Religious Freedom and United States Drug Laws: Notes on the UDV-USA Legal Case[1]

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Introduction

The expansion of Brazilian churches using *ayahuasca* to Brazil's urban areas and to other countries has been accompanied by challenges to the legality of the decoction, which contains DMT, a substance prohibited under international treaties and the drug laws of various countries. The purpose of this paper is to offer a review of the trajectory and the substantive legal issues involved with one such case in the United States, that of the UDV-USA.[3] I do not pretend to offer here a full legal analysis, but merely to survey key issues; I also do not attempt a proper anthropological analysis of the legal process involved in the case, although I offer some thoughts on the cultural and historical backdrop of American attitudes toward drugs and religion in the conclusion.

UDV-USA and the beginning of the case

In December, 1993, the state of New Mexico recognized the incorporation of the "Centro Espirita Beneficente Uniao do Vegetal" (UDV-USA, Inc.) as a "nonprofit religious" organization. The group, affiliated with the UDV, one of the two largest Brazilian religions that use decoctions of *Banisteriopsis caapi* and *Psychotria viridis* (commonly called ayahuasca) as central sacraments, had been operating less formally in the United States since at least 1988 without attracting much attention (Sandlin 2004).

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[3] The "Centro Espírita Beneficente União do Vegetal"-USA; in court documents the group's name has been consistently misstated as the "Centro Espirita Beneficiente."

According to court documents, the group's president, Jeffrey Bronfman, helped establish the church officially in the early 1990s, traveling often to Brazil and attaining the title of *mestre* ("master"), the church's highest grade of instruction. Since that time, Bronfman had been leading UDV services with a small group of Americans and Brazilians outside Santa Fe, using *hoasca* (the UDV term for ayahuasca) shipped from Brazil. On May 21, 1999, DEA agents intercepted a shipment of some 30 gallons of hoasca destined for Bronfman's Santa Fe office, which also served as the administrative office of the UDV-USA; searching Bronfman's office, agents seized additional quantities of hoasca as well as UDV-USA records and personal papers of Bronfman's (UDV complaint 2000[4]). No one was arrested and no charges were filed. More than a year and a half later,[5] in November, 2000, the UDV-USA filed a complaint in New Mexico District Court, asking the court to declare the seizure an illegal violation of UDV members' religious freedom, to prohibit further government interference with their religious practice, and to mandate the return of the seized hoasca.[6]

Case trajectory in a nutshell

More than six years after the initial seizure, the matter remains unresolved.[7] In August 2002 the District Court granted the UDV a preliminary injunction allowing them

[4] Throughout this text I have opted for a simpler system of referencing than that commonly employed in legal documents. Where only a page number is given, it refers to the last document mentioned in the text. Many of the decisions and briefs filed in the case are available online through various sources; readers can refer to www.udv-usa.com and the US Department of Justice website for some of these. Any referenced documents not otherwise available can be had by contacting the author at mdmeyer@virginia.edu.
[5] The UDV claimed in its district court complaint that ongoing negotiations with the federal government to find a compromise allowing them to continue practicing their religion led to the delay in filing.
[6] The case has been in the federal court system since it involves federal laws. There are three levels to this system: District Courts, Courts of Appeals or Circuit Courts, and the Supreme Court.
[7] During this time, cases involving the other Brazilian church, Santo Daime, have come and gone before courts in the Netherlands (where it is now legal), Spain (where it is also tolerated), and France (where church members were found not guilty of drug possession and trafficking, only to see the government

to import and use hoasca, but the government was granted an emergency stay while a 3-judge panel for the 10th Circuit Court of Appeals reviewed the decision (eventually affirming the injunction in September 2003), and another stay during a 13-judge *en banc* review (which, in November of 2004, also affirmed the District Court ruling). Extraordinarily, in late 2004 the Supreme Court granted an emergency stay of the injunction while reviewing the government's stay request. But on December 10, 2004, the stay was lifted and the preliminary injunction issued in 2002 went into effect, marking the first time since the 1999 seizure that the UDV was able to resume its services with hoasca. The government appealed the case—still centered on the preliminary injunction—to the Supreme Court, and in March 2005 the Court agreed to review the case in its fall 2005 session, with a decision expected sometime in mid-2006. This ruling will bear on the preliminary injunction only, and a formal trial on the merits of the case could still take place after the decision is handed down.

The UDV's District Court Complaint

UDV-USA's initial complaint, filed November 21, 2000 in New Mexico district court, asked the court to declare that federal authorities had acted illegally in seizing sacramental hoasca from church offices, and to enjoin enforcement of federal drug laws against UDV importation, distribution, and use of hoasca, in addition to mandating the return of the seized tea. The complaint offered five basic arguments supporting these requests:

1) That the Controlled Substances Act (CSA), the relevant federal drug control law, did not apply to hoasca;

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subsequently add ayahuasca and its constituent plants to its list of banned substances). See www.santodaime.org and Adelaars and van der Plas (2002)for more information about these cases.

2) That the government should allow the UDV to practice in the United States under international principles of "comity," since hoasca is permitted by law in Brazil;
3) That the government's actions in seizing the UDV's hoasca violated Equal Protection principles, since the Native American Church (NAC), which uses peyote as a sacrament, is protected by federal law;
4) That the government had violated 1st Amendment rights of UDV members and legislated religious favoritism by denying them an exemption to the CSA when it allowed one to the NAC and to scientific researchers working with controlled substances; and
5) That the government violated the mandate of the 1993 Religious Freedom Restoration Act (RFRA), which orders that government infringements on religious exercise fulfill a "compelling" government interest, and do so in the "least restrictive means" available.

On December 22, 2000, the UDV entered a formal Motion for Preliminary Injunction[8] to allow the UDV to resume its religious services, which had been suspended following the government seizure, pending the outcome of a trial of the case. The government contested each of the UDV's claims in its reply to the motion, noting that the seized tea was shown by assay to contain dimethyltryptamine (DMT), an illegal substance under US law and international treaty.[9] It minimized the fact that the Brazilian government permits hoasca and similar decoctions, arguing that the doctrine of comity "cannot be used to override a clear domestic statute" (51). It also vigorously contested the UDV's attempt to compare its situation to the federal exemption to the CSA permitted to Native American Church use of peyote, arguing that the drugs in question were different, and especially that the NAC exemption flowed from the special political status of Native

[8] The purpose of a preliminary injunction is to prohibit or compel some conduct by one of the parties to a suit while the case is considered, especially where "irreversible harm" will otherwise result.
[9] The CSA places DMT, along with hallucinogens such as LSD, psilocybin, and mescaline, in the most restrictive of its five "schedules." According to the CSA, substances in Schedule I have no recognized medical use, a high potential for abuse, and a lack of accepted safety for use even under medical supervision. Such well-known drugs as cocaine (Schedule II) and methamphetamine (Schedule III) are listed elsewhere, presumably because of their medical utility. DMT is also prohibited by the 1971 UN Convention on Psychotropic Substances.

