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Constitutional Law - New Mexico Federal Court Rejects Government's Attempt to Determine Membership Eligibility in a Religion: United States v. Boyll

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CONSTITUTIONAL LAW—New Mexico Federal Court Rejects Government's Attempt to Determine Membership Eligibility in a Religion: *United States v. Boyll*

I. INTRODUCTION

As Native American traditions and culture receive unprecedented exposure and general approval in American popular culture, non-Indians increasingly appreciate and accept traditionally Indian religions and ways of thought.[1] This interest in Indian culture and adoption of indigenous peoples' values has occasioned new legal problems as the courts struggle to accommodate the rights of non-Indians to practice and enjoy "Indian" rituals.[2] In *United States v. Boyll*,[3] a federal district court sitting in New Mexico faced such a situation, hearing the case of a non-Indian who became a practitioner of a traditionally Native American religion. In *Boyll*, the court bucked the prevailing national judicial trend by declaring that non-Indians can be practicing members of an Indian religion and thus enjoy the exemption allowing the religious use of peyote.[4]

II. STATEMENT OF FACTS

In April 1990, Lawrence Robert Boyll travelled from his home near Taos, New Mexico, to northern Mexico to obtain peyote from an Huichol Indian tribal elder.[5] Boyll, a non-Indian California native and son of a

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1. Recent cinematic offerings, for example, include such Indian-themed movies as *Dances with Wolves*, *Thunderheart*, and *Last of the Mohicans*. Tony Hillerman's Navajo-based novels are best sellers, as is Forrest Carter's THE EDUCATION OF LITTLE TREE (1986). Also, the current historiographic debate over Christopher Columbus's role in the "New" World has heightened interest and occasioned a whole new crop of commercially successful literary works. *See*, KIRKPATRICK SALE, THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY (1990); MICHAEL DORRIS, THE CROWN OF COLUMBUS (1991); LESLIE MARMON SILKO, ALMANAC OF THE DEAD (1991); J. MCIVER WEATHERFORD, INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD (1988).

2. *See, e.g.*, Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) (non-Indian church seeking benefits granted to Native American Church); State v. Whittingham, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974) (non-Indian members of the Native American Church appealed conviction for peyote use); Native Am. Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979) (non-Indian church with similar name sought benefits accorded Indian-origined Native American Church); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (non-Indian church sought benefits granted to Native American Church).

3. 774 F. Supp. 1333 (D.N.M. 1991), *appeal dismissed*, United States v. Boyll, 968 F.2d 21 (10th Cir. 1992). Boyll submitted two motions to dismiss. *See infra* text accompanying note 24. The district court granted both motions. On appeal to the Tenth Circuit Court of Appeals, the government argued against only one of the motions. The court of appeals declined jurisdiction, noting that because the district court granted both motions to dismiss, the government should properly have appealed both motions. United States v. Boyll, 968 F.2d 21 (10th Cir. 1992).

4. *Boyll*, 774 F. Supp. at 1337-39.

5. Trial Transcript at 36, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB). The Huichol Indians are a tribe of Nayarit, Mexico, and traditional peyote users. *See*, FERNANDO BENITEZ, IN THE MAGIC LAND OF PEYOTE (1975); *see also* BERTHA P. DUTTON, HAPPY PEOPLE: THE HUICHOL INDIANS (1962).

Methodist minister,[6] considered himself a member of the Native American Church ("NAC"),[7] a religion in which the primary sacramental ceremony is the ingestion of peyote. While still in Mexico, he mailed a package containing peyote to his post office box in San Cristobal, New Mexico.[8] From Mexico, the package travelled to the United States Postal Service in El Paso, Texas, where a United States Customs Service search disclosed a quantity of peyote in the package.[9] The customs inspectors decided to make a controlled delivery of the package to Boyll.[10]

Boyll returned to New Mexico after mailing the package.[11] On April 26, 1990, the postal inspector released the package to the local postmaster in San Cristobal.[12] Boyll picked up the package on the morning of April 27, 1990, under the surveillance of Customs Service agents. He put the package in the bed of his vehicle and returned home.[13] There, he took off the outside wrappings of the box, with the names and addresses of the sender and the addressee, and destroyed them in a wood burning stove.[14] The peyote itself remained in the vehicle's bed.[15] Soon after, Boyll returned to his vehicle and drove off.[16] He intended to deliver the peyote to Tellus Goodmorning, a Taos Pueblo Indian and Native American Church elder.[17]

Officers from the Customs Service quickly surrounded Boyll's vehicle and, with firearms drawn, confronted him.[18] When asked what was in the package in the bed of his vehicle, Boyll responded that it contained peyote.[19] He added that he thought that as a bona fide member of the Native American Church, he was exempt from criminal prosecution for possessing peyote.[20]

On May 10, 1990, a federal grand jury indicted Boyll on three counts—unlawful importation of peyote,[21] possession of peyote with intent to

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6. *Peyote Importation Charge Dismissed As 'Attack' on Liberty*, L.A. TIMES, Sept. 6, 1991, at A20, col. 1.

