**American Indian Religious Freedom... and a father's right to raise his child according to tradition**

Expanded Version

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In late November, 2002 I found myself sitting in a small Michigan Circuit Court testifying pro-bono as an expert witness in a child custody case revolving around the sacramental use of peyote. This Court's family judge in a prior divorce decree had forbidden a father from offering his religious sacrament, peyote, to his 4-year-old son. The father, Mr. Jonathan Scott Fowler, is a member of the federally-recognized Grand Traverse Band of Ottawa and Chippewa Indians, and his son, Ishkwada, with 25% Native blood quanta, is also eligible for Tribal enrollment. Mr. Fowler was awarded full physical custody of his son and did not accept that a judge could forbid him and his son from together expressing their faith like other Native American Church (NAC) families. The father turned to the Michigan State Court of Appeals, which decided that the decree against Mr. Fowler's religion should have had a hearing on the merits of the sacramental use of peyote. And so…the case landed right back before the very same family judge who handled the divorce.

It should have been enough for this Court to hear from a road chief (the "pastor" who leads the all-night prayer ceremony of the NAC) that the father was only seeking to bless his son in "that right way," which is customarily accepted and approved by the majority of NAC members. I was present because, sadly, we have a court system that fails to fully respect the traditions and customs of Native Americans…and so, instead, the Court needed to hear a medical expert weigh in on this issue of allowing a child to ingest peyote. Now mind you, this issue has already been settled by Act of Congress: the 1994 Amendments to the American Indian Religious Freedom Act (AIRFA) became law expressly to protect these religious rights of all Native Americans who are members of federally-recognized tribes. Such individuals cannot be excluded from the bona-fide practices of the NAC, but on the fault-lines of divorce, the need to uphold federal law appears to crumble in the name of "child protection." And so, as the only American scientist to conduct research on health consequences from life-long peyote use (now or historically), I offered my expert testimony in the 27$^{th}$ Circuit Court – Family Division of the State of Michigan before Judge Graydon W. Dimkoff for an NAC father fighting for the religious freedom of his family.

Years ago, when I started my research project looking into the consequences from the use of peyote by members of the NAC, I realized that I might be needed in cases such as this one. Though peyote and its psychoactive constituent, mescaline, are listed as Schedule 1 drugs of abuse, millions of peyote "buttons" are legally distributed and consumed across the United States each year by the 300,000 members of the NAC. The NAC, in fact, is the largest single denomination amongst Native peoples. It has survived years of hostile misunderstanding and outright persecution, but, with AIRFA in place, the NAC is now generally acknowledged as "main stream" and legal even if it remains hidden from most Americans. But what a contradiction! In one camp, peyote is being labeled as one of the

most dangerous drugs known to man. In another camp, we see over 150 years of peyote use by American and Canadian citizens, with no clear evidence of harm coming to them and much evidence of the Peyote Way aiding in saving families, healing addictions, and preserving/reactivating respect for Native Traditions. In all this time, there have been many reports and research papers describing the ceremony or small observational studies that Native ingestion of peyote appears helpful versus alcoholism. In all this time, though, no one ever attempted a thorough, methodologically sound evaluation of this use of peyote to screen for harm or safety. Over the coming years, my collaborators and I will start to publish the results from our work that gave neurocognitive tests to carefully screened NAC members or former alcoholics or those who never were members of the NAC and who never had problems with drugs and alcohol. How I wish that these publications already were in print because this present case ruled against Mr. Fowler. Despite the absence of any evidence of harm, despite the passage of AIRFA, despite my clear testimony, Judge Dimkoff issued a ruling months later stringing together a patchwork of inaccurate assessments about the NAC use of peyote, about peyote, itself, and about my research. With an elected judgeship, I suspect the Honorable Dimkoff was more interested in getting to his pre-determined conclusions that are in-line with his electoral base, than in actually sticking his neck out to uphold the Constitution and protect the religious rights of one father and his young son.

So what exactly was Mr. Fowler asking for? What was the Judge's explanation for his denial? Read on.

