC:RELIGIONS, http://www.bbc.co.uk/religion/religions/christianity/subdivisions/quakers_1.shtml (last updated Mar. 7, 2009).

[110] *Quakers*, *supra* note 109.

[111] *Id.*

[112] United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996).

[113] Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

however, refused to consider that the plaintiff's beliefs were non-standard among Jehovah's Witnesses, noting that such beliefs are personal interpretations of religion and that courts should not be the arbiters of what constitutes correct or logical religious beliefs.[114] Thus, the Supreme Court appears to endorse an idea of religion similar to that articulated by law professor Charlotte Walsh: "[R]eligion, in its broadest sense, encompasses one's understanding of the world, of one's part in it; as such, everyone has their own 'religion' and the individual in question can be the only true arbiter of what 'counts' in this respect."[115]

Of course, courts may approach cases where an individual is charged with possession or distribution of drugs and only subsequently claims to use the drug for religious purposes differently than cases where an individual has previously asserted a religious belief in the use of the drug. Where individuals fail to present any evidence to support their claim that they used the drug for religious purposes, the court may properly assume that the claim is spurious and an ad-hoc attempt to avoid criminal consequences. However, where the individual presents evidence that their drug use is an intrinsic part of their religious or spiritual beliefs stemming from prior to their arrest, the inquiry into the legitimacy of their beliefs should halt.[116]

B. The Balancing Test and the Safety of Entheogens

Even when refraining from an unconstitutional inquiry into the

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[114] *Id.* at 715–16.

[115] Charlotte Walsh, *Beyond Religious Freedom: Psychedelics and Cognitive Liberty*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE, 211-234, 212 (Beatriz Caiuby Labate & Clancy Cavnar eds., 2014).

[116] *See* United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968).

legitimacy of a religion, courts sometimes fail to reasonably consider all available data when executing the balancing test proscribed by RFRA and *Gonzales*.[117] Employing data in this balancing test is well within the jurisdiction of the courts—Congress is free to criminalize the recreational use of drugs, but nothing in that delegation of power prohibits courts from balancing the importance of applying that law against the grave possibility of burdening religious rights. Generally speaking, courts should and frequently do use statistics and scientific research in writing their decisions.[118]

In *Gonzales*, the Supreme Court acknowledged that the balancing test Congress developed for the courts is not easy to execute.[119] However, the Court reminded lower courts of their solemn duty to execute it nonetheless.[120] In spite of this, lower courts still fail to consistently apply the test proscribed under RFRA, and a number of courts have simply rested on the government's assertion that certain drugs are dangerous to

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[117] *See, e.g.*, United States v. Anderson, 854 F.3d 1033 (8th Cir. 2017) (stating that the court assumed without evidence that heroin was more dangerous than peyote or ayahuasca); United States v. Christie, 825 F.3d 1048 (9th Cir. 2016) (concluding without evidence that diversion of marijuana use posed higher risk to the public than peyote or ayahuasca due to broad market); Whyte v. United States, 471 A.2d 1018 (D.C. 1984) (concluding without evidence that diversion of marijuana use posed higher risk to the public than peyote or ayahuasca due to broad market); McBride v. Shawnee Cnty, 71 F. Supp. 2d 1098 (D. Kan. 1999) (concluding without evidence that diversion of marijuana use posed higher risk to the public than peyote or ayahuasca due to broad market); United States v. Carlson, 959 F.2d 242 (1992) (concluding without evidence that diversion of marijuana use posed higher risk to the public than peyote or ayahuasca due to broad market).

[118] Justice Stephen Breyer, *Science in the Courtroom*, 16 ISSUES IN SCI. & TECH. 4 (Summer 2000) ("Our decisions should reflect a proper scientific and technical understanding so that the law can respond to the needs of the public.").

[119] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

[120] *Id.*

the public when weighing the government's interest in uniformly banning their use.[121]

Courts looking at peyote and ayahuasca have often cited data or testimony concerning the relatively low potential for abuse and dangerousness of those drugs.[122] In contrast, courts have failed to cite actual data when rejecting challenges for other drugs, such as marijuana and heroin.[123] Given that few judges have scientific backgrounds, a decision that is based on a judge's uncorroborated opinion of what constitutes a dangerous or abuse-potentiating drug leaves a serious risk of error.

