

The “Great National Crusade.” *Employment Division v. Smith* and the Settler-Colonial Project

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In April of 1990, the United States Supreme Court released its highly anticipated decision on the *Employment Division, Department of Human Resources of Oregon v. Alfred Smith et. al* case. The case had already made its way to the Supreme Court once in 1988, when the Court sent it back to the Supreme Court of Oregon, telling them they would hear the case only after the state sorted out the ambiguities of its own law. When Americans learned of the Court's decision, many were confused and dismayed: it was a blow to all with a stake in the preservation of the right to freedom of religion, and another in a decade of court rulings stripping the Bill of Rights over the use of controlled substances. Activists immediately jumped to action. To many, the ruling seemed like an inconceivable answer to a seemingly simple question: does banning the principle sacred object of a bona fide religious tradition violate the First Amendment?

In 1983, Alfred Smith (Klamath) was fired from his job at a drug and alcohol rehabilitation and counseling center. A year later, Galen Black was fired as well. The two men were told they had violated the center's employment policies on abstaining from drugs and alcohol by eating peyote, a small, hairy, psychoactive cactus, in ceremonies of the Native American Church. Despite their religious reasons for taking peyote, they were fired as having been fired for reasons of "misconduct," making them ineligible for unemployment benefits while they searched for different work. In frustration, Smith and Black took Oregon's Employment Division to court, claiming that their First Amendment right to freely exercise their religious beliefs had been violated by the Division's decision. Citing the well-established *Sherbert v. Verner* decision, which ruled it unconstitutional for an individual to be denied unemployment benefits if they were fired for a religiously-motivated reason (in the *Sherbert* case, refusing to work on a Saturday sabbath), Smith and Black sought to establish the discriminatory and

unconstitutional nature of the Employment Division's decision. The law coming out of the *Sherbert* case on the right to freely exercise religion mandated that the government have a "compelling interest" in restricting an individual's right to freely exercise their religious beliefs. Oregon's courts agreed: the state's justifications for denying Smith and Black unemployment benefits did not pass the *Sherbert* test, while thirty years of established precedent had ruled that the right to possess and ingest peyote for religious purposes was constitutionally protected. The State of Oregon, however, refused to give in. Then Attorney General of Oregon, David Frohnmayer, appealed to the Supreme Court of Oregon and, when they ruled against him, appealed to the United States Supreme Court. After two rounds of litigation, one in 1987-1988 and another in 1989-1990, the Supreme Court decided that Smith and Black's First Amendment right to freely exercise their religious beliefs had not been violated by the State of Oregon, stating that a neutral law, generally applied to all regardless of religious belief, did not place an undue burden on religious practice by the state onto members of the Native American Church.<sup>1</sup>

### ***Employment Division v. Smith in Context***

Modern Peyotism, a religious tradition incorporated in the United States mainly under the name of the Native American Church (and also the smaller and slightly different Peyote Way Church of God), emerged in the mid-19th century in Oklahoma Territory. It involves an overnight, community-based ceremony in which the peyote cactus, considered a gift from God or a sacrament, is eaten by believers. Contrary to popular belief, while peyote is a hallucinogen, anthropologist David Aberle has observed:

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<sup>1</sup> *Employment Division v. Smith*, 494 US 872.; Ronald K. Bullis, "Swallowing the Scroll: Legal Implications of the Recent Supreme Court Peyote Cases," *Journal of Psychoactive Drugs* 22, no. 3 (July 1990): 325-332.; Thomas C. Maroukis, *The Peyote Road: Religious Freedom and the Native American Church* (Norman, OK: University of Oklahoma Press, 2010), 202-205.

The visions are definitely not critical; they are rare or absent in a very large percentage of [...] cases, and disvalued by many peyotists, although welcomed by many others [...] the peyote experience is characterized by a feeling of the personal significance of external and internal stimuli. The user is prompted to ask, of everything, “What does this mean for me?” [...] Users may find personal significance in the events of the peyote meeting, the physical surroundings, their fellow participants and their behavior and expressions, scotomata, visions, nausea, indigestion, headache, backache, or simply in their ruminations.