Mr. Fowler is a member in good-standing of the Native American Church of the Morning Star, which was founded (according to the Judge!) in the late 1800's in Michigan. The taking of the sacrament, peyote, is central to the services and prayer ceremonies of the NAC. Mr. Fowler simply wished to do as any other proud father might by bringing his son to ceremonies and have him blessed with the "Medicine." Much has been misunderstood on this issue and it is critical to understand: we are talking about a very small amount of ground-up peyote or a small sip of peyote-infused tea being placed on the son's lips. This father wasn't seeking to "intoxicate" his 4-year-old boy, nor would he responsibly permit his son to just unwittingly eat away at peyote as if it were candy. Peyote is revered by these peoples and is to be respected. It also has a bitter, acrid taste that precludes being mistaken for a delicious food. As they come of age, children of NAC members eventually decide to try to stay awake for an entire service and ingest an "adult" amount of peyote. Such a "rite of passage" typically occurs somewhere between age 10 and 14, but children do attend these ceremonies in their younger years before fully participating. They stare wide-eyed at the fireplace in the center of the tipi or traditional house and listen carefully to their elders' words. Some play make-believe drum in time with the beat of the peyote songs being accompanied by water-drum. Perhaps these children will be given a blessing by being touched with peyote, such as a small amount rubbed on the forehead, or by a very small "taste" placed in their mouth. Eventually, these children fall asleep behind their parents or grandparents until morning. And while these children sleep, the road chief and other congregants will offer blessings over these sweet little bodies. This is part of their traditions and is how their faith carries forward into the future.

Judge Dimkoff's 31-page decision is filled with errors. My catalog of them with my comments follows:

1. He writes that mescaline content in peyote varies by how it is "grown" and the "fertilizers used." In the United States, peyote, *Lophophoria williamsii*, grows only along a small strip of Texas bordering Mexico. While it is legal for bona-fide members of the NAC and for peyote dealers (registered and licensed by the DEA and the Texas Department of Public Safety) to harvest peyote, it remains illegal to grow peyote.
2. He uses the circuitous logic that peyote is a dangerous substance because it is listed as a dangerous, Schedule 1 substance in the Controlled Substances Act. Also, he notes that the Natural Products National Database lists peyote as "unsafe to take." Both these facts have absolutely nothing to do with the accepted safe usage of peyote as a sacrament of the NAC. Such warnings have to do with the abuse of peyote as a drug only. The Judge, I suppose like many Americans, has a hard time accepting that peyote is also not a drug but a sacrament that is federally-protected for Native Americans. In no case do NAC members ingest peyote as a drug. Perhaps this Judge should also make sacramental wine illegal to dispense to minors in Catholic Church services or certain Jewish holidays because minors might be harmed by alcohol in those settings…
3. He writes that the ingestion of sacramental peyote is "an act which they knowingly, voluntarily, and understandingly take as adults with adult physical and mental maturity, and after experience in and with life in general." As I wrote above, the judge is 100% wrong here. He implies that only adults are members of the NAC, but this isn't some R-rated movie that excludes the young…this is a religion and it is taught to family-members as they grow up…except that the Judge prevents Mr. Fowler from doing so with his own son, of course.
4. He writes that a person "receives a full blessing, whether or not he/she actually ingests the peyote" when "touched on the head, or the lips, or even on the leg by the teapot or cup" containing peyote. Like most religions, though, the NAC practice traditions and exercise their faith in ways that go much deeper than just seeking blessings. If receiving blessings were all that is needed within this faith, then I suppose the Judge was right in his ruling. Ask any road chief about this, though, and you'll quickly find that the Judge has completely misconstrued the views of the NAC for his own purposes.
5. He writes that few children actually attend NAC ceremonies!
6. He twists the methods of my study to suggest that each of the 3 groups weren't distinct. Again and again, he focuses on how the non-NAC groups could have attended up to 5 peyote ceremonies in their life and so, in his scientific opinion, the study isn't valid. He can wait like everyone else for my published work, but I suggest this Judge stick to his actual area of expertise. Fact: the mean number of times those in the alcohol group or control group ate peyote: ZERO!
7. He complains that my study doesn't attempt to control for pre-morbid functioning (i.e. pre-peyote use functioning). We did in fact obtain data on pre-morbid functioning through questions about family work and education, family medical history, screening for evidence of fetal alcohol syndrome, and by screening for

adolescent conduct disorder, attention-deficit hyperactivity disorder, and antisocial personality disorder.