Americans, so that the UDV was not "similarly situated" for purposes of legal analysis.[10] The government advanced the same logic to combat the UDV's 1st Amendment claim, the bulk of which also hinged on the comparison to the NAC: because of the exemptions granted to the NAC and for research, the UDV argued, enforcement of the CSA against the UDV was an arbitrary targeting of their religion, not "neutral" enforcement of a "generally applicable" law, as is required of statutes that burden the practice of religion.[11] With regard to the UDV's claim under the RFRA, the government asserted that it did have a "compelling interest" in controlling the UDV's use of hoasca, for three reasons: 1) it must adhere "to an important international treaty obligation" (16), the UN Convention on Psychotropic Substances;[12] 2) that drug abuse in general is "one of the greatest problems affecting the health and welfare of our population" (20), and that Congress, in enacting the CSA, "placed DMT at the very highest level of concern" (21-2), reflecting its lack of safety;[13] and 3) that a religious exemption for hoasca would increase the likelihood of its diversion to non-religious contexts. The government also asserted, with

[10] There are actually two federal exemptions for NAC peyote use. The older one dates from the 1965 Drug Abuse Control Amendments, which first prohibited hallucinogens at the federal level; this law, which was later incorporated into the 1970 Controlled Substances Act, exempts any use of peyote in *bona fide* ceremonies of the NAC. The more recent exemption is the result of the 1994 enactment of the American Indian Religious Freedom Act Amendments (AIRFAA), and applies only to Indians who are members of federally recognized tribes. The AIRFAA explicitly bases the NAC exemption on the "special trust relationship" between the federal government and Native Americans as upheld in *Morton v. Mancari* (1974). This precedent established that laws that would otherwise violate Equal Protection principles could stand because they were based on political, not racial classifications. The question whether non-Indians who belong to the NAC can be prosecuted under federal law does not appear to have been decided yet.

[11] This was the precedent established in *Employment Division v. Smith* (1990), where two drug abuse counselors from Oregon were fired for participating in NAC ceremonies and sued when they were denied unemployment benefits. Justice Antonin Scalia wrote for the majority, "[I]f prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended" (cited in Long 2000:188).

[12] The government argued that this interest "is particularly compelling where, as here, the treaty in question is vital to one of the Government's most important interests"—namely, the international war on drugs.

[13] The government noted that little is known, from a scientific perspective, about hoasca itself, but argued that reports of harmful interactions with MAO inhibitor antidepressants, as well as studies with isolated DMT, raise "serious concerns that must be resolved through scientific research before ayahuasca can be considered safe" (25-6). It compared DMT to LSD on the basis of chemical similarity, and raised the specter of "long-lasting psychosis" resulting from its use.

regard to the RFRA claim, that total prohibition of hoasca was the "least restrictive means" of achieving its stated interests, and that it was, therefore, not violating the RFRA in prohibiting the tea.[14]

After this first round of arguments, in late May, 2001, Senior Judge Robert A. Parker called for a two-week evidentiary hearing on the Motion for Preliminary Injunction, to be held from October 22nd to November 2nd, 2001. Parker set three topics for expert witness testimony in the hearing, based on the main points of contention that emerged from the parties' initial arguments: the safety of hoasca, the potential for diversion of hoasca from UDV religious use to recreational channels, and the ethnic composition of the NAC. Following this hearing, in January, 2002, three branches of the NAC submitted a request to file a friend-of-the-court brief opposing the UDV's attempts to invoke the NAC exemption in making their case, while a branch of the Santo Daime church located in Oregon requested permission to file a brief supporting the UDV.[15]

Judge Parker denied both requests in a Memorandum Opinion and Order dated February 25, 2002, and at the same time ruled against the UDV's Equal Protection claims. Parker conceded that the UDV had raised some doubt about whether the NAC was a religion practiced exclusively by Indians, as the government and the NAC had characterized it, but added that "this Court is reluctant to conduct the type of complex anthropological and theological inquiry that would be required to draw a definitive

[14] The 1971 Treaty did allow signatories to make, at the time of signing, certain exceptions for the "traditional" use of plants containing substances proscribed under the treaty; indeed, the United States made such an exception for Native American Church peyote use. But neither the US nor Brazil made such an exception for *ayahuasca* (although Peru did), and even if the US had done so, the treaty does not allow such exceptions for imported substances. While it is possible to amend the treaty, the government suggested that such a process would take years and "would entail enormous diplomatic and political costs for any country seeking such an amendment" (32). There may be good reasons, however, for arguing that ayahuasca is not covered by the Convention, making such reservations unnecessary (see below).

[15] The Native American Church is an umbrella name for several distinct churches, which have different views on some aspects of ritual and on criteria for membership (see, e.g. Long 2000, Stewart 1987).

conclusion regarding whether non-Indians can truly be members of the NAC" (12). In denying the Equal Protection claim, he affirmed that, "Against the backdrop of *Morton* [which upheld hiring preferences for Indian tribes], this Court believes that the implementation of the federal peyote exemption can be characterized other than as the imposition of racial restrictions onto the NAC by the government" (18-9).

The District Court issues a Preliminary Injunction

A key moment in the case came six months later, when Judge Parker issued a second Memorandum Opinion and Order, granting the UDV's Motion for Preliminary Injunction on the basis of its RFRA claim. Parker was not persuaded by the UDV's argument that hoasca was not covered by the CSA, since the "plain language" of the statute bans any "material, compound, mixture, or preparation which contains any quantity of" a substance listed in Schedule I.[16] Nor was Parker moved by the UDV's claim under principles of international comity, since these encourage interpretations of the law friendly to the customs and regulations of other nations where there is ambiguity in a statute, and he found none in the CSA. Moving on to the parts of the UDV's 1st Amendment claim left after disposal of the Equal Protection aspects of the argument, Parker disagreed that exceptions to the CSA for research meant that the law discriminated against religious uses of the drugs it covers. According to his reading of precedent in this area, the UDV would have to show not only that the CSA allows significant non-religious exceptions, but also that these exceptions to the law would "jeopardize the same interests

[16] The UDV had argued that there was ambiguity about whether the CSA prohibited naturally occurring forms of DMT as well as synthetic ones, since the substance can be found in the human body as well as in many plants utilized for commercial purposes in the US. The UDV also claimed that Congress, in constructing the CSA, had named both the plant and its active chemicals where it intended to ban both, as with peyote and mescaline, hallucinogenic mushrooms and psilocybin, and marijuana and cannabinoids. While Judge Parker did not try to explain this apparent redundancy, he also did not accept that failure to list hoasca or its constituent plants meant that they were not covered by the CSA.

that the government uses to justify the restrictions on religious conduct imposed by the CSA" (15). Parker found that allowing the use of drugs "in controlled scientific, research, and medical environments" does not go against the government's interest in promoting public health, while the "unregulated consumption of drugs in ceremonial settings" might pose health and diversion risks that medical-scientific uses do not. Parker also rejected the UDV's argument that the government's failure to persecute non-religious possession and distribution of DMT in the form of certain plants—one of which, phalaris grass, was even recommended by the Department of Agriculture for erosion control—implied religious discrimination against the UDV, concluding that it was more relevant that such plants were not being consumed for their psychoactive effects than it was that they were possessed for secular, as opposed to religious, purposes.[17] Having rejected the UDV's other arguments in favor of a preliminary injunction, Judge Parker turned to an evaluation of their RFRA claim.