But it has been used for thousands of years by Indigenous people along the Rio Grande, namely the Aztecs, Chimichecs, Coahuiltes, Coras, Huicholes, Jumanas, Laguneros, Tarahumaras, Toltecs, and Zacatecos. In Mexico today, it is still an integral aspect of the spiritual traditions of several of these groups. Scholars agree that the modern Peyotist tradition was most likely developed by Carrizos and brought north by Lipan Apaches. From there, the religion spread rapidly: by 1867, Kiowas, Caddos, Wichitas, Delawares, and Comanches in Oklahoma Territory all had significant Peyotist sects, and actively proselytized throughout Oklahoma and beyond. It is not a coincidence that the religion became popular in tandem with the establishment of the reservation system. The tenets of Peyotism, called the Peyote Road, appealed to Native peoples’ feelings of powerlessness as they were forced onto reservations with few employment opportunities, little to do, poor living conditions, and rampant disease while the close quarters into which many Native nations were squeezed made it even easier for the religion to spread. By 1880, the popularity of the peyote religion—in many ways a revivalist tradition—led reservations to begin banning peyote. In 1890, the Bureau of Indian Affairs labeled it an intoxicant in an attempt to get it federally banned.<sup>2</sup>

Like other revivalist religious movements such as the Ghost Dance, the emergence and practice of Peyotism was a resistance of American settler-colonialism, and a direct threat to the

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<sup>2</sup> Maroukis, *The Peyote Road*, 32, 22-25, 17.; David F. Aberle, *The Peyote Religion Among the Navaho*, (Norman, OK: University of Oklahoma Press, 1991), 4, 6.

Bureau of Indian Affairs' agenda of converting and assimilating Native people. Banning peyote had the same purpose as banning traditional language, traditional dress and sacred objects such as eagle feathers, as well as sending Native children to assimilationist boarding schools: destroying Native culture and identity so as to eliminate Indigenous people from North America. As early as 1909, the BIA labeled Peyotism a "religious cult" intended to excuse the use of a "powerful narcotic;" however, it was clear that the government's issue was not with the use of the peyote substance, but with the Peyotist religion as an increasingly popular alternative to Christianity. While federally banning peyote was a priority until World War II and the BIA consistently lobbied Congress for this ban, six bills banning peyote usage failed to pass between 1918 and 1937. When the federal Drug Abuse Control Act added hallucinogens to the list of controlled substances in 1965, the use of peyote by the Native American Church was exempted.<sup>3</sup>

The 1990 *Employment Division v. Smith* decision called back a long history of religious suppression of Indigenous people in the Americas, and particularly the United States' efforts to suppress Peyotism and the Native American Church. However, after World War II, the federal government seemed to have more or less given up on actively attacking religious peyote use. The heightened interest of the federal government in limiting the use of substances it classified as "drugs," including hallucinogens like peyote and its main active chemical compound mescaline, also impacted the ruling. In the 1980s, Ronald Reagan's "Moral Majority" was intent on holding Americans to a certain standard—and demonizing the users of any and all substances associated with the upheaval of the 1960s and '70s. While the federal government exempted the religious use of peyote when it banned peyote for the general population, states were responsible for their

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<sup>3</sup> Maroukis, *The Peyote Road*, 192, 106-107, 54, 49.; Senator Daniel K. Inouye, "Discrimination and Native American Religious Rights," in *Native American Cultural and Religious Freedoms* ed. John Wunder (New York, NY: Garland Publishing, 1996), 11-12.

own drug laws. While nearly all fifty states had written or judicially crafted exemptions to their drug laws for Peyotists by the 1980s, one notable exception was the state of Oregon.<sup>4</sup>