7. Defendant's Affidavit, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB) ("I consider myself a full member of the Native American Church and am accepted as such by those with whom I worship."). All records, affidavits, pleadings, and motions cited in this article are on file with the Clerk of the United States District Court in Albuquerque, New Mexico.

8. *Boyll*, 774 F. Supp. at 1335.

9. Trial Transcript at 4, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB).

10. *Id.*

11. *Id.* at 10.

12. *Id.*

13. *Id.* at 10-11, 22.

14. *Id.* at 16, 30.

15. *Id.*

16. *Id.* at 11, 23, 33.

17. *Id.*

18. *Id.* at 12, 39.

19. *Id.* at 13, 17, 34, 41.

20. *Id.* at 46; *see also*, Appellant's Brief-In-Chief at 6, United States v. Boyll, 968 F.2d 21 (10th Cir. 1992) (No. 91-2235) ("[Boyll] understood that members of the Native American Church need not apply for registration before they import peyote.").

21. 21 U.S.C. §§ 952(a), 960(b)(3) (1988). Section 952(a) reads, "It shall be unlawful to import into the customs territory of the United States from any place outside thereof . . . any controlled substance in schedule I." Peyote is listed as a Schedule I controlled substance. § 812(c)(12).

distribute,[22] and using the United States Mails to facilitate a Comprehensive Drug Abuse Prevention and Control Act felony.[23] In response to Boyll's Motions to Dismiss, the government argued, inter alia, that Boyll could not be a member of the Native American Church because membership was restricted to Native Americans.[24] The court did not directly address the charges contained in the indictment, but instead directed its opinion to the government's attempt to prevent non-Indian membership in the NAC.[25]

III. PEYOTE AND THE RELIGIOUS USE EXEMPTION

Peyote derives from the small, spineless cactus plant *Lophophora williamsii* which grows in the Rio Grande Valley of Texas and northern Mexico.[26] The peyote grows on the top of the cactus plant, and looks like a button.[27] When ingested, either by chewing the button or drinking a peyote-based tea, peyote generates an hallucinogenic effect. Although it can cause vomiting and paranoia in some people, most users experience a heightened sense of comprehension and a feeling of friendliness toward other people.[28]

Indian tribes of the American Southwest and northern Mexico have used peyote in religious ceremonies for centuries, with Spanish historical records chronicling its use as early as 1560.[29] Use of peyote as a sacrament gradually spread northward from Mexico.[30] Today, religious use of peyote is the central tenet of the Native American Church, an incorporated religion which combines elements of Christianity with traditional Native American beliefs.[31] Because of its indigenous origin, NAC members are overwhelmingly Indian.[32]

While efforts to prohibit peyote's use date from the days of the Spanish Conquest,[33] the United States Bureau of Narcotics and Dangerous Drugs[34] did not declare peyote illegal until the 1960s, when psychedelic drugs

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22. *Id.* §§ 841(a)(1), § 841(b)(1)(C).
23. *Id.* § 843(b), (c).
24. Response to Defendant's Motions to Dismiss at 7, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB).
25. *Boyll*, 774 F. Supp. 1333.
26. People v. Woody, 394 P.2d 813, 816 (Cal. 1964).
27. *Id.*
28. *Id.* at 816-17. See OMER C. STEWART, PEYOTE RELIGION: A HISTORY (1987) for a definitive history of peyote and the Native American Church.
29. *Woody*, 394 P.2d at 817.
30. *Id.*
31. Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).
32. State v. Whittingham, 504 P.2d 950, 951 (1973), *cert. denied*, 417 U.S. 946 (1974). "The Native American Church has always been primarily an 'Indian religion' by reason of its origin and in the context that substantially all of its members are Native Americans." *Id.* (quoting trial judge's memorandum opinion).
33. *Toledo*, 892 F.2d at 1485-86.
34. The Bureau is now known as the Drug Enforcement Agency. *Boyll*, 774 F. Supp. 1334, 1339.

became popular.[35] Congress criminalized peyote use and possession in 1965.[36]

At the same time, the federal government drafted an exemption allowing members of the NAC to use peyote in bona fide religious ceremonies.[37] It extended the exemption solely to the NAC because it considered the Church a singular expression of Native American culture,[38] with membership of up to several hundred thousand.[39] The government's trust responsibility to preserve American Indian culture motivated Congress to enact the exemption.[40] Protection of religious liberty was an important secondary factor.[41] At that time, the government did not feel that the NAC religious exemption would ever be employed by non-Indians, as in *Boyll*.[42]

IV. DISCUSSION AND ANALYSIS

In *Boyll*, the court first addressed the government's allegation that the defendant could not be a practicing member of the Native American Church because membership was restricted to American Indians.[43] The government based its argument on recent case law from other jurisdictions which restricted NAC membership to Indians.[44] The court forcefully rejected the government's attempt to determine the NAC's racial composition, stating that it was for the congregation, and not the government, to decide membership eligibility.[45] Yet the court failed to consider fully

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35. *Boyll*, 774 F. Supp. at 1338 (". . . not until the popularity of psychedelic drugs in the 1960s did Congress restrict the possession, consumption and sale of peyote.").