Parker began by noting that Congress had passed the RFRA with the explicit intent of undoing the precedent established in *Employment Division v. Smith* (1990; see note 10 above), under which "neutral, generally applicable" laws may burden religious practice without implicating 1st Amendment issues. The RFRA used legislative means to return to the "*Sherbert* test," which had been the accepted standard for review of free exercise cases from 1963 until *Smith*. Under *Sherbert*, and again under the RFRA, government action could interfere "substantially" with the exercise of religion only in the pursuit of "a compelling government interest" achieved by the "least restrictive means" possible. Under 10th circuit law, Parker continued, a litigant who wishes to press a case

[17] Judge Parker did note that the UDV may later pursue a selective enforcement claim based on the use of other DMT-containing plants for ostensibly non-religious purposes in the US, which has been largely ignored by law enforcement. On "ayahuasca analogues" of this sort see Ott (1994).

under RFRA must show "(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion" (citing *Kikumura v. Hurley* [2001]). Since the federal government had never contested that the UDV members who brought the suit were sincere practitioners of a *bona fide* religion whose exercise was seriously impeded by the government's attempts to prohibit hoasca, "the hearing began with the Government shouldering the weighty load thrust upon it by Congress in passing RFRA" (27).[18] This was one major difference between the UDV case and other attempts to use the RFRA to gain an exemption from the CSA: having established a "*prima facie*" case under RFRA, the burden shifted to the government to justify its prohibition of UDV use of hoasca.[19] There was another difference, Parker observed: most of the other cases drawing on the RFRA involved marijuana, a substance presenting many differences from hoasca in terms of pharmacology and patterns of use, and whose potential for harm was established, for purposes of law, by a long series of precedents.

Next, Parker moved to an evaluation of the evidence presented by both parties during the October-November, 2001 hearing on the potential harms of hoasca and the risk of its diversion (the issue of NAC ethnicity having been disposed of by Parker's denial of the UDV's Equal Protection claim). He also analyzed a third issue—whether the United States had a compelling interest in prohibiting hoasca stemming from its commitment to

[18] Judge Parker observed that the government took this stance for the purposes of the preliminary injunction only, and that it may wish later to contest some aspect of this tripartite test as applied to the UDV.

[19] In *US v. Meyers* (1996), for example, a man convicted of marijuana charges asked the 10th Circuit Court of Appeals to overturn his conviction, asserting that he was Reverend of the Church of Marijuana and that his religion encouraged the cultivation and distribution of *Cannabis* for the good of humankind. In denying his request, the appeals court determined that Meyers's beliefs about marijuana were secular, and "more accurately espouse a philosophy or a way of life rather than a 'religion.'" In another case involving marijuana and the RFRA, *US v. Bauer*, there was no question of whether the appellants, who were Rastafarians, held sincere religious beliefs. Instead, the 9th Circuit appeals court upheld their conviction because it was not clear that government enforcement of laws against selling marijuana "substantially burdened" their religious practice, since Rastafarianism did not require such conduct.

the 1971 UN Convention on Psychotropic Substances—which was not discussed in the hearing but was brought up by the government in briefs submitted afterward. In its arguments the government had placed much weight on the congressional findings attached to the CSA on the dangers of drugs in general, and more particularly on the classification of DMT in CSA's Schedule I. Parker discounted this tactic, observing that "under RFRA, Congress mandated that a court may not limit its inquiry to general observations about the operation of a statute" (31).[20] In other words, in Parker's interpretation, the burden was on the government to show, not that enforcing its controlled substance laws represented a compelling interest, but that prohibiting religious use of hoasca in the context of the UDV's religious services advanced those interests, and that providing an exemption to the UDV would compromise them.

Relative safety. In assessing the evidence presented on the relative safety of hoasca, Parker noted the lack of scientific knowledge about the tea, and observed that expert witnesses for each party offered different views of what information was available:

> The lack of knowledge about hoasca, relative to many other substances, forms the core of the dispute between the parties in this case. The Plaintiffs' experts and the Governments' experts have offered differing interpretations of preliminary data, conflicting views on the value of comparisons between ayahuasca and other hallucinogenic drugs, and contrasting evaluations of whether certain findings signify risks associated with hoasca use. (33)

In defending hoasca, for example, the UDV relied heavily on a study of 15 long-term church members that showed no ill effects, and in fact pointed to "remission of psychopathology" following initiation in the UDV and "high functional status" generally

[20] In *Kikumura v. Hurley*, for example, involving an RFRA challenge to prison regulations of pastoral visits, the 10th Circuit appeals court found that "under RFRA, a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government interest, advanced in the least restrictive means, to apply the prison regulation *to the individual claimant*" (cited in Parker:31; my emphasis).

(Grob et al. 1996:86). Government experts stressed the limitations of the study, criticizing its small, all-male sample, lack of baseline data, and the possibility that long-term members tended by default to be those who were not harmed by hoasca. For its turn, the government referred to studies of intravenous DMT that showed elevation of blood pressure and the possibility of "psychotic reactions" in those with existing psychopathology (Strassman 2001), as well as indications of potentially harmful interactions of hoasca with anti-depressant medication, and reports from the UDV's own Department of Medical and Scientific Studies (DEMEC) of 24 cases of "psychosis" in UDV members during a five-year period.[21] The evidence on the safety of hoasca presented by each side, Parker concluded, was virtually "in equipoise," meaning that the government had not "successfully carried its onerous burden" under the RFRA (45).

Diversion potential. Proceeding to weigh the evidence on potential for diversion of hoasca from UDV ceremonial use, Parker judged that, again, "the parties have presented virtually balanced evidence" on the question (52). The government cited reports of "euphoria" associated with DMT ingestion, and rising interest in hallucinogens in the United States, as measured by surveys, to argue that permitting the UDV to import hoasca would be likely to lead to a substantial problem of diversion to non-religious use of the tea. Mark Kleiman, an expert witness for the UDV, pointed to several factors to counter this argument: hoasca sometimes induces nausea; "ayahuasca analog" teas can be made from domestic plants (some of which do not provoke nausea); the tea's form is too

[21] Judge Parker cited the testimony of Dr. Glacus Brito, who testified that of the 24 cases recorded from 1991-96, there were 11 that bore "no relationship whatsoever" to hoasca, seven in which tea was "resharpening mechanism" for "prior mental condition," and one in which tea "act[ed] as a trigger" with no prior history of "psychosis" (41). The UDV's contention that the comparability of this rate of "psychosis" to that of the general population supported hoasca's relative safety was challenged by the government's expert witness, Dr. Sander Genser, who testified that the greater "social connectedness" and self-screening of UDV members would lead to the expectation of a lower incidence of psychopathology than that of the general population, so that even a statistically normal incidence of "psychosis" was worrisome.

bulky for a large illegal market; the UDV in the United States would import a relatively small annual amount (some 3000 doses per year); and finding a steady market in which to sell diverted hoasca would be very difficult. Kleiman also testified that hallucinogenic compounds in general are "less reinforcing" than opiate drugs and therefore less likely to be abused for hedonistic ends. Finally, Kleiman observed that the UDV itself, which considers hoasca sacred, has a strong interest in keeping close control of its sacrament, and would take measures to be sure it was not diverted. Given the closeness of the evidence presented by both sides, Judge Parker again ruled that the government had failed to meet its burden, and remarked in a footnote that "the specificity of Dr. Kleiman's analysis may even tip the scale slightly in favor of the Plaintiffs' [that is, the UDV's] position" (52).

