

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 14

SPRING 2024

ISSUE 2

INDIGENOUS PEOPLES' SPIRITUAL RIGHTS TO MEDICINAL PLANTS

Sinnai Avila^{1*}

Abstract

In the face of climate change, extractivism, discrimination against Indigenous peoples, and cultural appropriation, Indigenous knowledge and cultural heritage are under threat. This Note explores the status of Indigenous Peoples; rights to use their ceremonial plants by looking at the legal inequities that prevent Indigenous peoples from exercising their cultural practices and traditional ceremonies. Indigenous communities reside on territories where 80% of the world's biodiversity is found. Indigenous peoples' cultural and spiritual practices, traditional knowledge, and livelihoods depend on healthy biodiverse systems. This is one of many reasons why Indigenous land defenders risk their lives protecting their territories.

Several factors pose challenges for Indigenous peoples seeking to protect and preserve

^{1*} Being Maya Q'anjob'al and Xicana raised in diaspora, sharing moments in ceremonies with Maya elders and relatives were some of the most spiritually grounding memories and formative aspects that shaped my identity as an Indigenous woman. To protect our traditional and cultural practices is to resist over 500 years of colonialism and suppression of our ancestral knowledge. This article is for the many generations of Indigenous ancestors and knowledge keepers who preserved our cultures and ceremonies in hopes that future generations like my own could remember and protect them.

I want to express my sincere gratitude to my article advisor, Professor Rebecca Tsosie, whose scholarship has paved the way to advancing Indigenous rights and whose mentorship helped guide my analysis of this article. I am also deeply grateful to Tata Intiwari Yatiri for our illuminating discussion that introduced me to these concerns and his observations as an Indigenous medicine healer in Peru.

Note for the reader: This article will say Indigenous peoples in reference to the Indigenous communities around the world regardless of government recognition. Where the article occasionally mentions Native tribes it refers to tribes located within the United States colonial borders.

their cultural practices, including their ceremonial plants like peyote, psilocybin, and ayahuasca. Indigenous knowledge keepers must be at the forefront of discussions involving their cultural practices and medicinal plants. Currently, United States domestic law is failing to protect Indigenous peoples' spiritual and cultural practices even though it has stated it supports the United Nations Declaration on the Rights of Indigenous Peoples, recognizing Indigenous Peoples' rights to cultural heritage and traditional knowledge. This article argues that the U.S. should implement international principles that recognize Indigenous peoples' rights to ancestral cultural practices under the western notion of religious rights.

| | |
|---|----|
| INTRODUCTION | 2 |
| I. HARM TO MEDICINAL PLANTS AND INDIGENOUS PEOPLES' CULTURAL SURVIVAL | 3 |
| A. Impacts of Climate Change on Indigenous Cultures & Spirituality | 4 |
| B. Structural Racism Against Indigenous Healers and Knowledge-Keepers | 5 |
| C. Cultural Appropriation of Indigenous Cultures and Medicinal Plants | 6 |
| II. THE CURRENT STATE OF INDIGENOUS RIGHTS TO CEREMONIAL AND MEDICINAL PLANTS | 9 |
| A. <i>Peyote</i> : Plant Medicine Enthusiast Campaign to Decriminalize Peyote for Non-Indigenous People | 10 |
| B. <i>Psilocybin</i> : Case Study of Western Sciences Extracting Indigenous Knowledge | 12 |
| C. <i>Ayahuasca</i> : The Law Protects Churches' Ayahuasca Use While Likely Criminalizing Individual Indigenous Ayahuasca Practitioners | 13 |
| i. Spiritual Rights to Ayahuasca under RFRA Despite CSA Restrictions | 14 |
| ii. Major Inequities Blocking Indigenous Peoples' Rights to Medicinal Plants | 17 |
| A. State Efforts to Legalize and Decriminalize Plant Medicines | 18 |
| II. ADOPTING INTERNATIONAL STANDARDS FROM THE UNDRIP AND CBD TO PROTECT INDIGENOUS PEOPLES' RIGHT MEDICINAL PLANTS AND CULTURAL PRACTICES | 19 |
| A. UNDRIP and CBD: International Principles Upholding Indigenous Cultural and Spiritual Practices | 21 |
| CONCLUSION: INDIGENOUS PEOPLES' VOICES SHOULD BE CENTERED IN CONVERSATIONS REGARDING THEIR SACRED PLANTS AND CEREMONIES | 23 |

Introduction

The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”² Unfortunately, many Indigenous cultural practitioners and spiritual leaders lack the legal protections to practice their traditional ceremonies and use their sacred plants as a religious right. In the face of colonization and Christianity’s assimilation efforts, Indigenous communities were forced to hide their ancestral worldviews, spiritual beliefs, dances, songs, and ceremonies. Those who chose to continue their traditional practices risked being killed or persecuted, so many were forced to do so in hiding.