While the *Employment Division v. Smith* case caused the Supreme Court of Oregon to decide in 1988 that peyote users *were* exempt from the state's restrictions on peyote usage, David Frohnmayer, the Attorney General of Oregon, and the state he represented were adamant: peyote use was wrong, dangerous, and against the law always, regardless of the user's religious beliefs. At the height of America's War on Drugs, and "moral" frenzy, Frohnmayer's arguments struck a chord; like all who "used drugs," members of the Native American Church must have been misguided and sick, bringing their children up to think that "substance abuse" was acceptable. The Supreme Court heard oral arguments on November 6, 1989, where Attorney General Frohnmayer and Supreme Court Justices made clear the assumptions and biases behind their beliefs. In context, the *Employment Division v. Smith* case proves to be more than simply a constitutional quandary, and reveals that the War on Drugs was/is not only a tool intended to reinforce a racial caste system or create a constant flow of bodies of color for underpaid labor, as has been observed by scholars such as Michelle Alexander, but that these previously observed effects of the War on Drugs fit into a larger interest by the federal government in completely eliminating people of color from the American polity. In analyzing the oral arguments of this case, I work to prove that the government's interest in controlling Native bodies under the guise of a righteous Drug War in 1989 is part of the settler-colonial project, mirroring historic attempts

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<sup>4</sup> Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* (New York, NY: Little, Brown & Company, 1996).

to ban Peyotism and other Native religions to catalyze the eventual assimilation and erasure of Native people from the American landscape.<sup>5</sup>

### **Assumptions of Native Irresponsibility and Proclivity to Substance Abuse**

In his oral argument, Oregon Attorney General David Frohnmayer relies on implications of Native irresponsibility or lack of agency to argue for the continued ban on peyote use even for Native American Church members. In doing so, he relies on unstated stereotypes of an Indigenous proclivity to substance abuse and alcoholism to ensure his argument's success, despite citing no evidence to support his claims. By painting Indigenous bodies as vulnerable and Indigenous people as lacking responsibility and agency, Frohnmayer is able to imply that the non-Western, non-mainstream Native American Church is simply a front for irresponsible behavior that would be better eradicated.

Frohnmayer insists on the dangerousness of peyote, implying that the settler state has better knowledge of the risks and benefits of traditional Indigenous religion and medicine than Indigenous people do themselves. Several times throughout his argument, he states that peyote is “unquestionably a dangerous and powerful hallucinogen.” However, he cites very little evidence to support this besides that peyote is considered a Schedule I drug in most states, which designates that a substance has a high potential for abuse and no medical value whatsoever. This is a cyclical argument: the evidence for a drug being dangerous cannot be that it has been designated as dangerous, because the question is why it has been designated as such. Frohnmayer ignores the evidence against his assertion that peyote is “undoubtedly” or “unquestionably” dangerous. As Smith and Black’s lawyer Craig Dorsay later points out, peyote is non-habit

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<sup>5</sup> Ibid.; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, NY: The New Press, 2010).

forming, non-tolerance forming, and there are no psychological or neurological issues linked to its use. It is not “addictive.” Under the strict control of the religious ceremony, peyote is not at all harmful. By regulating the drug even for religious purposes on the legislative—not scientific—decision that peyote is a Schedule I drug, and therefore “unquestionably” dangerous, the state asserts a control over the Indigenous body that implies a paternalistic motive: settler legislatures, made up of almost entirely non-Indigenous people, know what is good for Indigenous people better than Indigenous people do.<sup>6</sup>