36. *Id.* (citing Drug Abuse Control Amendments of 1965, 79 Stat. 226 § 3(a)).

37. 21 C.F.R. § 1307.31 (1992) states:

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

38. *Boyll*, 774 F. Supp. at 1339. In explaining why the exemption applied only to the NAC, Mr. Sonnenreich of the Bureau of Narcotics and Dangerous Drugs stated, "We consider the Native American Church to be *sui generis*. The history and tradition of the church is such that there is no question but that they regard peyote as a deity as it were, and we will continue the (religious use) exemption." *Id.* (quoting *Drug Abuse Control Amendments of 1970, Hearings Before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce*, 91st Cong., 2nd Sess. 117-18 (1970)).

39. *Woody*, 394 P.2d at 817 ("estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a 'member' ").

40. United States v. Warner, 595 F. Supp. 595, 601 (D.N.D. 1984) ("The United States is following the policy of preserving the Indians' dependent nation and culture by granting an exemption to Indians for the use of peyote in the religious ceremonies of the NAC.").

41. 111 CONG. REC. 15,977 (1965). After the exemption was included in the Drug Abuse Control Amendments of 1965, Representative Harris of Arkansas noted that the exemption protected religious liberties in addition to preserving Indian culture.

42. *Warner*, 595 F. Supp. at 598 ("The legislative history . . . of 21 C.F.R. § 1307.31 does not support a finding that Congress was interested in a broad exemption for the religious use of peyote by . . . non-Indians.").

43. *Boyll*, 774 F. Supp. at 1336-39.

44. *See infra* text accompanying notes 57-60.

45. *Boyll*, 774 F. Supp. at 1336-37.

the government's interest in preserving institutions for the exclusive benefit of Native Americans, and misread legislative history.[46]

The court next discussed whether the government's indictment of Boyll constituted an impermissible burden on the free exercise of religion. The court applied the two-step *Sherbert v. Verner*[47] analysis, which posits that the government's burdensome action will survive constitutional scrutiny only if the action serves some compelling state interest.[48] The court noted that the government's actions amounted not simply to a burden on Boyll, but also as a complete prohibition on his free exercise rights.[49] It weakened its opinion, however, by not considering a situation where a compelling state interest could take precedence over, and even prohibit, an individual's religious freedom.[50]

Interestingly, the court neglected to address the indictment against Boyll for peyote importation, and his failure to register as a peyote importer as required by law.[51] By not addressing his failure to register, the court suggests that mere membership in a particular religion protects members of that religion from having to comply with neutral and generally applicable laws. The court thus transformed this simple criminal case into one raising grave constitutional issues.[52]

A. Interpreting 21 C.F.R. Section 1307.31

1. Equal Protection

The *Boyll* opinion began with the government's argument that the exemption did not extend to Boyll because he was non-Indian.[53] According to the government, the exemption applied exclusively to Native Americans.[54] In support of that assertion, the government relied on state laws[55] which hold that "an exemption granted to members of the Native American Church . . . does not apply to a member with less than 25 percent

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46. *See infra* text accompanying notes 73-80.

47. 374 U.S. 398 (1963).

48. *Boyll*, 774 F. Supp. at 1340-41.

49. *Id.* at 1341.

50. *See infra* text accompanying notes 98-102.

51. 21 C.F.R. § 1307.31 (1992) states that "[a]ny person who manufactures peyote for or distributes peyote to the Native American Church, . . . is required to obtain registration annually and to comply with all other requirements of law."

52. *See infra* text accompanying notes 109-17.

53. "[M]embership is limited to persons who [sic] ethnic descent is at least twenty-five percent derived from American Indian stock. . . . Boyll [is not] twenty-five percent American Indian and [thus] cannot be [a] member[] of the Native American Church." Response to Defendant's Motions to Dismiss at 7, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB).

54. *Id.* at 7 ("Only [Indian] members . . . are exempt from being prosecuted for possession of peyote.").

55. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. § 481.111 (West 1991): "The [criminal] provisions of this chapter relating to the possession and distribution of peyote do not apply to use of peyote by a member of the Native American Church in bona fide religious ceremonies of the church . . . . *An exemption granted to a member of the Native American Church under this section does not apply to a member with less than 25 percent Indian blood.*" *Id.* (emphasis added).