While some courts operate under the likely accurate assumption that drugs such as heroin have a higher abuse potential and are more dangerous than drugs such as ayahuasca and peyote,[124] the assumptions made by other courts in marijuana cases are not so obvious.[125] For instance, the court in *Carlson* stated that "[m]arijuana distribution in this country is a social problem of considerably more complexity and breadth than that of peyote."[126] Though the marijuana market is surely larger than that of peyote, the court does not articulate how this constitutes a

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[121] *See, e.g.*, *Anderson*, 854 F.3d at 1033; *Carlson*, 959 F.2d at 242; *Christie*, 825 F.3d at 1048; *Whyte*, 471 A.2d at 1018; *McBride*, 71 F. Supp. 2d at 1098.

[122] *See, e.g.*, Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1220 (D. Or. 2009), *vacated in part on other grounds*, Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011).

[123] *See, e.g.*, *Anderson,* 854 F.3d at 1036 ("[W]e could distinguish [*Gonzales*] on the basis that heroin simply is more dangerous than either hoasca or peyote."); *Carlson*, 959 F.2d at *3 ("The classification is one of drug type. Marijuana distribution in this country is a social problem of considerably more complexity and breadth than that of peyote.").

[124] *See, e.g.*, *Anderson*, 854 F.3d at 1036 ("[W]e could distinguish [*Gonzales*] on the basis that heroin simply is more dangerous than either hoasca or peyote.").

[125] *See, e.g.*, *Carlson*, 959 F.2d at *3.

[126] *Id.*

compelling interest or how marijuana use constitutes a "social problem."[127] The *United States v. Christie* court echoed the sentiment of the *Anderson* court in its approach to marijuana, finding that the government has a compelling interest in "promoting public health and safety" and reducing the "hazards associated with illegal, recreational drug use" without actually citing evidence concerning these "hazards."[128] This kind of coded language implies without substantiation that marijuana causes harm and threatens the legitimate free exercise rights of individuals who use it for religious purposes.

Like the Supreme Court in *Gonzales*, courts are obligated to review the evidence of the concrete and scientifically supported risks associated with the drug in question.[129] Entheogens, particularly psychedelics, are typically non-addictive and non-toxic.[130] They have extremely low levels of mortality and produce little, if any, physical dependence.[131] Some evidence suggests that they may even help with addiction to other substances.[132]

Strong evidence further indicates that these drugs have very little long-term neurological effects.[133] In a study of over 130,000 respondents, among whom 13.4% (nearly 22,000) reported using a psychedelic at

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[127] *Id.*

[128] United States v. Christie, 825 F.3d 1048, 1057 (9th Cir. 2016).

[129] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432–33 (2006).

[130] Walsh, *supra* note 115, at 212.

[131] Michael Winkelman, *Psychedelics as Medicines for Substance Abuse Rehabilitation: Evaluating Treatments with LSD, Peyote, Ibogaine and Ayahuasca*, 7 CURRENT DRUG ABUSE REV. 101 (2014).

[132] *Id.*

[133] Teri S. Krebs & Pål-Ørjan Johansen, *Psychedelics and Mental Health: A Population Study*, PLOS ONE (Aug. 19, 2013).

some point in their life, researchers found no significant associations found between lifetime use or past-year use of psychedelics and increased rate of negative mental health effects.[134] Quite the contrary, these studies found that psychedelic use is associated with lower rates of mental health problems.[135] Likewise, studies of ayahuasca indicate that use of the drug has no adverse neurocognitive effects.[136]

When courts fail to consistently and reliably incorporate such studies in their determination of "compelling" government interests, they gravely distort the responsibility given to them by Congress in RFRA.

VI. Conclusion

The RFRA sets out a robust balancing test that compels courts to consider the seriousness of violating religious rights.[137] This protection is particularly important where the litigant is of a minority religion and likely already faces persecution and discrimination. The judiciary, as the countermajoritarian branch of government, may not be arbiters of heresy, as the Supreme Court reminds us in *Ballard*.[138] Courts may not judge what religions or religious beliefs merit protection; all creeds must merit protection, or the right to free exercise means instead of the right to freely exercise state-sanctioned religions—which is no right at all.

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[134] *Id.*

[135] *Id.*

[136] Horgan & Tzar, *supra* note 17.

[137] *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2019).

[138] United States v. Ballard, 322 U.S. 78, 86 (1944).