This article will argue that U.S. domestic laws fail to protect Indigenous peoples’ spiritual and cultural rights, so the United States should look to international legal standards in the United

² U.S. CONST. amend. I.

Spring 2024

Nations Declaration on the Rights of Indigenous Peoples³ and Convention on Biological Diversity⁴ to codify legal protections for Indigenous peoples' rights to their ceremonial plants.

Indigenous peoples' rights to intellectual property and data sovereignty are critical to protecting Indigenous knowledge. There is substantial research that addresses the dilemma of Indigenous communities asserting intellectual property rights. But this Note will discuss Indigenous peoples' rights to medicinal plants and ceremonies from the lens of religious freedom and protecting Indigenous knowledge.

Part I discusses how climate change, racism, and cultural appropriation create a constellation of challenges for Indigenous peoples to protect their cultural practices and ceremonial plant medicines. Part II provides case studies demonstrating the status of Indigenous medicinal plants like peyote, psilocybin mushrooms, and ayahuasca. It recounts Indigenous legal battles to obtain legal protection for using peyote during NAC ceremonies and includes an analysis of legal precedent that can permit established churches to use ayahuasca in ceremonies. The last part highlights how the U.S. should incorporate international human rights standards in its domestic policies to extend legal protections for Indigenous peoples' cultural rights to their traditional ceremonies and medicinal plants.

I. Harm to Medicinal Plants and Indigenous Peoples' Cultural Survival

This section will illustrate how the threats of climate change, appropriation of Indigenous technical knowledge,⁵ and racism are attacking Indigenous peoples' spiritual and cultural practices. For many Indigenous communities, plants are sacred because they hold living essences, healing properties, personalities, and crucial roles in Indigenous cultures. "Plants are not just 'cultural resources.' Plants are our relatives. They're to be treated with reciprocal respect," says Craig Torres, a Tongva member who advocates to protect white sage from illegal poaching in Southern California.⁶

³ G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

⁴ Convention on Biological Diversity art. 8(j), May 6, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

⁵ This Note will use the terminology "scientific and technical knowledge" interchangeably with "traditional" or "customary" knowledge as practiced by the U.N. Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay. Word choice is powerful, and the world should recognize Indigenous knowledge for its scientific contributions. Indigenous peoples' knowledge is not from a folklore distant past, but rather Indigenous scientific knowledge has protected our earth's plants, forests, rainforests, wildlife, and the natural world all while continuing to evolve conservation practices. See José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), *Indigenous women and the development, application, preservation and transmission of scientific and technical knowledge*, ¶ 8, U.N. Doc. A/HRC/51/28 (Aug. 9, 2022) [hereinafter Indigenous Women's Knowledge Report].

⁶ Cal. Native Plant Soc'y, *Saging the World*, <https://www.cnps.org/conservation/white-sage> (last visited Feb. 11, 2024). Rose Ramirez, a Chumash and Yaqui Native woman, writes: ". . . the ubiquitous white sage, *Salvia apiana*, a plant that we adore. We use it for ceremony, gifting, food and medicine. We burn it to cleanse our bodies, minds, ceremonial instruments, and our homes. We use it to help bury our dead and to get us through menopause. From a single leaf to a dried bundle, many of us grow it, and have it on hand, ready for use, to gift or to provide to a person in need."

A. Impacts of Climate Change on Indigenous Cultures & Spirituality

Unfortunately, climate change, resource extraction, and “clean energy” developments are threatening Indigenous lands, resources, and cultural heritage. Climate change is disproportionately impacting Indigenous peoples’ lands through increased “desertification, flooding, melting glaciers, rising sea levels, changes to vegetation and animal populations, and the general degradation of agricultural lands and natural resources.”⁷ With Indigenous communities conserving 80 percent of the world's existing biodiversity,⁸ climate change’s consequences are concerning because Indigenous peoples’ culture, medicinal practices, and livelihoods are interdependently connected to their environments. Environmental degradation and loss of biodiversity would harm Indigenous peoples’ knowledge, culture, and way of life. Reduced genetic diversity and loss of transmission of Indigenous knowledge would in turn limit Indigenous peoples’ ability to combat climate change’s effects.