Frohnmayr’s insistence on the dangers of peyote are central to his argument. The *Sherbert* test, named after the 1962 *Sherbert v. Verner* case, is a balancing test requiring the state to prove it has a “compelling interest” in substantially burdening the free exercise of religious belief. The test was applied in Native American Church members’ favor in peyote precedent cases *People v. Woody* (1964) and *State v. Wittingham* (1973). In anticipation of an argument from Smith and Black’s defense that the case failed the *Sherbert* test and the government had no “compelling interest” in limiting their religious freedom, Frohnmayr claims that the state has “interest in regulating all peyote and hallucinogenic drug use [...] in order to further the health and safety interests of its citizens.” As the respondents’ lawyer and Justice Blackmun’s dissent would later point out, in over a century of religious peyote use in its current form by Native North Americans, only a handful of cases had been recorded in which it caused harm. These were so little that the dangers of the religious use of peyote had been entirely dismissed by scientists, anthropologists, most states, and the federal government at the time of the *Smith* case. Therefore, the state was not furthering the “health and safety interests” of all of its citizens—only

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<sup>6</sup> Bullis, “Swallowing the Scroll,” 330.; Maroukis, *The Peyote Road*, 5-6.; Aberle, *The Peyote Religion Among the Navaho*, 9-11.; *Employment Division v. Smith*, 494 US 872, Oral Argument (November 6, 1989), 06:40-06:54.

its citizens attempting to use the drug recreationally. The state then left itself open to criticism for both overly regulating the bodies of Native people (members of sovereign nations) *and* truly making its decisions under the assumption that religious claims for peyote use are a “front” for recreational use.<sup>7</sup>

Frohnmayer’s later arguments and the responses of Supreme Court Justices also paint religious claims as a “front.” Frohnmayer presents his argument in an accusatory fashion, implying that Native American Church members may be using claims to the safety of their service in order to “get away with” drug use. In an authoritative tone, he told the Supreme Court, “We believe that it is ironic that while Respondents concede that the use of a Schedule I drug is dangerous as to everyone else, it is safe to them. And the burden, we believe, lies properly on Respondents to show convincingly why the dangers of drug use, or substance abuse, are less as to them.” Frohnmayer is right: Smith and Black *did* concede that the use of peyote could be dangerous in uncontrolled, recreational use. Smith and Black, however, took the sacrament under the strict supervision of Roadmen, the leaders of the Native American Church ceremony, which has never caused any individual serious harm. While Frohnmayer presents his argument in a professional, supposedly logical way, his tone shows contempt for Native American Church members’ claims that their ceremony is not harmful. Additionally, he corrects his speech, first saying “the dangers of drug use,” already mischaracterizing the Native American Church sacrament (one would not call sipping communion wine “alcohol use”), and then correcting himself, saying, “or substance abuse.” This correction makes it almost shockingly clear how little he believes that Native American Church members were genuine about their religious ceremony.

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<sup>7</sup> Maroukis, *The Peyote Road*, 5-6.; *Employment Division v. Smith*, 494 US 872 (1990).; Oral Argument (November 6, 1989), 31:33-32:23.; Bullis, “Swallowing the Scroll,” 329-330.

He considers all “drug use” abuse, and thinks that members of the Native American Church use their ceremony as a cover-up for using drugs irresponsibly.<sup>8</sup>

Significantly, much of Attorney General Frohnmayer’s views of Peyotist religious practice is revealed in his explanation of why the termination of respondents Smith and Black was entirely justified. When asked by Justice Blackmun why the respondents were fired, Frohnmayer said, simply, “because they were drug counselors.” When Blackmun, slightly taken aback, pushed him to elaborate and clarify that they were *not* fired because their conduct was illegal, Frohnmayer replied:

They were fired because they were drug counselors [...] They were drug counselors. Their employer had a drug and alcohol free policy [...] They were fired for the statutory purpose upheld by the Employment Appeals Board of engaging in misconduct at their work, because it was a drug and alcohol free policy, consistent with the policy of many drug and alcohol rehabilitation centers, that they act as role models for those whom they were counseling. That was a valid job-related requirement.