Treaty obligation. The government's third asserted compelling interest, not discussed at the evidentiary hearing but subsequently presented to the court, was a "treaty obligation" under the 1971 Convention on Psychotropic Substances, to which the United States is a signatory. Parker ruled that the government had no compelling interest in prohibiting UDV use of hoasca under the Convention, since in his reading the Convention does not cover hoasca. While it is in many respects like the CSA—listing drugs in schedules, and including the primary hallucinogenic compounds in the most restrictive category—the Convention contains significant differences. For example, where the CSA lists both plant sources and the compounds they contain (see note 8), the Convention lists only the compounds. Nevertheless, the government contended that hoasca was covered under Article 3(1), which states that "a preparation"—defined as any "solution or mixture, in whatever physical state"—"is subject to the same measures of

control as the psychotropic substances which it contains" (cited by Parker:53). The treaty also differs from the CSA in providing for religious exemptions from its provisions, so long as these are made at the time of signing and involve "plants growing wild" that are "traditionally used by certain small, clearly determined groups in magical or religious rites." Brazil, however, did not make such an exemption for hoasca, and even if it had, the government argued, hoasca could not be imported under the Convention, since the same article excludes the "provisions relating to international trade" from religious exemption. The government also argued that the existence of this specific mechanism for religious-use exceptions precludes other religious exemptions. Parker was persuaded, however, by the UDV's use of the 1976 Commentary on the Convention, that hoasca was not covered by it. The UDV pointed to the Commentary's assertion that "[t]he inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle" to contend that even if DMT is listed in the Convention's Schedule I, hoasca is not, since it is "clearly distinct" from purified DMT. As specific examples of plants not covered by the Convention the Commentary names peyote, the roots of *Mimosa hostilis* (the source of the Brazilian *vinho de jurema*) and *Psilocybe* mushrooms (art. 32, para. 12). In a footnote, the Commentary clarified that *M. hostilis* and *Psilocybe* mushrooms are taken by "infusion" and in "beverages," respectively. While the government contended that hoasca was nonetheless a "preparation" under the Convention, Parker accepted the UDV's argument that it is a substance distinct from DMT for purposes of the Convention and more like the "infusion" and "beverage" forms that the Commentary clearly said were not covered. In concluding his analysis, Judge

Parker wrote that "this Court finds that the 1971 Convention on Psychotropic Substances does not apply to the hoasca tea used by the UDV," and that the government's interest in adhering to the treaty, therefore, did not constitute a "compelling reason" to ban UDV use of hoasca (57-8).

The RFRA requires government conduct that "substantially burdens" religious practice to further a "compelling interest" by the "least restrictive means." Because Judge Parker ruled that the government had failed to meet its burden of showing a compelling interest based on hoasca's purported lack of safety, potential for diversion, and prohibition under the 1971 Convention, his analysis did not reach the question of the "least restrictive means" for advancing the government's interests.

Judge Parker's review of the evidence in this case established the first criterion for the issuance of a preliminary injunction under 10th Circuit precedent, a demonstration of "a substantial likelihood of success on the merits" in a full trial. However, the relevant precedent, *Kikumura v. Hurley* (2001), put forth three additional criteria:
1) "irreparable injury" to the "movant" (the party requesting the injunction) if it is denied; 2) the injury to the movant if the injunction is denied "outweighs the injury to the other party" if it is granted; and 3) the injunction "is not adverse to the public interest." In *Kikumura* the court gave great weight to the value of religious freedom, ruling that an allegation of violation of the RFRA in itself establishes "irreparable injury" to those denied the free exercise of their religion. The UDV, in presenting a *prima facie* claim under the RFRA, satisfied this test. As to the balance of harms and the public interest, Judge Parker again relied on *Kikumura*. He acknowledged that the government had presented "concerns" about hoasca's safety and diversion issues, but that given the

closeness of the evidence in the hearing and the actual harm suffered when the UDV was enjoined from practicing its religion, Parker concluded that "the scale tips in the Plaintiffs' favor" (59). Finally, Parker reasoned that the public interest consisted, not merely in being protected from the possible harms of UDV hoasca use, but even more strongly in the "vindication" of religious freedom through the RFRA, a statute enacted by Congress, as the representatives of the people, "specifically to countermand a Supreme Court ruling [*Employment Division v. Smith*]" (60). Having concluded that the UDV had satisfied the requirements for a preliminary injunction under its RFRA claim, Parker ordered a hearing on the form the injunction would take, to be held August 19, 2002.

There is no doubt that the court's decision to grant the UDV's request for a preliminary injunction was a major victory for the UDV. But many details remained to be determined around the principal question of how much government oversight the UDV would have to accept. Would UDV hoasca be tested by the government for DMT content? How much information about individuals in the church could be collected? Could the government perform criminal background checks on church members who handled hoasca outside of ceremonies? What form would information about possible health risks of hoasca consumption take?

A few days after issuing the order granting the injunction, Judge Parker ordered the lawyers for both parties to draft a joint proposed form of injunction, or each to draft one if they could not agree, and to meet again on September 3, 2002 to discuss their differences. In a memorandum to the court commenting on its proposed injunction, the UDV suggested that the government should look to the NAC peyote exemption in implementing the injunction. Whether the UDV could legally be compared with the NAC

or not, the church's lawyers argued, "[t]he government's successful relationship over many years with the NAC demonstrates that, as a practical matter, stringent bureaucratic controls are unnecessary once the otherwise controlled substance is in the hands of religious practitioners who regard it as a sacrament" (2).[22] The government, meanwhile, insisted that the UDV follow all the regulations stipulated in federal law for importers and distributors of controlled substances, from intensive recordkeeping to precise stipulations of secure storage measures to be employed. Some of these requirements would lead to unusual arrangements; for example, the government suggested in its proposed injunction that the UDV, in administering its sacramental tea in its ceremonies, be "required to keep records of all hoasca dispensed to individuals in a manner that comports with the record-keeping requirements for narcotic treatment programs," including measuring and recording the individual consumption levels of each participant (3). Such a high level of internal regulation by the DEA would, according to the UDV's brief in support of its version of the injunction, "thoroughly entangle our government with the religious rituals, religious conduct and religious beliefs" of the church (1). Despite repeated meetings before the judge to address their specific disagreements, negotiations between the parties' lawyers remained stalled. In mid-September the UDV's lawyers requested an opportunity to brief Judge Parker on "fundamental philosophical differences" between the government and the UDV about whether and why the specific regulations regarding importation and distribution of controlled substances should be

[22] With respect to DEA regulation, the American Indian Religious Freedom Act Amendments state that the law does not bar "reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote," but according to government testimony cited by the UDV, while *peyoteros*, or dealers in peyote, must register with the DEA, "the government does not regulate the Native American Church" once the peyote reaches church personnel. AIRFAA does not explicitly exempt the NAC from all the provisions of the CSA.

followed to the letter in this case. The government's position, expressed in the memorandum accompanying its proposed injunction, was that the recordkeeping and control provisions of the CSA had not been challenged in the case, that such laws "apply to everyone, and Plaintiffs [the UDV] cannot ask this Court to enjoin the enforcement of otherwise valid laws simply because Plaintiffs don't believe the laws are necessary in their case" (3).