Importantly, Indigenous women’s in-depth understanding of sacred plants, harvesting practices, and water and forest management play an essential role in protecting Indigenous knowledge and combating climate change.⁹ Indigenous communities and particularly Indigenous women around the world use plant resources for medicinal purposes and to preserve their ancestral healing practices. For example, the Sengwer and Ogiek women in Kenya use a traditional beekeeping practice to harvest “honey for food and medicinal purposes as an important element of forest conservation in support of biodiversity.”¹⁰ As a result, Indigenous women are one of the first vulnerable groups to experience the consequences of climate change and its impacts on their technical knowledge.

In 2019, the Inter-American Commission on Human Rights reported that biodiversity loss in Colombia was threatening Indigenous peoples’ traditional practices because the disappearance of forests and flora is contributing to the decline of plant species—including plants used for ayahuasca.¹¹ Climate change, extractive industries, and capitalist exploitation of natural resources are inevitably harming Indigenous people’s traditional healing practices. For example, Native groups in Southern California are advocating to protect white sage because overdevelopment, climate change, historical droughts, extreme wildfires, and poaching are harming their medicinal plant.¹² Indigenous communities’ cultural survival is inextricably connected to the biodiversity of their ancestral lands. For these reasons, Indigenous land defenders and water protectors around the world are at the front lines risking their lives, safety, and criminal prosecution to protect their territories.¹³

⁷ Indigenous Women’s Knowledge Report, *supra* note 5, at ¶ 62.

⁸ The World Bank, *Indigenous Peoples*, <https://www.worldbank.org/en/topic/indigenouspeoples> [https://perma.cc/VAR5-8WX7].

⁹ Indigenous Women’s Knowledge Report, *supra* note 5, at ¶ 30.

¹⁰ *Id.* at ¶ 31.

¹¹ Inter-Am. COMM’N ON HUM. Rts., *Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-American Region* ¶ 135 (Sept. 29, 2019), <https://www.oas.org/en/iachr/reports/pdfs/panamazonia2019-en.pdf>.

¹² See Cal. Native Plant Soc’y, *supra* note 6.

¹³ John Vidal, *How Guatemala is sliding into chaos in the fight for land and water*, THE GUARDIAN (Aug. 19, 2018), <https://www.theguardian.com/world/2018/aug/19/guatemala-fight-for-land-water-defenders-lmining-logging- eviction> [https://perma.cc/S4FF-93FF]. In 2017, there were 483 reported “serious acts of aggression against people fighting for their lands . . .” *Id.* In 2018, Guatemala was one of the most dangerous countries for environmental activists, as 18 human rights and land defenders were killed. Among them was Luis Arturo Marroquín, a Maya Q’eqchi’ leader of a group of indigenous farmers who spoke out against evictions, land grabs and pollution due to mines, hydroelectric dams, logging, and palm oil and sugar cane developments.

B. Structural Racism Against Indigenous Healers and Knowledge-Keepers

Structural racism and discrimination are deeply rooted in colonialism, and structural racism is actively harming Indigenous rights to medicinal and cultural practices. Structural racism is present in the institutional and social spheres. Institutional racism can look like laws refusing to recognize Indigenous peoples' religious freedom by denying them rights to their cultural practices. In 2019, Hawaiian law enforcement officers arrested 33 land defenders—many of whom were Native Hawaiian elders—for advocating against the construction of the Thirty-Meter Telescope because it would desecrate their sacred site called Mauna Kea.¹⁴ Similarly, the United States and Canada passed laws in the 1870s banning Indigenous cultural practices and spiritual beliefs, including dancing.¹⁵ One devastating example took place at Wounded Knee in 1890 when the U.S. military massacred the Lakota Natives for gathering for a Ghost Dance, which the U.S. government saw as a threat that would lead to “an all-out Indian war.”¹⁶ The settler-government killed them because the Lakota members continued engaging in ceremonies and traditional practices.