Frohnmayer’s repetition of the fact that Smith and Black were drug counselors in a rehabilitation center that had a drug and alcohol free policy reveals a certain level of incredulity: Frohnmayer clearly believes that arguments that Smith’s and Black’s terminations were unjust are ludicrous; he is shocked he even has to explain why their behavior was seen as misconduct. He emphasizes that the rehabilitation center had a similar policy to most drug and alcohol rehabilitation centers in order to prove the legitimacy of such a policy. Most tellingly, he goes beyond simply explaining the reason for their termination (misconduct) and indicates the reason the policy is in place. Frohnmayer explains the policy was necessary so that counselors “act as role models for those whom they were counseling,” and highlights his opinion that this was a “valid job-related requirement.” Especially because this was not an answer to the question Blackmun asked, this

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<sup>8</sup> *Employment Division v. Smith*, 18:19-18:28.; Maroukis, *The Peyote Road*, 14.

assertion reveals Frohnmayer's understanding of Native American Church ceremonies as a façade for recreational drug use; fulfilling their religious obligations, in Frohnmayer's view, prevented Smith and Black from being good role models for their patients.<sup>9</sup>

### **Devaluing the Sacred: the Drug War as a Holy War**

In their dialogue, Frohnmayer and Supreme Court Justices repeatedly reject language which connotes Native religious practice as holy or sacred equal to Judeo-Christian tradition. The use of peyote by the Native American Church has commonly been called a "sacrament" due to the religion's teaching that peyote is not only just a gift from, but a part of God, similar to the belief in many Christian denominations that sacramental bread and wine is the body and blood of Christ. Several Supreme Court Justices ask questions about peyote as a sacrament, perhaps due to their research prior to hearing the case, and Smith and Black's lawyer, Craig Dorsay, uses descriptions of peyote as a sacrament to argue that just as sacramental wine was exempted from Prohibition in the 1920s, peyote use should be universally exempted from drug law for members of the Native American Church. Frohnmayer and other Supreme Court Justices, however, react to these comparisons almost with offense, fiercely arguing that because peyote is a Schedule I drug, the two practices are not analogous. As the drug scheduling system is a settler invention, imposing its conventions on Native people is already a form of colonial violence against Native bodies; it assumes, as argued above, that Native knowledge is inferior to settler knowledge and that Native people are not responsible enough to have bodily autonomy. In addition, devaluing the sacred in Indigenous spiritual tradition is indicative of the assumption that Judeo-Christian

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<sup>9</sup> *Employment Division v. Smith*, 21:11-22:04.

religious belief is more valid than Native belief and reveals the *Employment Division v. Smith* decision as an extension of historical assimilationist policy.<sup>10</sup>

Despite the comparison between peyote and sacramental bread and wine being frequently used by ethnographers, advocates, and Native American Church members themselves, both Attorney General Frohnmayer and the court dismiss the assertion that peyote is a sacrament of the same weight repeatedly. When Justice Stevens asked Frohnmayer whether his interpretation of the law would allow for the prohibition of the religious use of wine if the state issued a general prohibition, he replied:

That's a different question [...] There, an argument for accommodation is stronger, stronger in at least two respects. First is that [...] to the extent that this Court examines or re-examines the nature of the compelling state interest and the potential danger of the ingestion of sacramental wine in small quantities, it [...] might well question [...] the state's overall interest in regulation of a very dangerous substance [...] if peyote were a Schedule IV substance] it could be a different case [...] The second is clearly that the use of peyote in the ceremonies is at least in part for its very hallucinogenic properties.

Frohnmayer's argument essentially boils down to one point: Native people use peyote for its hallucinogenic properties, and that is dangerous. But, as with most of his oral argument, he provides no evidence to support this, relying on what he suspects the Court already believes about Native bodies, "drug use," and the Native American Church. As Frohnmayer hopes, many members of the Court *do* already seem to have made their minds for political reasons, including Justice Scalia who later says, "You would say that it would be at least a close case as to which a state could prohibit this and not prohibit the use of alcohol in worship services to the point of inebriation." When the respondents' lawyer compares sacramental wine to peyote, Scalia remarks, "Your pointing to the traditional use of wine at religion services would not make any