On November 13th, 2002, Judge Parker issued a preliminary injunction based in adherence to the substance, if not the letter, of CSA regulations. Striking a compromise between the wishes of the government and the UDV, the injunction ordered the government to expedite an importation permit for the UDV, and the church would be allowed to resume its services as soon as the permit was issued. Shipments of hoasca would have small (60 ml) samples removed both in Brazil and in the US for testing for DMT content at the DEA's discretion, and each batch would be assigned a number to track it. Once in the possession of the UDV, the hoasca would be kept in padlocked refrigerators in locked rooms, and the DEA could require the UDV to divulge names and Social Security numbers of church members who regularly handled hoasca outside of ceremonies (but not those of other church members). Judge Parker retained the narcotics treatment program protocol for documenting hoasca consumption, but with the following modifications: individual consumption of hoasca would not be recorded, but the UDV would note the total amount consumed at each ceremony; records would not identify specific participants, but a count would be kept of the total number of attendees; lastly, the UDV would record the batch number rather than the dosage strength (in terms of DMT content) of the hoasca served at each ceremony. Inspections permitted under the

CSA could not be carried out during church ceremonies, and the UDV would retain the power to deny inspection of particular items pending approval of the court. The UDV would inform the government of the "general times and places" of ceremonies so that legitimate and illegitimate use of hoasca could be distinguished. It would also be required to inform members and potential members of the possibility of harmful interactions of hoasca with MAO-inhibiting medications, and of the risk of adverse reaction to the tea in persons with a history of "psychosis."

Government appeals

The government immediately appealed the preliminary injunction to the district court for a stay pending the outcome of the case, and when Judge Parker denied the stay, it appealed to the US Court of Appeals for the 10th Circuit. It was a moment of relative rancor, given the generally staid disposition of legal filings. The government's motion to stay criticized the district court judge's evaluation of the evidence regarding the safety of hoasca and its potential for diversion, and found fault with his lack of deference to the Congressional findings of the CSA. But it laid special emphasis on the issue of the 1971 Convention, arguing that it did apply to hoasca and that it represented a crucial government interest. First, the government argued that the district court erred in ruling that the Convention did not cover hoasca: while there was indeed ambiguity about whether certain plants were covered, "[h]oasca is not a plant; it is a 'solution or mixture' created from two different plants via a time-consuming and labor-intensive process called a 'preparo'" (6). The "crystal clarity" of the Convention's definition of "preparation" should have forestalled inquiry beyond the text itself, the government's motion argued. In sum, it concluded that "[o]bscure and ambiguous footnotes contained in one author's

post-ratification Commentary on a treaty cannot trump the unambiguous language of the treaty" (8). Next, the government argued, since the Convention did cover hoasca, the government's interest in adhering to it should be weighed in the "balance of harms." The "incremental and temporary" harm suffered by the UDV members in being unable to practice their religion "is outweighed by the potentially permanent harm that will befall the government if the United States ceases to be in compliance with one of its most important international treaties" (19).

In reply, the UDV faulted the generality of the harms alleged by the government and decried the "arrogant style that has typified the government's approach to every issue in this case" (7). The government had not demonstrated that any real injury to it would result from the preliminary injunction, but had only offered "rank speculation that if it is required to allow the plaintiffs to engage in the free exercise of religion, its prestige as a leader in the war on drugs will be tarnished" (2). In stressing the harmfulness of hoasca the government had failed to come to terms with the other exemptions—for research and for the NAC—allowed for Schedule I hallucinogens: "[T]he government's protestations of concern for the health of the plaintiffs and other participants in UDV ceremonies are not credible in light of its *laissez-faire* attitude toward the NAC's use of peyote," (7) UDV lawyers wrote. The UDV also attacked the government's argument that hoasca was controlled by the 1971 Convention. They introduced a letter from Herbert Schaepe, Secretary of the International Narcotics Control Board, the group responsible for enforcement of the Convention, stating explicitly that ayahuasca (hoasca) was "not under

international control and, therefore, not subject to any of the articles of the 1971 Convention" (10).[23]

Tenth Circuit Court of Appeals: Panel decision

On December 12th, 2002, ten days after Judge Parker denied the government's request for a stay, Tenth Circuit Court of Appeals Judges Kelly and Hartz decided to grant the government an emergency stay of the injunction pending appeal of the ruling. The judges showed broad deference to the position of the government in their order. First, they were sympathetic to the government's argument that the 1971 Convention did in fact cover hoasca, ruling that the district court's reasoning on the subject was "in considerable tension" with the Convention's definition of "preparation," and that "[h]oasca is plainly a preparation containing DMT" (4-5). They saw no reason to question the government's reading of the treaty: "we are reluctant to second-guess the executive regarding the conduct of international affairs," they wrote (7), and the Commentary and Schaepe's letter were not "sufficient to override the plausible interpretation of the Convention by the executive" (5). Second, the two judges disagreed with Judge Parker's opinion that RFRA authorized questioning the findings of Congress about DMT, noting again that his ruling was "in considerable tension with (if not contrary to) the express findings in the CSA" with regard to Schedule I substances (5). Finally, they reasoned that the

[23] This letter was requested by the Dutch Ministry of Public Health in 2001 to aid in evaluating a legal case then going on in the Netherlands involving Santo Daime, the other major Brazilian church that uses a sacrament made from *Banisteriopsis* and *Psychotria viridis*. The relevant paragraph reads in full:

> "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g., decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."

The UDV attempted to enter this letter into the record at the evidentiary hearing in October-November 2001, but the government objected and Judge Parker forbade it, as pertaining to a topic outside the scope of the hearing (see 10th Circuit *en banc* rehearing, opinion of McConnell, p. 28).

government "suffers irreparable injury when its criminal laws are enjoined without adequately considering the unique legislative findings" about drugs. Despite the burden to the religious practice of UDV members, a stay would "merely reinstate the *status quo*" in the case—that is, enforcement of the CSA and compliance with the Convention—pending the outcome of an appeal to a panel of the 10th Circuit.