Colonization's embedded effects are also seen in our social structures through the social stigmas that result in day-to-day discrimination against Indigenous spiritual leaders. In some places, community members label Indigenous traditional practices “witchcraft.”¹⁷ This has often justified discriminatory treatment against Indigenous spiritual leaders, including exclusion from “social, civil and political events.”¹⁸ In more extreme cases of racial violence, people have even murdered Indigenous knowledge keepers who continue engaging in their cultural and spiritual practices.¹⁹

Tata Domingo Choc Che was a Maya Q'eqchi' *ajilonel*, a “specialist in Maya medicine,” in Guatemala. He partnered with various scientific research projects to conserve and share his ancestral knowledge about herbal remedies.²⁰ He was helping write a book that would document “evidence of Maya Q'eqchi herbal science, as a mechanism to document the intellectual property of his People.”²¹ In 2020, people in his community accused him of using “witchcraft” after a man

¹⁴ Ryan Prior & Chris Boyette, *Protesters arrested at Hawaii's Mauna Kea for blocking construction of the Thirty-Meter Telescope*, CNN (Jul. 17, 2019), <https://www.cnn.com/2019/07/17/us/mauna-kea-arrests-telescope-protests-trnd/index.html> [<https://perma.cc/64BA-DS8M>].

¹⁵ Patti Jo King, *The Truth About the Wounded Knee Massacre*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://ictnews.org/archive/the-truth-about-the-wounded-knee-massacre>.

¹⁶ *Id.*

¹⁷ Indigenous Women's Knowledge Report, *supra* note 5, at ¶ 67.

¹⁸ *Id.*

¹⁹ Quimy De León et al., *¿Cuál fue la causa del crimen contra Domingo Choc Che Aj Ilonel?*, PRENSA COMUNITARIA (June 9, 2020)

https://prensacomunitaria.org/2020/06/cual-fue-la-causa-del-crimen-contra-domingo-choc-che-aj-ilonel2/?fbclid=IwAR2XJ15VUv6pdkGZhPOKRWuUgNIXaRSVJsfJ24IdO-yUEeXRCO669k_ZiG4 [<https://perma.cc/AQ8S-8EHT>].

In Guatemala from 2002 to 2020, there had been 20 reported homicide cases of Indigenous spiritual leaders. *Id.*

²⁰ *Id.* Diana Pastor & Jess Cherofsky, *Celebrating the Life of Tata Domingo Choc Che and Demanding Justice for His Assassination*, CULTURAL SURVIVAL (June 23, 2020), <https://www.culturalsurvival.org/news/celebrating-life-tata-domingo-choc-che-and-demanding-justice-his-assassination> [<https://perma.cc/34ZR-TH3E>].

²¹ *Id.*

in their community died.²² *Tata Domingo Choc Che's* own community members tortured him, burned him alive, and recorded the horrific crime.²³

Racism and stigmas against Indigenous spiritual and cultural practices permeate society. Guatemala's brutal history is stained with massacres of the Maya people, and its structural racial legacy is still present in the racial violence seen against Maya communities. *Tata Domingo's* story is not an isolated event. Indigenous communities continue to experience racism and discrimination for engaging in their traditional ceremonies and practices. Simultaneously, non-Indigenous people are appropriating and profiting from Indigenous cultures by commodifying their ceremonial plants.

C. Cultural Appropriation of Indigenous Cultures and Medicinal Plants

Tourism is resulting in non-Indigenous people seeking to experience Indigenous healing practices. Unfortunately, tourism has turned healing and traditional ceremonies into folklore for tourists in Latin America, "transgressing their true meaning and their cultural and spiritual values."²⁴ Moreover, the "wellness economy" comprises industries that market wellness activities to consumers and is made up of sectors that include wellness tourism and traditional medicines.²⁵ According to the Global Wellness Institute, the global wellness industry is worth \$5.6 trillion, with traditional medicines comprising \$519 billion and wellness tourism being \$651 billion.²⁶ What is the result? Capitalism's harmful effects force Indigenous communities to enter this market out of financial necessity and sell their ceremonies to foreigners.