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<sup>10</sup> Maroukis, *The Peyote Road*, 59.; *Employment Division v. Smith*.

difference. I don't assume that the states would be compelled to allow excessive use of alcohol [...] drunken parties [...] on the grounds of religion [...] I don't see a correlation between the wine and the peyote." While on the surface it seems like maybe Scalia is simply pointing out that the amount of wine drunk at communion is too little to have any effect, while peyote is taken with the specific knowledge that it will have a psychoactive reaction, Scalia's language makes his beliefs on peyote as a sacred sacrament clear. While he could have made his point after saying that the states would not be compelled to allow drunkenness, Scalia compares the use of peyote to a "drunken party," bluntly revealing his conviction that the use of peyote by Native American Church members can only be recreational.<sup>11</sup>

According to David Aberle, an anthropologist sent to study peyote use among the Navajo by the American government in the 1960s, peyote is seen as a divine incarnation, very similar to the Christian sacraments of bread and wine. As with the familiar sacraments in certain Christian services, where members believe they absorb the Holy Spirit (a part of God) when taking communion, members of the Native American Church believe they are absorbing what they call "power" (an invisible, supernatural force) when they take the peyote sacrament into their bodies. Moreover, peyote use could hardly be described as a "party:" Aberle even goes so far as to claim that "the emotional tone of the experiences is often one of mild to acute anxiety, sometimes of considerable duration, and often accompanied by depression." The dismissal of peyote as a sacrament implies a fundamental distrust for non-settler religious beliefs, but more directly of Native American people themselves and their ability to safely exercise their own bodily autonomy: Frohnmayer, Scalia, and the Court do not believe that the religious use of peyote is

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<sup>11</sup> *Employment Division v. Smith*, 30:36-31:17, 17:51-18:02, 15:44-18:02.

based in genuine belief. When Scalia compares the use of peyote in religious services to “drunken parties [...] on the grounds of religion,” he makes their contempt and disbelief clear; despite the repeated pleas by attorney Craig Dorsay for the Court to recognize a degree of cultural misunderstanding (he drops the word “ethnocentrism,” which the Court does not appreciate), Scalia can only see peyote as a “hallucinogenic drug” whose properties must make for a wild, hedonistic night, not a holy substance encouraging reflection, introspection, gratitude, and healing.<sup>12</sup>

Frohnmayr’s characterization of peyote, and his insistence that there is no possible non-recreational use of peyote reflects the drug rhetoric of the historical moment. *Employment Division v. Smith* was argued in the Supreme Court in November of 1989, while America’s War on Drugs raged on all over the country. In the years preceding Frohnmayr’s portrayal of religious peyote use as equivalent to substance abuse, the federal government had launched a campaign against “drugs,” as a constructed category, including all “mind-altering” substances associated with counterculturists and people of color, first focusing on marijuana and heroin and expanding to include LSD, psilocybin, cocaine/crack, mescaline (the hallucinogenic chemical in peyote), and peyote itself. This “drugs” category, of course, included neither alcohol nor tobacco, and while multiple government commissions as well as independent groups advised Presidents Nixon and Reagan (the most intense drug warriors in the White House in the Drug War years) and Congress that banning drugs, especially marijuana, could not be justified on “public health” grounds while alcohol and tobacco remained legal, overzealous politicians entirely ignored them, continuing to espouse the physical dangers of drug use and the detriment of recreational drug

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<sup>12</sup> Maroukis, *The Peyote Road*, 7.; Aberle, *The Peyote Religion Among the Navaho*, 11-13, 6.

users on society citing flawed or misconstrued science or nothing at all. After Nixon essentially invented the Drug War as a campaign platform in 1969, and even more after Reagan's election in 1980, politicians used drug fearmongering as a powerful political tool. Being "tough on drugs" was code for being tough on individuals who threatened white hegemony, an appealing prospect to Americans who felt their culture and power were crumbling in the name of equality, especially racial equality. State politicians like Attorney General Frohnmayer and other Oregon officials, seeing its success, appropriated the tough-on-drugs strategy from their federal colleagues.<sup>13</sup>