That decision came nine months later, on September 3rd, 2003, when a 3-judge panel of the Appeals Court for the 10th Circuit affirmed Judge Parker's decision to grant a preliminary injunction to the UDV. The two-judge majority found no error in the district court's evaluation of the evidence as to health risks and potential for diversion of sacramental hoasca: "We see no basis for disagreeing with the district court's characterization of the evidence as 'in equipoise' and hold proper its determination the Government failed to satisfy its RFRA burden on the issue of health and safety risks of hoasca" (21). Citing *Kikumura*, the panel majority also ruled that the government's reliance on the congressional findings contained in the CSA did not satisfy the burden placed on it by the RFRA. The government "failed to build an adequate record" on the facts of the particular case "demonstrating danger to Uniao do Vegetal [sic] members' health from sacramental hoasca use." Mere "recitation of the criteria for listing a substance on CSA Schedule I and of the general danger of hallucinogens" (22) and "speculation based on preliminary hoasca studies and generalized comparisons with other abused drugs…does not suffice to meet the Government's onerous burden of proof" (26). As to the burgeoning Convention argument, the majority declined to render a decision on the question whether hoasca was covered by the Convention, deeming it unnecessary to the appeal. But they did note that the generality of the government's expert witness

testimony on the importance of adhering to the Convention did not meet the government's burden of justifying its interference in UDV religious practice. The UDV also found sympathy for its arguments that the NAC peyote exemption suggested that government insistence on the generalized dangers of Schedule I controlled substances under any circumstances was overdrawn. The lack of trouble with the NAC, they wrote, "belies the Government's claimed need for constant official supervision of Uniao do Vegetal's [sic] hoasca consumption" (32). Finally, the panel majority disagreed that the preliminary injunction would alter the *status quo* in the case (and that the UDV therefore had to show "strongly and compellingly" that it deserved the injunction). The "last *uncontested* status" between the UDV and the government was the UDV's "uninhibited exercise of their faith. It is the government's attempt to disrupt that status that UDV seeks to enjoin" (16), they ruled.

Judge Murphy, in dissent, wrote that the majority had used the wrong standard in evaluating whether the preliminary injunction was properly granted. Since the case involved a "disfavored" injunction—here, one that would change the "*status quo*"—the burden was on the UDV to show that the four injunction factors weighed "heavily and compellingly" in its favor. Since the evidence was found to have been "in equipoise," he wrote, an injunction changing the *status quo*—enforcement of the CSA and compliance with the Convention—should not have been granted.

Tenth Circuit Court of Appeals: *En banc* decision

The government requested, and received, a review of the case *en banc* (that is, with all 13 of the 10th Circuit judges participating), and a stay of the preliminary injunction pending the review. The court took more than a year to render its decision, but

on November 12th, 2004, the *en banc* 10th Circuit court ruled 8-5 to uphold the preliminary injunction issued by the district court. The court's decision was a lengthy and complex consideration of the UDV case intertwined with a reexamination of the standards the 10th Circuit uses in reviewing preliminary injunctions granted by circuit courts. It featured five different opinions, with different majorities voting to uphold the UDV injunction and endorsing an increased burden on parties requesting injunctions that change the *status quo*.

Judge Murphy wrote a dissent presenting very similar views to those in his panel decision: the *status quo* in the case[24] called for the UDV to shoulder a higher burden of evidence, and the RFRA did not authorize the court to question Congress's finding in the CSA that all Schedule I drugs—including DMT and, by extension, hoasca—were unsafe to use under any circumstances. RFRA was written to restore free exercise jurisprudence to its status pre-*Smith*; under that standard, Murphy wrote, courts "routinely rejected" religious exemptions from controlled substances laws, "and have continued to do so with RFRA" because of Congress's determination that drugs are inherently harmful to

[24] The debate about the *status quo* in the case conceals some very basic considerations behind an exceedingly technical appearance. A given determination of the *status quo* may depend on the relative value one assigns *a priori* to the free exercise of religion and to the enforcement of drug laws. For example, for Judge Seymour the case presents "two plausible *status quo*s, each of them important": the UDV practicing its religion and the government enforcing the CSA (18). In Judge Murphy's opinion, by contrast, it is the revelation that the UDV was in violation of the CSA (as currently interpreted by the government) that brought the true *status quo* to light: government enforcement of the CSA. For him the UDV practice to that point lacked legitimacy because they imported hoasca without labeling it "hoasca" or declaring that it contained DMT. The UDV's conduct amounted to "a façade of compliance with the CSA," and "the *status quo* must be determined as of the time all parties knew or should have known all material information"; it was irrelevant that the UDV had actually been practicing its religion for several years without obvious signs of serious harms or diversion of hoasca. In contrast, Judge Seymour granted that the UDV "may have acted in a somewhat clandestine manner" but noted that "its importation and use of the tea was premised on its firmly held belief that such religious activity was in fact protected from government interference by its right to the free exercise of its religion" (18 n. 3).

individual and collective wellbeing (16).[25] The government has a compelling interest in enforcing the CSA pursuant to the findings of Congress, and the RFRA "ought not result in a case-by-case redetermination of whether these findings are correct" (19). In sum, the UDV "has not carried its burden of demonstrating that its injury, although admittedly irreparable, sufficiently outweighs the harm to the government so as to warrant interim relief that alters the *status quo* pending a determination of the merits" (40). Three judges voted with Murphy's argument to reverse the order for a preliminary injunction, and a fourth offered a slightly different reason for reaching the same conclusion.

The majority, in upholding the district court's injunction, divided its allegiances between two opinions, written by Judges Seymour and McConnell. The two differed mainly in their understanding of the criteria for granting preliminary injunctions, with Seymour arguing that the type of injunction sought by the UDV did not require that the party requesting it meet a higher burden of evidence, even if it changed the *status quo*. McConnell, on the other hand, wrote that "preliminary injunctions that disturb the *status quo*" should be subject to a higher standard than those injunctions that preserve it (44). The areas of agreement between the two opinions were much more substantial, as they came together in affirming that the UDV had demonstrated a right to an injunction even under a heightened standard, and persuaded eight of the 13 judges to sign onto this proposition.

[25] Judge Murphy cited, among others, Justice Sandra Day O'Connor's opinion in *Employment Division v. Smith*, in which she decried the majority's shift away from the *Sherbert* standard, but held that, even applying *Sherbert's* "compelling interest" and "least restrictive means" tests, she would join the majority in denying 1st Amendment protection to NAC peyote use because "uniform application" of the CSA is "essential to accomplish" the government's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance." Such a broad prohibition on that most restricted class of drugs is justified by Congress's determination that the "health effects caused by the use of controlled substances exist regardless of the motivation of the user," religious or otherwise.

In affirming the district court's grant of preliminary injunction, the Seymour and McConnell opinions each portrayed the RFRA as a robust act of Congress that was capable of presenting a serious challenge to the most entrenched of federal laws, given the proper circumstances. "We must not forget," McConnell wrote, "that this case involves the intersection of two Acts of Congress of equal dignity….: the government has no less interest in obeying RFRA than it has in enforcing the CSA" (41). For both of them, the RFRA put a heavy burden on the government to demonstrate persuasively that the particular use UDV made of hoasca would threaten the health and safety of its members and the public, that it presented too high a risk of diversion to recreational use, and that it imperiled international leadership in anti-drug efforts by placing the United States in violation of the Convention.