8. He complains that I couldn't figure out if a neurological condition is related to peyote or a pre-morbid condition because I didn't test individuals before they ever ate peyote. Except, as noted in the study's exclusion criteria, I didn't enroll any individual with a neurological condition or any other condition that might impact cognitive testing.
9. His decision reveals a fascination only with the use of peyote as a drug and not as a sacrament. He writes that "the court further finds that peyote is dangerous, and in general should be avoided, and that the scientific/medical community accepts these two principles as fact." It is ignorance like this that has caused so much hardship for the NAC over the years. No reasoned member of the scientific/medical community could ever support this Judge's conclusion about the NAC's use of peyote.
10. He complains that I can't offer information about a child's use of peyote since I didn't test children. NAC members who participated in the study had attended, on average, well over the minimum 100 ceremonies in their lifetime required for study enrollment. These people were born and raised NAC, and virtually all had first been blessed with peyote as a young child.
11. He complains that subjects were placed in respective groups by self-report only. He fails to appreciate that we had a number of sham screening questions in our intake forms so that individuals couldn't figure out what was needed for enrollment in our study. Family members and friends were also consulted to confirm group-status.
12. He complains that I didn't consider the quantity of peyote consumed by subjects and turns to some local docs who testified against Mr. Fowler for support on this point (none of whom, by the way, have ever conducted research on substance abuse or on peyote). How convenient a suggestion! Since these individuals didn't do my work, perhaps they can't comprehend the sensitive nature of seeking details about a person's faith, especially from within the Native American community. This isn't like asking an alcoholic how many drinks he consumes on average. By requiring at least 100 ceremonies in which peyote was ingested, I am on solid ground in stating that the NAC members who participated had been exposed exclusively to peyote more times than most recreational hallucinogen users in this country.
13. He faults me for not including "people of European descent." I only tested those who have a legal right to peyote, which, again, are members of federally-recognized tribes.
14. He complains that I refused to acknowledge that "research on peyote to prove its safety and efficacy for Native Americans is necessary." Of course I refused! Research is not necessary because this is a long-standing, accepted practice of Native Americans and there is no record of harm coming to adherents of this faith. He mentions that there are case reports of adverse events and harm from mescaline, but he could not locate a single report of peyote damaging the lives of NAC members. Most importantly, from a legal standpoint, the passage of AIRFA completely protects the use of peyote by bona-fide members of the NAC. Perhaps

that is why Judge Dimkoff fails to mention this active, valid federal law anywhere in his decision: there is no way to respect this applicable federal law and also reach the conclusions he rendered.

15. He writes that I have no statistics to show how many of the 300,000 NAC members actually ingest peyote. Yet again, this Judge reveals a superficial understanding of the NAC. He should have consulted with a road chief or a religious expert so that he could avoid injecting such ignorance into his decision. Over 2 million buttons are consumed each year by members of the NAC. If they are active members, they attend prayer ceremonies. If they attend ceremonies, then, by and large, it is to be assumed that they consume peyote. Perhaps there is the rare ceremony where that doesn't happen (and that would be very rare), but, over a lifetime, members of the NAC will ingest peyote…and more than just once.
16. He writes that my "review of the literature indicates tests may have failed to detect true residual hallucinogenic effects." My, how words can be misconstrued and twisted! In other words, fear of harm should be enough for a judge to do what this judge did…we only need more sensitive tests to ultimately prove that he is right! My review of the literature concerning neurocognitive consequences from long-term hallucinogen use (Halpern JH, Pope HG Jr. Do Hallucinogens Cause Residual Neuropsychological Toxicity? *Drug and Alcohol Dependence*, **53**:247-256, 1999) found that there is no evidence to support the fear-mongering that hallucinogens cause lasting brain damage. We can't preclude what we don't know, of course, but that is far from supporting this Judge's spin.

In trying to uphold the American Indian Religious Freedom Act of 1994, I refused to weigh in that peyote requires any further testing of safety or for evaluating mescaline content for Native American use. This Judge called me inconsistent for doing so, and instead he turned to a local professor of pharmacognosy from Ferris State University, a Dr. Robert Kruger. This Ph.D. is an expert in the pharmacy of natural plants, but he is not a medical expert nor has he ever done any research on hallucinogens or peyote, in particular. "Dr. Krueger unequivocally stated that the consumption of peyote by a child would pose a substantial threat to that child's well being, both physically and mentally." And his evidence for this statement is not based on any scientific fact concerning the health of Native Americans or, I suspect, any Americans at all beyond a few case reports concerning recreational mescaline abuse. No, it is based only on the fact that peyote is listed as a poison in the Natural Products National Database. Also, a local family practice physician with no expertise in the field of substance abuse research, Dr. Elizabeth Tree-LeVasseur of the Lakeshore Medical Center, hysterically yelled at me outside the proceedings and then later testified that "the administration of peyote to a child is in itself child abuse." Obviously, such "expertise" proved music to this Judge's ears. Their opinions insult the hundreds of thousands of members of the NAC and fly in the face of the countless examples of true success stories of born and raised NAC members. The current President and Vice President of Navajo Nation, by the way, are lifelong members of NAC, but, apparently they need Drs. Krueger and Tree-LeVasseur to tell them that they are damaged goods.