Accounting for about 19 percent of people in the world living in extreme poverty,²⁷ Indigenous peoples in countries like Mexico, Guatemala, Colombia, and Peru have limited economic opportunities. With limited financial opportunities, some Indigenous people have found the ability to make ends meet by sharing and leading spiritual retreats and ceremonies for non-Indigenous people. The following examples will focus on the harmful effects that ensue when non-Indigenous people commodify Indigenous ceremonial plants. Ultimately, Indigenous peoples' sovereignty demands respect for the ways that they choose to share, sell, or exclude others from accessing their ceremonies and plant medicines.

"Shamanic tourism" refers to the growing business trend of Western tourists who seek authentic ethnic experiences.²⁸ Tourism in Indigenous territories raises "ethical, socioeconomic and human rights-related concerns"²⁹ To exemplify, there are many psychedelic tourism

²² *Id.*

²³ Sofia Menchu, *Murder of indigenous Maya healer spurs calls for justice in Guatemala*, REUTERS (June 8, 2020), <https://www.reuters.com/article/us-guatemala-murder/murder-of-indigenous-maya-healer-spurs-calls-for-justice-in-guatemala-idUSKBN23G0DV>; Jeff Abbott, *Herbalist's murder highlights assault on Mayan spirituality in Guatemala*, THE GUARDIAN (Oct. 25, 2021), <https://www.theguardian.com/global-development/2021/oct/25/guatemala-mayan-spirituality-herbalist-murder-domingo-choc-che> [<https://perma.cc/26DN-9AZE>].

²⁴ U.N. Special Rapporteur on the Rights of Indigenous Peoples, *Tourism and the rights of Indigenous Peoples* [hereinafter "Tourism and Indigenous Peoples Report"], U.N. Doc. A/178/162, ¶ 42 (Jul. 12, 2023).

²⁵ Glob. Wellness Inst., *Wellness Economy Statistics & Facts*, <https://globalwellnessinstitute.org/press-room/statistics-and-facts/> [<https://perma.cc/AZ5J-63XX>].

²⁶ *Id.*

²⁷ The World Bank, *supra* note 8.

²⁸ Evgenia Fotiou, *Shamanic Tourism in the Peruvian Lowlands: Critical and Ethical Considerations*, 25 J. Latin AM. & Caribbean Anthropology 374, 380 (2020).

²⁹ WORLD TOURISM ORG., RECOMMENDATIONS ON SUSTAINABLE DEVELOPMENT OF INDIGENOUS TOURISM 2 (2019), <https://doi.org/10.18111/9789284421299>; see generally *Tourism and Indigenous Peoples Report*, *supra* note 24.

Spring 2024

websites that advertise Mexican peyote gardens, which are marketed to tourists who are interested in using peyote recreationally and fail to consider the correct harvesting practices that will conserve the cacti.³⁰ Incorrectly harvesting peyote, such as by digging out the entire cactus with its roots, is contributing to the depletion of the cactus.³¹ The decline in peyote population would inherently harm traditional Huichol practices and the Native American Church (NAC), whose members use peyote as a sacrament.³² More on peyote will be discussed in Part II. What is important to mention in this section is that there are many illegitimate NAC groups that claim to be “genuinely-chartered NAC branches,” yet they have no actual bona fide connection to the NAC organization or federally recognized tribes.³³ Non-Natives have also appropriated sacred plants like kava from Polynesian cultures,³⁴ cacao from Mesoamerican Indigenous cultures,³⁵ stevia from the Guaraní people in Paraguay,³⁶ and maca from Indigenous communities in Peru.³⁷ Indigenous peoples’ sovereignty demands they have the right to protect the authenticity of their traditional plants, ceremonies, and healing practices.

Unfortunately, tourism has turned healing and traditional ceremonies into folklore for tourists in Latin America, “transgressing their true meaning and their cultural and spiritual values.”³⁸

³⁰ James D. Muneta, *Peyote Crisis Confronting Modern Indigenous Peoples: The Declining Peyote Population and a Demand for Conservation*, 9 AM. INDIAN L.J. 135, 163 (2020).

³¹ *Id.* at 167.

³² Guttman, *infra* note 63.

³³ Muneta, *supra* note 30 at 168.