In the Reagan years, the rhetoric on the *moral* dangers of drugs was incessant. Reagan's director of his new Drug Abuse Policy Office, Carlton Turner, was intent on "cleaning up society," while President Reagan proposed to involve the military and the FBI to enforce drug policy and made drugs an ethical problem, calling for a "moral or [...] spiritual solution" to a largely invented "drug problem." Associating a nonexistent "rise in crime" with Democratic administrations' focus on attempting to remedy structural problems rather than criminalizing drug-using individuals, Reagan connected drug use directly to crime and directly rejected science debunking his philosophy, while simultaneously affirming drug use as a moral failing. The association of drug use with evil had the most widespread impact on people like Frohnmayer and Justice Scalia, who are either unwilling or unable to conceive of the use of a substance designated a Schedule I (by federal Attorney General's office, it should be noted, not scientists or doctors) being used in any introspective, spiritual service. Reagan called for a "spiritual solution" to all drug use—automatically making even the *idea* of the spiritual use of a substance designated as a drug by the federal government paradoxical. Reagan's spiritual language around

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<sup>13</sup> Baum, *Smoke and Mirrors*.

the Drug War went even further over the course of his presidency, and the connections between drug use and sin—as in, a religious, Judeo-Christian sin—were not discreet. In 1986, Ronald and Nancy Reagan addressed Americans from the White House, promoting “outspoken intolerance” for the drug “cancer” and referring to the Drug War as “a great national crusade.” In November 1989, though Reagan had recently left office, the Drug War as a moral imperative raged on under his successor George H. W. Bush.<sup>14</sup>

Outlawing peyote without exception for religious use amounts to cultural genocide, a fact that Frohnmayer attempts to dodge acknowledging but of which the Supreme Court is aware. “You do concede, I take it,” Justice Kennedy asks Frohnmayer towards the end of his time, “that the enforcement of Oregon criminal laws would in effect destroy the Native American Church and its ritual in your state.” “We don’t concede that, Justice Kennedy,” Frohnmayer replies, “for a very practical reason. The Oregon criminal prohibition, construed as constitutional by the Oregon Court of Appeals since *State v. Soto*, has been on the books for more than a decade. There is no suggestion in our state that that religion has been destroyed by inappropriate police intrusion into the tipi ceremony.” Even Scalia is shocked by the nonsense of this response: “What do you mean by inappropriate police intrusion [...] Are you saying you are not going to enforce the criminal law if we sustain it?” “No, we are not saying that,” Frohnmayer replies, and attempts to shift the focus instead onto Oregon’s criminal law. Frohnmayer is clearly aware of the consequences of the enforcement of the law without exceptions: the Native American Church itself, the name under which Peyotists are incorporated, would be criminalized. Frohnmayer does not want to admit that he knows this or that this would be the consequence, and so (rather

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<sup>14</sup> Baum, *Smoke and Mirrors*, 137-260.

awkwardly) tries to worm his way out of actually answering the Supreme Court's questions. However, the tone and wording of their questions reveal that the Supreme Court Justices know what criminalizing their peyote use would mean for members of the Native American Church.<sup>15</sup>