Indian blood."[56] The government's position suggested that while anyone can belong to the NAC, only Indian NAC members are free from criminal prosecution for using peyote in ceremonies.

Several state and federal cases support the government's contention that NAC membership is limited to Indians. At least as early as 1964, the California Supreme Court described the NAC as "a religious organization *of Indians*."[57] More recently, in *Peyote Way Church of God, Inc. v. Thornburgh*,[58] the Fifth Circuit Court of Appeals elaborated on the NAC's racial composition, stating that "the record conclusively demonstrates that NAC membership is limited to membership to *Native American members* of federally recognized tribes who have at least 25% Native American ancestry . . . ."[59] Drawing from case law,[60] the government concluded that federal policy restricts NAC membership to Native Americans.

The government sought to exclude a person from membership in a particular religion based on the color of his skin. This stance required the court to consider the equal protection implications of the government's interpretation of the religious use exemption. In *Boyll*, the court had to consider whether the defendant would be denied the equal protection of the law (i.e., exemption from criminal prosecution) if the government's interpretation were to prevail. The *Boyll* court held that equal protection rights compelled the conclusion that the religious use exemption applied equally to Indians and non-Indians.[61]

In rejecting the government's interpretation of the exemption, the court relied on expert testimony, case law, and statutory interpretation. Professor Omer Stewart, a courtroom witness and a recognized authority on peyotism,[62] stated that while the overwhelming majority of Church members are Native Americans, no single Church policy expressly prohibits non-Indian membership.[63] The court also referred to *Arizona v. Whittingham*,[64] in which the Arizona Supreme Court stated:

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56. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214 (5th Cir. 1991) (citing Texas's racially restrictive religious use exemption).

57. People v. Woody, 394 P.2d 813, 817 (Cal. 1964) (emphasis added).

58. 922 F.2d 1210 (5th Cir. 1991).

59. *Id.* at 1216 (emphasis added).

60. *See, e.g.*, Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 416 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) ("The Native American Church is a religious organization of American Indians drawn from a variety of western tribes."); Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193, 195 (5th Cir. 1984) (describing the NAC as "a peyotist religion that admits only persons whose ethnic descent is at least 25% derived from American Indian stock.").

61. *Boyll*, 774 F. Supp. at 1340.

62. *Id.* at 1335 n.2.

63. *See* STEWART, *supra* note 28. "From the beginning, attendance of non-Indians to peyote meetings has been a somewhat personal or tribal matter. For instance, very early in Oklahoma, some Caddo refused to allow non-Indians to attend any of their meetings. But others, such as the Kiowa and Comanches, welcomed non-Indians, black and white, as long as they were seriously interested. With the formation of the NAC, the same attitude has generally prevailed, and the presence of non-Indians has been no problem." *Id.* at 333. "The ruling of [one NAC congregation] that only Indians should be enrolled in the Native American Church is new and is not shared by most peyotists." *Id.* at 334.

64. 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974).

> The Native American Church has always been primarily an 'Indian religion' by reason of its origin and in the context that substantially all of its members are American Indian. However, membership to persons who are not members of Indian Tribes or do not have Indian heritage, is usually not refused.[65]

These more liberal interpretations of Church membership policy provided a basis for the court's rejection of the argument that Boyll could not be a practicing member of the NAC simply because he was non-Indian.

The court also relied on testimony from Indian and non-Indian members of Boyll's NAC congregation who themselves rejected the government's attempt to define NAC membership. Local NAC members testified that their interpretation of NAC philosophy was to encourage membership of any sincere believer, regardless of race.[66] The court thus noted that the same Indians whose culture the religious use exemption presumably sought to protect did not object to non-Indian NAC membership.[67]

The court further suggested that permitting Indian NAC members to ingest peyote while prohibiting non-Indian NAC members from ingesting the same drug implies a policy of protecting the health and welfare of non-Indians while allowing Indians to take the drug at their peril.[68] As the court stated, "[w]e 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."[69]

Finally, the court noted that the framers of the federal religious use exemption did not specify a racial restriction.[70] Lacking such a mandate, the court refused to interpret the exemption as racially exclusive. "Nowhere is it even suggested that the exemption applies only to Indian members of the Native American Church. Had the intention been to exclude non-Indian members, as the United States argues, the language of the exemption would have so clearly provided."[71]

In concluding that the government was wrong to place a racial restriction on NAC membership by interpreting the religious use exemption in a

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65. *Boyll*, 774 F. Supp. at 1336 (quoting Arizona v. Whittingham, 504 P.2d 950, 951 (1973), *cert. denied*, 417 U.S. 946 (1974)).