³⁴ Jean Christensen, *Concern Grows in Hawaii Over Kava Tea Drinking and Driving*, THE WASHINGTON POST (Jan. 14, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/14/concern-grows-in-hawaii-over-kava-tea-drinking-and-driving/69495477-f7ce-41a0-b168-7c1dd5ee5092/> [<https://perma.cc/WWN7-CTXR>]; Eddie Kim, *The Appropriation of Kava Almost Destroyed It. Will This Time Be Different?*, VICE (Aug. 16, 2021), <https://www.vice.com/en/article/3aqyyy/the-appropriation-of-mood-altering-kava-plant-drink-by-westerners-trend> [<https://perma.cc/S3QZ-GYVY>].

³⁵ Non-Indigenous people are visiting countries like Guatemala, purchasing cacao, and profiting from selling cacao and cacao ceremonies to a non-Indigenous market. See Soul Lift Cacao, *How to avoid cultural appropriation when sharing cacao*, <https://soulliftcacao.com/blogs/news/how-to-avoid-cultural-appropriation-when-sharing-ceremonial-cacao> [<https://perma.cc/CG3K-SCV5>]; Ora Cacao, *Reflections on Cultural Appropriation & Cacao*, <https://ceremonial-cacao.com/es/blogs/cacao-journal/reflections-on-our-cultural-appropriation-cacao-forum> [<https://perma.cc/HWP2-3YHH>]; Eric Federico Fridman, *Navigating Cultural Appropriation in Cacao Ceremonies*, MEDIUM (Jan. 28, 2020), <https://medium.com/@ericfedericofridman/navigating-cultural-appropriation-in-cacao-ceremonies-751f4f77c240> [<https://perma.cc/G366-YJ9V>].

³⁶ Eric J. Wallace, *The Indigenous Tribes Fighting to Reclaim Stevia from Coca-Cola*, ATLAS OBSCURA (July 12, 2019), <https://www.atlasobscura.com/articles/where-is-stevia-from> [<https://perma.cc/556U-8KKC>] [hereinafter Wallace]. For the Guaraní tribe in Paraguay, stevia, referred to as “ka’a he’e,” has traditionally been used as a ceremonial medicine since time immemorial. *Id.* The Guaraní are currently in a lawsuit against Coca-Cola, and they are suing the company for stealing genetic properties from their traditional plant and not sharing any benefits with the Guaraní people. *Id.*

³⁷ *Id.*; Fabiola Tavui, *Distorting the Life of Maca (Lepidium Miyenii)* (Dec. 12, 2016) (Master’s thesis, University of San Francisco) (on file with the Gleeson Library, University of San Francisco) [hereinafter Tavui]. Maca is currently known as a “super food.” Tavui, *supra* note 37, at 6. It was traditionally stewarded by Indigenous people in Peru. Wallace, *supra* note 36. Private companies stole its genetic properties, patented the plant, and commercialized it into the global market. Tavui, *supra* note 37, at 31. Fortunately, in 2007, lawyers were able to block the companies from using Indigenous peoples’ technical knowledge due to “biopiracy.” Wallace, *supra* note 36.

³⁸ Tourism and Indigenous Peoples Report, *supra* note 24.

In 2019, the Union of Indigenous Yagé Medics of the Colombian Amazon (UMIYAC) published the Declaration about Cultural Appropriation from the Spiritual Authorities, Representatives, and Indigenous Organizations of the Amazon Region, which highlights the issues that arise when people commodify yagé (another word for ayahuasca):

The sacred yagé plant is part of the collective cultural, ancestral and medicinal heritage of the Amazonian indigenous peoples and its purpose is to cure diseases. Yagé cannot be used for profit or business, outside the livelihood of those who practice traditional medicine by lineage and with the endorsement of indigenous communities and organizations;

Mixing practices; such as the use of San Pedro, yagé, peyote, kambó, Bufo alvarius, iboga and temazcal, decontextualizes and violates the sacredness of ancestral traditions, that are fundamental for the survival of the original peoples [this refers to a common practice seen at many Western-owned wellness retreats]. The indiscriminate use of indigenous practices also puts the health of the people who attend these events at risk;

In the face of this new scourge, we urgently call on all people of consciousness not to put their health at risk by participating in these commercial activities and to respect the cultural and social processes of resistance of the indigenous people.³⁹

This declaration was written by various Indigenous communities in Colombia that have traditional yagé healers, and they highlight the strict norms and spiritual laws that their traditional healers adhere to as stipulated in the UMIYAC document titled “Code of Ethics for the Practice of Indigenous Medicine in the Amazon Piedmont of Colombia.”⁴⁰ While UMIYAC does not represent all Indigenous communities that have an ancestral relationship to ayahuasca, the declaration highlights the recurring themes and challenges that arise when Indigenous medicinal plants are appropriated by both non-Indigenous people and Indigenous members who do not follow traditional customs to lead such ceremonies. One of the consequences the declaration highlights is that illegitimate and self-proclaimed ayahuasca healers threaten the health and safety of people seeking healing. This is why it is non-negotiable to consult with traditional Indigenous healers every time their medicinal plants come into question.