**Conclusion: *Employment Division v. Smith* as Assimilationist Policy, Continued**

The oral arguments for the *Employment Division v. Smith* case implied that religious arguments from the Native American Church were being used to excuse a moral wrong, and the 1990 decision fits neatly into a narrative pushed by President Reagan and the Moral Majority that there is *no excuse* for “drug use.” Despite arguments by Smith and Black’s lawyer Dorsay on the religious purpose of peyote and research submitted to the court on the Peyote religion, just the language used during the dialogue reveals the Court had already made up its mind. Peyote was not seen as a valid religious sacrament, despite modern Peyotism having been established over a century before the *Smith* decision and being grounded in thousands of years of pre-colonial religious use. The moral arguments of Reagan’s Moral Majority had a more insidious purpose than creating a more “ethical” America—their morality was grounded in a Eurocentric worldview and Judeo-Christian theological teachings. By “moralizing” America, the government really intended to Christianize it. In this way, the *Employment Division v. Smith* decision, while reversing half a century of religious freedom jurisdiction, was not an anomaly. *Smith* is an extension of late-19th and early 20th-century attempts to assimilate and Christianize Indigenous people. By allowing the criminalization of even the religious use of peyote, the state essentially allowed the criminalization of a religion made up of nearly entirely Native people.

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<sup>15</sup> *Employment Division v. Smith*, 26:54-27:48.

In *Settler-Colonialism and the Transformation of Anthropology*, Patrick Wolfe writes that “settler colonies were (are) premised on the elimination of native societies. The split tensing reflects a determinate feature of settler colonization. The colonizers come to stay—invasion is a structure, not an event [...] survival is a matter of not being assimilated.” Wolfe describes settler-colonialism as an ongoing process of genocide. In his view, the elimination of Indigenous peoples is not a historical relic, but a continuous historical process. Wolfe also denotes assimilation as a form of elimination. In *Incarcerated Stories: Indigenous Women in the Settler-Capitalist State*, Native ethnographer Shannon Speed (Chickasaw Nation) shows that indigeneity, more so than other racial identities, is seen as culturally based. When Indigenous people assimilate into the settler culture they are surrounded by, they are no longer considered Indigenous at all, but white. What *Employment Division v. Smith* says about the War on Drugs supports these theories; the case displays the assimilationist agenda behind the state’s belief that it must play a role in regulating and controlling the bodies of its populace because, in doing so, it can “moralize” (Christianize, or bend to Eurocentric ideas of morality) nonwhite racial others. The War on Drugs has directly targeted people of color, and the mass incarceration of black men is one of its most well-known legacies. But rarely are these particular aspects of the War on Drugs, this case and the regulation of Native bodies, associated with it. In ignoring this case and its implications, it can be difficult to see the way in which the War on Drugs was and is a part of the larger American settler-colonial project.<sup>16</sup>

While maybe not in so many words, Americans were aware of the implications of the Supreme Court’s decision. All activists with a stake in protecting minority religions jumped to

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<sup>16</sup> Baum, *Smoke and Mirrors*.; Shannon Speed, *Incarcerated Stories: Indigenous Women Migrants and Violence in the Settler-Capitalist State* (Chapel Hill, NC: University of North Carolina Press, 2019).; Patrick Wolfe, *Settler-Colonialism and the Transformation of Anthropology* (New York, NY: Cassell, 1999), 1-3.

action, and in 1993, following the election of Democrat Bill Clinton to office, Congress passed the Religious Freedom Restoration Act. In it, Congress as a body affirmed that the free exercise of religion is an “unalienable right,” and noted that even laws neutral towards religion can burden religious exercise, directly referencing *Smith*’s elimination of the government’s requirement to justify burdening First Amendment rights and mandating the use *Sherbert* test in all future free exercise cases. This was followed in 1994 by amendments to the 1978 American Indian Religious Freedom Act specifically to “provide for the traditional use of peyote by Indians for religious purposes, and for other purposes.” These amendments also directly referenced *Smith*, stating that while the decision had refused to protect peyote use, “the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.” Ultimately, these were bandages covering one symptom of a larger, more heinous structure of regulation, control, and oppression of bodies of color. The Drug War continued in full force under President Bill Clinton, and its rhetoric has followed Americans into the 21st century.<sup>17</sup>

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<sup>17</sup> Baum, *Smoke and Mirrors*.; American Indian Religious Freedom Act Amendments of 1994, H.R. 4230.; Religious Freedom Restoration Act of 1993, H.R. 1308.; Maroukis, *The Peyote Road*, 208-209.

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