66. Affidavit of Jimmy Reyna, Taos Pueblo Indian, United States v. Boyll, 774 F. Supp. 1333 (D.N.M.) ("Both from my own experience as a church member . . . , and from accounts told to me by my father, Tellus Goodmorning, and others, I am aware of the participation and membership of non-Indian people in the Native American Church . . . . [Non-Indians] were accepted as full members of the Church and still are today. In my opinion, any attempt to restrict Church membership to Indians is unjustified."); Affidavit of Alden Naranjo, Southern Ute Indian Tribe member, *Boyll*, 774 F. Supp. 1333 ("[T]he majority of church members with whom I am acquainted do not support any attempt to restrict membership to those of Indian descent."); Affidavit of Stacy Diven, *Boyll*, 774 F. Supp. 1333 ("During my fifteen years as a member of the Native American Church, I have encountered isolated instances of opposition by Indian members to non-Indian participation. However, in my experience, most Indian members of the Native American Church accept sincere white worshippers willingly.").

67. *Boyll*, 774 F. Supp. at 1337 n.3.

68. *Id.* at 1339.

69. *Id.* (quoting Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 416-17 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973)).

70. *Id.* at 1338. "The plain language of 21 C.F.R. § 1307.31 exempts *all* worshippers engaged 'in bona fide ceremonies of the Native American Church.'" *Id.* (emphasis added).

71. *Id.*

racially discriminatory fashion, the court relied on the plain language and ordinary meaning of the exemption itself. It pointed out that "[t]he language of a regulation or statute is the starting point for its interpretation."[72] The court added that "[t]he plain meaning governs unless a clearly expressed legislative intent is to the contrary."[73] So it would appear, at first glance, the religious use exemption is simple and plain, and that the federal framers meant to exempt all NAC members from criminal prosecution, regardless of color.

The court was incorrect, however, in insisting that "the legislative history clearly support[s] this Court's finding that Congress intended the exemption to apply to all members of the Native American Church, Indian and non-Indian alike."[74] The scant legislative history does not "clearly" support such an assertion, and the court simply was wrong when, *in dicta*, it cited the history as supporting its conclusions regarding the intent of the exemption's framers. When the court noted that lawmakers would have expressly limited the exemption to Indians if that was the intent, it ignored that at the time this regulation became law, virtually all members of the NAC were Indian.[75] And as the court itself pointed out, the regulation came about to prevent non-Indian "hippies" from abusing the drug.[76] The government probably never envisioned non-Indian membership.[77] That the *Boyll* court chose to interpret the exemption to apply equally to all sincere members of the NAC, regardless of race, suits New Mexico's multicultural society, but the exemption's history hardly makes "clear" that Congress intended the exemption to apply to all races.[78]

The court also used legislative history to support its assertion that the religious use exemption is meant primarily to protect religious freedom.[79] A more careful reading of the exemption's history, however, reveals that it came about less to protect the religious liberties of *all* NAC members than to preserve the cultural heritage of Native Americans.[80] The court's

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72. *Id.* (quoting Dyer v. United States, 832 F.2d 1062, 1066 (9th Cir. 1987)).

73. *Id.*

74. *Id.* at 1339.

75. *See supra* text accompanying notes 37-42.

76. *Boyll*, 774 F. Supp. at 1338 ("[N]ot until the popularity of psychedelic drugs in the 1960s did Congress restrict the possession, consumption and sale of peyote.").

77. *See* United States v. Warner, 595 F. Supp. 595, 598 (D.N.D. 1984) ("[T]he legislative history leading up to the promulgation of 21 C.F.R. § 1307.31 does not support a finding that Congress was interested in a broad exemption for the religious use of peyote by . . . non-Indians.").

78. Curiously, the court omitted all discussion of Indian preference laws. The Supreme Court in Morton v. Mancari, 417 U.S. 535 (1974), held that "[a]s long as the special treatment [i.e., Indian preference laws] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The Court further noted that preference for Indians can be based on political, and not racial, classification. *Id.* at 554.

While the failure to address Indian preference laws was not fatal to the *Boyll* opinion, an analysis of them would have strengthened the decision.

79. *Boyll*, 774 F. Supp. at 1339.

80. The *Warner* court noted the "governmental duty to preserve Indian culture and religion." *Warner*, 595 F. Supp. at 600. Also, "[t]he peyote exemption is uniquely supported by the legislative

harsh rejection of the government's suggestion that the exemption was meant for the exclusive benefit of Native Americans, while perhaps understandable in the context of New Mexico's many diverse and tolerant cultures, is misplaced—the legislative history tends to support the government's view that the exemption was meant to perpetuate American Indian culture.[81] In *Boyll*, the court avoided a constitutional conflict by interpreting the regulation in a racially neutral fashion.