The most contentious divergences between the concurring and dissenting opinions thus revolved around the power of the RFRA to mandate court scrutiny of government conduct. Where Judge Murphy had agreed with the government, for example, that the courts should defer to the general findings of Congress in the CSA that Schedule I drugs are unsafe "even under medical supervision," McConnell replied that "Congressional findings are entitled to respect, but they cannot be conclusive," because the RFRA mandates "strict scrutiny" by the courts of the law as it impacts a specific religious practice (23). The government's reliance on "Congress's general conclusion that DMT is dangerous in the abstract" (19) was not sufficiently specific to meet the demands of the RFRA. "If Congress or the executive branch had investigated the religious use of hoasca," McConnell wrote, "and had come to an informed conclusion that the health risks or possibility of diversion are sufficient to outweigh free exercise concerns in this case,

that conclusion would be entitled to great weight. But neither branch has done that" (23-4). Besides being too general to satisfy the RFRA's requirement of specificity, the government's views were unnecessarily rigid under the law's "least restrictive means" mandate. For instance, the government insisted that the CSA could brook no religious exemptions (excepting the unique case of the NAC). But the text of the law itself, McConnell pointed out, in allowing the Attorney General to craft exceptions to the law and in granting such an exception to the Native American Church, was evidence that Congress believed of "that at least some use [sic] of substances controlled by the Act are 'consistent with the public health and safety'" (24). The government was also being inflexible in its interpretation of the Convention. Judge McConnell noted that the government "utterly failed to carry its statutory burden" to show that a total ban on hoasca was "the 'least restrictive means' of furthering its interest in compliance with the Convention" (29), and had made no effort to consult with the relevant international authorities about the permissibility of, and necessity for, an exemption for hoasca. Instead, "it has posited an unrealistically rigid interpretation of the Convention, attributed that interpretation to the United Nations, and then pointed to the United Nations as its excuse for not even making an effort to find a less restrictive approach" (31). Furthermore, the government's stand against importing hoasca under the Convention seemed in tension with the fact, noted by the district court, that "the United States permits the exportation of [peyote] to Native American Church groups in Canada"[26] in apparent violation of the strict reading of the Convention employed by the government in the UDV case. McConnell argued that this situation "suggests that, in practice, there is room for

[26] The government denied this, but did not clarify its intended sense of the word "permit." The claim was based on the inclusion of Canadian churches in the Texas Department of Public Safety's registry of NAC entities authorized to receive shipments of peyote.

accommodation of the legitimate needs of religious minority groups" like the UDV (31). He agreed with the panel that, whatever the legal comparability of the NAC and the UDV, "the apparent workability of the accommodation for Native American Church peyote use strongly suggests that a similar exception would adequately protect the government's interests here," and it is "incumbent on the government to show why no such compromise regime could adequately serve its interests" (43).

In summing their views, Seymour and McConnell weighed the public's interest in granting the injunction against its interest in withholding it. The government had demonstrated only "that there *might* be some adverse health consequences or risks of diversion" resulting from UDV hoasca use, McConnell wrote, "[b]ut under RFRA, mere possibilities, based on limited evidence supplemented by speculation, are insufficient to counterbalance the certain burden on religious practice caused by a flat prohibition on hoasca" (35). The RFRA, Seymour argued, was intended by Congress to further a "vital public interest in protecting a citizen's free exercise of religion" (26 n.6), and the varied religious groups presenting friend-of-the-court briefs supporting the UDV[27] were evidence of a broad public interest in vindicating the free exercise principles at stake in the case. She concluded that "[t]he district court's ruling is appropriate in light of Congress' implicit RFRA determination that the harm prevented and public interest served by protecting a citizen's free exercise of religion must be given controlling weight, barring the government's proof, by specific evidence, that its interests are more compelling. Here, the government failed to overcome Congress' determination" (28).

[27] The groups are: the Christian Legal Society, the National Association of Evangelicals, Clifton Kirkpatrick, as the Stated Clerk of the General Assembly of the Presbyterian Church, and the Queens Federation of Churches, Inc. According to the brief, taken together, these groups represent over 20 million American religious practitioners.

Interlude: The UDV resumes its practice

In light of the 10th Circuit court's decision the UDV petitioned the District Court to order the DEA to issue an importation permit immediately, permitting the church to resume its ceremonies as outlined in the preliminary injunction. District Judge Parker deferred ruling on the request pending the resolution of the government's appeals of the *en banc* court's decision. The 10th Circuit Court of Appeals refused the government's request for a stay and on November 30th, 2004 issued a formal mandate to begin implementation of the preliminary injunction, only to recall it two days later when the Supreme Court issued a temporary stay while it decided whether to grant the government's request for a longer one. To let the injunction take effect, the government argued in its brief, would "compel the United States to go into violation of a vital international treaty combating transnational narcotics trafficking" (3). But on December 10th the Supreme Court denied to stay the injunction further, and the DEA issued the UDV a permit to import hoasca.

More than five years after the government seized the UDV's hoasca it was finally forced by the courts to relent and to allow the group to practice its religion, including bringing its sacrament into the country from Brazil. "We're going to look forward as soon as we can to be able realize our ceremonies, and particularly to enjoy the Christmas season with the right to practice our religion," UDV-USA president Jeffrey Bronfman told a reporter after the decision. The years the church had passed without being able to worship had been profoundly harmful; among the problems Bronfman described were "marriages that have come under great stress, health challenges that have been very, very difficult and we couldn't minister to them." There was also a more general "sense of

living in a country where we couldn't exercise the most basic and fundamental rights" that had now been rectified; the court's action left the group feeling "delighted and grateful." The government could still appeal the decision to the Supreme Court, but Bronfman said he hoped that wouldn't happen. "I would hope they would recognize the seriousness of the harm they've already done and move forward in cooperation rather than with the harshness and intolerance we've been dealing with for several years" (Sandlin 2004).

On to the Supreme Court

At the end of January 2005, the UDV petitioned the District Court of New Mexico to move to a hearing on the merits in the case. While that motion was under consideration, however, the government lodged a request with the Supreme Court to review the 10th Circuit's decision, and a ruling on the motion was put off indefinitely. On April 18th, 2005, the Supreme Court granted a writ of certiorari, meaning it agreed to hear the case.[28] The government's petition to the Supreme Court had again focused on congressional findings about the harms of DMT and the 1971 Convention, and argued that allowing the injunction to go into effect was an outrageous decision perpetrated outside the judicial mainstream based on biased evidence and unsound legal reasoning; to let it stand put at risk vital diplomatic interests and the very sanity of the United States' young people.