It really gets under my skin that Americans in positions of responsibility would abuse our Constitution and the principles upon which this nation was founded and disparage the protected beliefs of a people who have suffered so much since their world was "discovered" by Europe. Jonathan and Ishkwada Fowler are not the first Native Americans to be so dearly wronged by people who claim that they are there to protect and help them. In fact these actions remind me of an old sick saying of past advocates who were calling for the complete acculturation of Native Americans into "accepted" society: You've got to kill the Indian to save the man. Fortunately, the Judge's decision does permit Ishkwada to be present at NAC ceremonies. I think the future is quite bright for this family since federal law is on their side. Eventually, Ishkwada will be a fully-enrolled member of the Grand Traverse Band of Ottawa and Chippewa Indians just like his Dad. Eventually, Ishkwada will express his wishes, and, if it is his wish to partake fully in the ceremonies of the NAC, he will be allowed to do so with the consent of his parents or after future litigation in federal court.

It appears that our culture is so hysterical when it comes to the topic of "kids and drugs" that it influenced this Judge to run in fear from his obligations, and it resulted in major media coverage around the globe. The sacramental use of peyote by Native peoples has continued for thousands of years and is not going to stop, so we should all expect another case like this one sometime in the future. Next time around, we should all make sure people really have read the current American Indian Religious Freedom Act (see below). Also, my research on the neurocognitive functioning of longstanding NAC members will also finally be published soon…and science can't be ordered by Judge Dimkoff to accept his opinions as if they were peer-reviewed facts.

# American Indian Religious Freedom Act Amendments of 1994

**Oct 6, 1994**
**Public Law 103-344**
**108 Stat. 3124**
**Passed by 103rd Congress**

**[H.R. 4230]**

## An Act

> **To amend the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes, and for other purposes.**
>
> **Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,**

## SECTION 1. SHORT TITLE.

**This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1994".**

## SECTION 2. TRADITIONAL INDIAN RELIGIOUS USE OF THE PEYOTE SACRAMENT.

**The Act of August 11, 1978 (42 U.S.C. 1996), commonly referred to as the "American Indian Religious Freedom Act", is amended by adding at the end thereof the following new section:**

## "SECTION 3.

**a. The Congress finds and declares that**

1. **for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;**
2. **since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation;**
3. **while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, 22 States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;**
4. **the Supreme Court of the United States, in the case of Employment Division v. Smith, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard; and**
5. **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.**

**b.**

1. **Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.**

2. **This section does not prohibit such reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purposes of this Act.**
3. **This section does not prohibit application of the provisions of section 481.111 of Vernon's Texas Health and Safety Code Annotated, in effect on the date of enactment of this section, insofar as those provisions pertain to the cultivation, harvest, and distribution of peyote.**
4. **Nothing in this section shall prohibit any Federal department or agency, in carrying out its statutory responsibilities and functions, from promulgating regulations establishing reasonable limitations on the use or ingestion of peyote prior to or during the performance of duties by sworn law enforcement officers or personnel directly involved in public transportation or any other safety-sensitive positions where the performance of such duties may be adversely affected by such use or ingestion. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice. Any regulation promulgated pursuant to this section shall be subject to the balancing test set forth in section 3 of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2OOObb-1).**
5. **This section shall not be construed as requiring prison authorities to permit, nor shall it be construed to prohibit prison authorities from permitting, access to peyote by Indians while incarcerated within Federal or State prison facilities.**
6. **Subject to the provisions of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2000bb-1), this section shall not be construed to prohibit States from enacting or enforcing reasonable traffic safety laws or regulations.**
7. **Subject to the provisions of the Religious Freedom Restoration Act (Public Law 103-141; 42 USC 2000bb-1), this section does not prohibit the Secretary of Defense from promulgating regulations establishing reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety, or compliance with international law or laws of other countries. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice.**

c. **For purposes of this section--**
   1. **the term 'Indian' means a member of an Indian tribe;**
   2. **the term 'Indian tribe' means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. l601 et seq.)), which is**

**recognized as eligible for the special programs and services provide by the United States to Indians because of their status as Indians;**

3. **the term 'Indian religion' means any religion--**
    A. **which is practiced by Indians; and**
    B. **the origin and interpretation of which is from within a traditional Indian culture or community; and**
4. **the term 'State' means any State of the United States and any political subdivision thereof.**

d. **Nothing in this section shall be construed as abrogating, diminishing, or otherwise affecting--**
    1. **the inherent rights of any Indian tribe;**
    2. **the rights, express or implicit, of any Indian tribe which exist under treaties, Executive orders, and laws of the United States;**
    3. **the inherent right of Indians to practice their religions; and**
    4. **the right of Indians to practice their religions under any Federal or State law.".**

**Approved October 6, 1994.**

**For Legislative History of Act, see Report for P.L. 103-344 in U.S.C.C. & A.N. Legislative History Section.**