2. Undue Burden on the Free Exercise of Religion

The court next addressed whether Boyll's indictment amounted to an infringement of his right to exercise religion freely.[82] It held that the indictment indeed infringed upon his religious freedom by seeking to prevent him from practicing his religion.[83]

The court began its "undue burden" analysis by noting the impropriety of government involvement in deciding who can and who cannot be a member of a particular religion.[84] It indicated that the congregation, and not the government, decided membership eligibility,[85] noting that "[i]t is one thing for a local branch of the Native American Church to adopt its own restrictions on membership, but it is entirely another for the Government to restrict membership in a religious organization on the basis of race."[86] The court added that "[t]he 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."[87]

In considering the defendant's burden, the court applied the *Sherbert v. Verner*[88] two-step analysis to determine whether the government's indictment against Boyll withstood constitutional scrutiny.[89] Under *Sherbert*, a court must first determine whether a governmental action "imposes *any* burden on the free exercise of [defendant]'s religion."[90] If the court finds that any burden exists, it must then consider whether some "com-

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history and congressional findings underlying the American Indian Religious Freedom Act which declares a federal policy of 'protect[ing] and preserv[ing] *for American Indians* their inherent right for freedom to believe, express and exercise the[ir] traditional religions." Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342, 1345 (N.D. Tex. 1988) (quoting United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984)), *cert. denied*, 470 U.S. 1004 (1985) (emphasis added).

81. Of course, as the court indicated with its ruling, it is bound not by an unclear legislative history but rather by plain meaning of the words in the exemption. *Boyll*, 774 F. Supp. at 1339 (citing International Ass'n of Machinists v. Street, 367 U.S. 740 (1961)).

82. 774 F. Supp. at 1339-42.

83. *Id.*

84. *Id.* at 1340.

85. *Id.*

86. *Id.*

87. *Id.* (citing Paul v. Watchtower Bible & Tract Society, 819 F.2d 878, 878 n.1. (9th Cir.), *cert. denied*, 484 U.S. 926 (1987)).

88. 374 U.S. 398 (1963).

89. *Boyll*, 774 F. Supp. at 1340.

90. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)) (emphasis added).

pelling state interest . . . justifies the substantial infringement of [defendant]'s First Amendment right."[91]

Reasoning that the indictment not only burdened Boyll's free exercise but also amounted to an outright prohibition,[92] the court stated that the government's action in indicting Boyll satisfied the first *Sherbert* requirement. It concluded "that the racially restrictive interpretation of [the exemption] would impose a substantial burden on Mr. Boyll's free exercise."[93] By refusing to allow Boyll to use peyote, the government indictment "virtually inhibited" him from exercising his First Amendment rights.[94]

The court then addressed whether some compelling state interest justified infringing upon Boyll's First Amendment rights.[95] While briefly noting that drug abuse is a serious problem in the United States, the court held that "this amorphous problem, without more, cannot justify the serious infringement on the observance of religion."[96] The court added that:

> [i]n light of the absence of legal support for the United States' opposition to [Boyll]'s motions to dismiss, this Court cannot help but believe that the present prosecution is, at best, an overreaction driven by political passion or, at worst, influenced by religious or racial insensitivity, if not outright hostility.[97]

In so holding, the court implied acceptance of the concept that *any* burden on an individual's right to practice his religion is impermissible, and summarily dismissed the government's "war" on drugs.[98]

This reasoning inadequately treats the government's compelling interest in controlling drug use. The court's "undue burden" analysis summarily dismissed the government's compelling interest in regulating drug importation, focusing solely on the right of the individual to practice his religion freely. The court's reasoning refused to consider situations in which the government maintains a compelling interest in burdening, or even prohibiting, an individual's free exercise.[99] Instead, the *Boyll* court glibly brushed aside the compelling governmental interest in controlling drug use.[100]

The court had the opportunity to balance the government's compelling interest in ridding the country of illicit drugs with its interest in preserving individual religious freedom. Inexplicably, the court did not perform even

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91. *Id.* at 1340 (citing Sherbert v. Verner, 374 U.S 398, 406 (1963)).
92. *Id.* at 1341.
93. *Id.*
94. *Id.* (citing People v. Woody, 394 P.2d 813, 816 (Cal. 1964)).
95. *Id.*
96. *Id.*
97. *Id.* at 1342. Although the court intimated the prosecution may have been motivated by racial insensitivity, both the prosecuting attorney and defendant Boyll were white.
98. *Id.*
99. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (upheld statute forbidding polygamy which Mormon petitioner considered religious obligation); Goldman v. Weinberger, 475 U.S. 503 (1986) (upheld military regulation forbidding wearing yarmulkes); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (sustained prison's refusal to excuse prisoners from work assignments to attend religious services).
100. *Boyll*, 774 F. Supp. at 1341.

the most elementary balancing test, suggesting that *no* state interest could ever outweigh an individual's right to free exercise. In comparison, the *Warner* court considered the need to balance the government's interest in eradicating drugs with individual religious freedom.[101] That court asserted that "the government's interest in prohibiting the use of peyote is compelling and overrides Defendant's First Amendment rights to the free exercise of religion."[102] Clearly, other jurisdictions do not have qualms about performing the necessary balancing test.