The key to the 10th Circuit court's error lay in its questioning of Congress's judgment about the dangers of drugs, the government argued. The "heart of the court of appeals' analysis" was the view that RFRA required the court to revisit Congress's

[28] The US Supreme Court grants certiorari to fewer than 100 of the approximately 7000 requests for review that it receives each year. (http://www.appellate.net/articles/certpractice.asp)

findings about Schedule I drugs (16). The government suggested that in giving this role to the RFRA, the 10th Circuit departed from the practice of other appeals courts and of the Supreme Court, which had consistently rejected arguments for religious exemptions to drug laws.[29] The appeals court had not heeded "the considered judgments of Congress and more than 160 other Nations," the government insisted in a reply brief, but instead had unilaterally "forced the United States into ongoing violation of an international treaty and to open its borders and its communities to the importation, distribution, and use of a dangerous, mind-altering hallucinogen in violation of a longstanding and unquestionably constitutional criminal law" (1). The government attempted to minimize the legitimacy of the court's action by portraying it as based on "nothing more" than "allegations of a violation of the Religious Freedom Restoration Act…and the testimony of a few hired experts" (13).[30] The government also tried to link UDV hoasca use to concerns about illegal drugs generally. In a brief replying to the UDV's opposition for Supreme Court review, the government characterized UDV importation of hoasca as "clandestine trafficking of a DMT-based substance" and accused the church of "calculated mischaracterization of hoasca on importation forms, and distribution of hallucinogenics [sic] to children" (3; internal punctuation omitted). The government's petition urged the Supreme Court to uphold the CSA's status as "a comprehensive and unyielding bulwark against the use of Schedule I controlled substances by anyone for any reason" (26) except research,[31] and to dispose of the UDV case without further inquiry, lest "scores of adults

[29] Most of these cases, pre- and post-RFRA, involved marijuana, a comparison which district Judge Parker had already rejected because of its different pharmacology and patterns of use.
[30] This testimony was suspect, the government implied, because "most of" the UDV's witnesses were "either members of UDV and thus prospective users of hoasca themselves or conducted research funded by the head of UDV, respondent Bronfman" (16).
[31] The government's brief addressed the NAC peyote exemption only in a footnote, where it distinguished that situation from that of the UDV by the fact that Congress made the exemption, not courts, and did it

and children repeatedly undergo DMT-induced mind-altering and potentially psychosis-inducing episodes" (28).

The UDV, meanwhile, in asking the district court to move to hearing on the merits of the case, complained that the government had used "strident, grossly overstated" rhetoric in its appeals, throughout the case had "probed the outer limits of hyperbolic misuse of a record" (10-1), and now sought, for strategic reasons, to have further development of the factual record foreclosed by a final decision in the Supreme Court. They also argued that the government "has never attempted to explain how it can ask the courts to ignore the [NAC's] possession, distribution, and ritual use of peyote while claiming that [the UDV's] similar use of hoasca must be conclusively presumed to be a menace to society" (cited in Lucas 2005:3).

Conclusion: Drugs and Religion in America

The question through which the Supreme Court agreed to hear the case makes clear that the fundamental issue is a collision between a relatively new law protecting religious freedom and a well-entrenched panoply of drug control statutes:

> Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq*., requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse, it is unsafe for use even under medical supervision, and its importation and distribution would violate an international treaty.

Historically, there has been little room in American drug control laws for psychoactive sacraments. Although many European settlers in North America were impelled partly by

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under the federal "trust relationship." That AIRFAA postdates RFRA "underscores Congress's view….that RFRA alone would not entitle members of Indian Tribes to an exemption from the Controlled Substances Act" (26 n.5).

a desire for religious freedom, the major religious groups among them were Protestant denominations such as Calvinism which regarded the consumption of most psychoactive substances with suspicion. The use of "demon rum" in particular was viewed by many Protestants as an affront both to honorable worldly pursuits and to heavenly mandate. At the same time, stimulant drugs such as coffee and tea, which lent themselves to greater exertion in intellectual labor, were praised as agents of sobriety (Schivelbusch 1992).

The first major federal law restricting free market distribution of psychoactive drugs, the Harrison Act of 1914, was heavily promoted by Progressive Era moral reformists linked to Protestant denominations, such as the Women's Christian Temperance Union (Musto 1999). Self-medication with morphine, laudanum, and other opiate preparations, a common form of palliative treatment for social anxieties and general malaise among the middle classes in the late 19th century, was progressively marginalized as scientific medicine promised specific cures for particular illnesses (Acker 2002). Thus began the formalization of legitimate and illegitimate motives for using psychoactive drugs: medical use, under the right circumstances, was legitimate; any other use—such as self-prescription or open-ended use under a physician's supervision—was not just an unwise consumer choice but a criminal act. The participants in such transactions became symbols of the perils of the unrestrained free market: the addict as a sign of unrestrained, pathological pleasure-seeking through consumption, and the pusher as a paragon of the harms of unscrupulous profit-seeking in the absence of government regulation (Acker 2002).

The commonsense category of illicit drugs that we know today descends from American experience with opiates, and any substance with psychoactive properties that

comes to our collective attention is likely to be assimilated to the model developed around the opiate drugs, regardless of differences from those substances in pharmacology or cultural context of use. The tendency to assimilate new drugs to this classical model is based on the same cosmological understanding of the person that gave rise to modern Western political and economic philosophy. In this Enlightenment view, people are forever seeking bodily pleasure and trying to avoid pain. The tragic Augustinian vision of earthly existence as a term of unsatisfied longing was transformed into the faith, well expressed by Adam Smith, that each person's efforts to satisfy his never-ending desire to consume would be the stimulus to human industry, trade, and society, and that the "invisible hand" formed by the aggregate of commercial interactions would best satisfy people's wants. Human bondage to bodily desire became, through the advent of the bourgeois consumer, "the essential human freedom" (Sahlins 1988:44) and the best hope of civilization. Opiate drugs, then, are fitted quite easily into this model: they are eminently consumable and work directly in the body to lessen pain and increase pleasure, and have long been considered a great boon to suffering humanity. But given the assumed human tendency to seek as much pleasure and as little pain as possible, such a powerful agent needed controls—through the state, law, and morality—lest one give oneself completely over to their use to the detriment of all else in life, not least maintenance of one's obligation under the "social contract" to be a productive member of society. Most drug research in the 20th century reflected this orientation in assuming that abstinence or addiction were the only long-term possible outcomes of opiate use (Zinberg 1984). Because addiction was considered to impair rational choice, making drug users essentially un-free, the restriction of commerce in opiates could be harmonized with

ideals of the free market. Likewise, the pusher was cast, not as one citizen adding to the commonweal by entering into a free contract with another, but as a parasite seeking his own profit at the expense of the greater good (Bakalar and Grinspoon 1984).

Such an understanding of drugs makes possible a sharp division between authorized, medical-scientific use and all other uses, which are presumed to be motivated by "recreational" and hedonistic impulses and to be illegitimate. Even to consider other possible motives for drug use (once a substance has been so classified) requires a reconsideration of this deep-rooted dichotomy that is very difficult to achieve (Bakalar and Grinspoon 1984). Perhaps the most culturally significant aspect of the UDV-USA case is the way it raises questions about entrenched understandings of motives for drug use: can they be legitimately religious in character? Would the existence of religious uses of drugs undermine the entire anti-drug effort? And more to the point: is the government required to investigate the specifics of a particular case of drug use to make that determination? This, then, may be the central question in the UDV-USA case: to what extent may the government rely on historical understandings of drug use in formulating policy on the ritual use of ayahuasca and other psychoactive sacraments, and to what extent must the government take into account the particular cultural context in which these substances are employed?

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