In its zeal to protect religious liberty against perceived attack, the court seemed unable to comprehend that "sacred" objects can retain dangerous qualities which require government regulation. Thus, while peyote is sacred to NAC members, it retains its dangerous, psychedelic qualities and as such is rightly subject to regulation. By not even considering a balancing test here, and by focusing exclusively on the right of the individual to use peyote, the court suggested that no compelling governmental interest can regulate religious practices. The opinion implies an inability to recognize and balance the competing interests of religious freedom and the government's interest in protecting its citizens from illicit drugs.

3. Establishment Clause

In addition to equal protection and free exercise considerations, the religious use exemption presents Establishment Clause issues which the court did not clearly address. By according protection to the NAC not given to other religions, the regulation facially constitutes government protection of a particular religion. Yet, the Constitution prohibits the government from aiding or hindering a particular religion.[103] As the Supreme Court made clear in *Everson v. Board of Education*,[104] "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[105] Regarding religion, the government must maintain a "laissez faire" detachment.

The religious use exemption, which looks as if it aids a religion, has successfully weathered attacks against it as "establishing" or impermissibly aiding a religion. In *Peyote Way Church of God v. Thornburgh*,[106] the court rejected the charge by a non-NAC church that the exemption amounted to establishing a religion.[107] Because the exemption has survived scrutiny, the most plausible explanation for its continued constitutionality

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101. United States v. Warner, 595 F. Supp. 595, 597 (D.N.D. 1984).

102. *Id.* at 599.

103. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

104. 330 U.S. 1 (1947).

105. *Id.* at 15.

106. 922 F.2d 1210 (1991).

107. *Id.* at 1217. The court went on to note the government's continuing trust responsibility toward Native Americans. *Id.*

is that its purpose was to promote and protect Native American culture, and not to aid a particular religion. Protection of religious freedom for all was a serendipitous, secondary consequence.

B. Boyll's Failure to Register as a Peyote Importer

The *Boyll* opinion is also notable for an issue it does *not* address—the failure of Boyll to register as a peyote importer, as required by law. In its effort to promote individual freedom, the court failed to address the original indictment—importing and possessing peyote with intent to distribute it. Instead, the court focused exclusively on Boyll's right to use peyote.

The first count of the government's indictment against Boyll accused him of importing peyote into the United States. The defense argued, and the court agreed, that the religious use exemption protected Boyll against prosecution for peyote importation.[108] While the court often referred to that part of the exemption allowing peyote use, it never considered the second sentence of that exemption, which reads, "*[a]ny* person who manufactures peyote for or distributes peyote to the Native American Church . . . is required to obtain registration annually and to comply with all the other requirements of law."[109] A clear and simple reading of this second sentence suggests that "any person" includes members of the NAC. This interpretation of the exemption requires Boyll, whether an NAC member or not, to register. By failing to address the registration requirement, the court implied that NAC members are not "persons" for the purpose of applying this law.[110]

By omitting discussion of Boyll's failure to comply completely with the religious use exemption, the court suggested that NAC members, Indian and non-Indian alike, do not have to comply with neutral, generally applicable laws[111] requiring "any

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108. *Boyll*, 774 F. Supp. at 1337-39.

109. 21 C.F.R. § 1307.31 (1992) (emphasis added). Interestingly, none of the peyote cases thus far have addressed the registration requirement.

110. In its penultimate sentence, the court held that the listing of peyote as a Schedule I controlled substance did not apply to the importation, possession, or use of peyote by NAC members in bona fide religious ceremonies. *Boyll*, 774 F. Supp. at 1342. The court's holding apparently expanded the definition of "bona fide religious ceremonies" to include importation and possession with intent to distribute. The court was unable to distinguish between Boyll the NAC member peyote *user* and Boyll the peyote *importer*. Instead, the court lumped together the distinct concepts of "use," "possess," "import," and "distribute" into one large category, which category merited First Amendment protection. *See id.* at 1340-42.

111. In Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Supreme Court explored the concept of neutral, generally applicable laws. The Court held that the Free Exercise Clause of the First Amendment does not relieve an individual from having to comply with laws applicable to all. *Id.* at 882. In *Smith*, the Court upheld an Oregon law universally forbidding peyote use, holding that laws which "incidentally" inhibit a person from practicing his religion are not necessarily unconstitutional. *Id.* at 876-90.

The *Boyll* court declared *Smith* inapplicable to this case because 21 C.F.R. § 1307.31 is specifically directed to religious practices, whereas *Smith* involved neutral, generally applicable *criminal* laws. *Boyll*, 774 F. Supp. at 1340. In arriving at this conclusion, the *Boyll* court relied on Salvation Army v. New Jersey Dept. of Community Affairs, 919 F.2d 183 (3rd Cir. 1990), which interpreted

person"[112] to register as a peyote importer. Thus, for example, distributors who happen to be NAC members do not have to comply with the law, while non-NAC distributors must still follow the registration rule. Moreover, despite the court's dismissal of the government's attempts to regulate drugs as a "wildfire,"[113] drug abuse remains a pervasive problem in the United States.[114] Enforcing the registration requirement on all peyote importers allows the government to know who is a legitimate peyote importer and who is not. With this ruling, however, a defendant can simply claim NAC membership in order to defeat the government's control of peyote importation.

By not addressing the registration requirement, the court was unable to balance the burden of annual registration with the benefit of preventing potential misuse of peyote. Registration does not unreasonably interfere with a person's right to practice a chosen religion freely, especially when such registration accomplishes a compelling state interest. Allowing a non-Indian to escape the registration requirement neither promotes Native American culture nor protects religious freedom.

Smith. *Boyll*, 774 F. Supp. at 1340.

The *Boyll* court's contention that laws specifically directed to religious practices were outside the ambit of *Smith* and thus subject to traditional compelling interest analysis was presented only in a dubitante concurring opinion. *See Salvation Army*, 919 F.2d at 204. Contrary to *Boyll*'s suggestion, neither *Salvation Army* nor *Smith* states that laws directed specifically to religious practices will remain subject to the compelling interest test. *Boyll*, 774 F. Supp. at 1341. Further, even if the first sentence of 21 C.F.R. § 1307.31 is directed specifically toward religion and somehow subject to the compelling interest test, the second sentence of that exemption, requiring registration, is a neutral law, applicable toward all, regardless of religion. One can hardly imagine a defendant attempting to evade criminal prosecution with the phrase, "Oh, no, that law doesn't apply to *me*, *I'm* a Presbyterian!"

Boyll further suggests that *Smith* applies only to neutral, generally applicable *criminal* laws. Yet, as *Salvation Army* made clear, "as often as [*Smith*] makes reference to generally applicable criminal laws, it makes references that are not so limited." *Salvation Army*, 919 F.2d at 195.

The *Boyll* court erroneously distinguished *Smith*. Had *Boyll* interpreted *Smith* as requiring everyone to comply with neutral, generally applicable laws, the court would have concluded that Boyll, even in the practice of his religion, was still subject to the registration requirement. To suggest otherwise is to misinterpret *Smith*.

In dicta, the court of appeals in *Boyll* also implied that Boyll's "pilgrimage" to collect peyote shielded him from having to comply with neutral, generally applicable laws because "[t]he act of travelling to the place where peyote is harvested is considered an act of piety which has its own rewards." United States v. Boyll, No. 91-2235, 1992 U.S. App. LEXIS 14357, at *15 (10th Cir. 1992). To suggest that a NAC member does not have to comply with neutral, generally applicable laws because he is on some vaguely defined "pilgrimage" is like suggesting that Jews and Christians returning from a visit to the Holy Land do not have to show their passports to customs and immigration authorities simply because they were on a pilgrimage and are therefore not subject to generally applicable laws.

112. 21 C.F.R. § 1307.31.

113. *Boyll*, 774 F. Supp. at 1333.

114. Defendant Boyll argued that peyote importation would never be a problem because "[p]eyote is not a drug likely to become popular. The plant itself is extremely bitter and the ingestion of peyote can cause vomiting." Motion to Dismiss Number Two at 6, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (No. 90-207-JB) (citing E. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980)). Therefore, the defendant reasoned, the government does not have a compelling interest in regulating its importation. *Id.* Yet, the very fact that the government requires annual registration undermines this assertion. The government maintains a compelling interest in knowing who is importing dangerous drugs like peyote. Further, the fact that the government allows an exemption does not negate or minimize the state's compelling interest in controlling drug importation into the United States.

V. CONCLUSION

The *Boyll* court strongly supports the right of the individual to choose the religion of his choice, free from the government's interference and attempt to restrict membership racially. Yet, the court's hyperbolic assertion that Congress "clearly" meant the religious use exemption to apply to all races fails to consider fully the historical context in which the exemption was enacted, and it misinterprets legislative history.

While noting that the indictments of Boyll amounted to a virtual prohibition of his right to practice his religion freely, the court weakened its opinion when it failed to consider "any" instance where the government may have a compelling interest in burdening a religion. The court failed to balance the individual's right to exercise his religion freely with the state's compelling interest in eradicating drugs. By focusing solely on the right of the individual, the court implied that no government interest could equal the individual's right. Lacking judicial dispassion, the opinion appears less as a spirited defense of the individual than as an attack against perceived state intrusion.

Finally, by not including the second sentence of the peyote use exemption, the court indicated that it will actively enforce laws against non-members of a particular religion, while excusing members from compliance with neutral, generally applicable laws. This implies both discrimination against non-members and a refusal to consider the government's compelling interests.

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