For Indigenous peoples, to retain the integrity—meaning the true essence—of Indigenous knowledge is to practice cultural sovereignty. Cultural sovereignty is inextricably tied to political sovereignty because the ultimate goal of political sovereignty is to protect Indigenous peoples’ way of life.⁴¹ “Cultural integrity is possible when language, spirituality, and traditional forms of

³⁹ Union of Indigenous Yagé Medics of the Colombian Amazon, *Declaration about cultural appropriation from the spiritual authorities, representatives and indigenous organizations of the amazon region*, <https://umiyac.org/2019/11/01/declaration-about-cultural-appropriation-from-the-spiritual-authorities-representatives-and-indigenous-organizations-of-the-amazon-region/?lang=en> [https://perma.cc/3N33-LQY9].

⁴⁰ UNION OF YAGÉ HEALERS OF THE COLOMBIAN AMAZON, *Code of Ethics for the Practice of Indigenous Medicine in the Amazon Piedmont of Colombia* (Sept. 2000), https://www.bialabate.net/wp-content/uploads/2008/08/code_of_ethics_umiyac.pdf.

⁴¹ Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 202 (2001).

Spring 2024

education are employed to bring [Native] people together as culturally distinct communities.”⁴² That cultural integrity is threatened when non-Natives culturally appropriate medicinal plants traditionally used by Indigenous communities. The next section will discuss how states legalizing medicinal plants for recreational use by non-Indigenous people can lead to major cultural appropriation problems for Indigenous peoples.

Climate change, racism, and cultural appropriation are harming Indigenous peoples' cultural practices and rights to their ceremonial plants. Diminishing global biodiversity and extractive industries are threatening Indigenous peoples' cultural practices. Racism is repressing Indigenous knowledge-keepers' ability to safely protect and preserve their cultural traditions. Further, cultural appropriation is a modern form of extraction of Indigenous knowledge for personal gain without fully respecting the integrity of Indigenous cultures. Despite Indigenous communities facing legal, political, and social challenges, they've fought to protect their medicinal plants and ceremonies.

II. The Current State of Indigenous Rights to Ceremonial and Medicinal Plants

*The Native American Church “is not a religion but a ceremony. At the turn of the 19th century, many tribes had to hide their ceremonial ways within a religious structure called the Native American Church. Back then, the government and non-Indian community were afraid of us, as our ceremonies became associated with rebellion. This misunderstanding resulted in the Wounded Knee Massacre in 1890 and many other incidents.”*⁴³

- Andrew Wakonse Gray, Osage Native American Church Leader

Since the start of colonialism, Indigenous peoples have found ways to protect their culture and spirituality despite the dominant Christian religion being forced on them. The current dominant structure is composed of Western constitutional laws that often infringe on Indigenous peoples' rights to their cultural practices by criminalizing plant medicines that Indigenous communities consider sacred.

Many Indigenous peoples' plant medicines have been classified as Schedule 1 drugs under the Controlled Substances Act of 1970 (CSA).⁴⁴ Thus, the CSA criminalizes Indigenous peoples' ceremonial and healing practices that use such plants listed under the CSA. This is an example of epistemic injustice,⁴⁵ where the Western dominant culture fails to understand Indigenous peoples' spiritual relationship with medicinal plants. Hence, colonial governments create harmful policies that affect Indigenous peoples' cultural survival. Still, Indigenous communities have asserted their sovereignty by protecting their traditional knowledge, ceremonies, and plant medicines.

Sovereignty can look like Indigenous communities protecting the sacredness of their plants, such as peyote, and excluding non-Indigenous people from commodifying them, as seen in

⁴² *Id.* at 208.

⁴³ Dennis Zotigh, *Native Perspectives on the 40th Anniversary of the American Indian Religious Freedom Act*, SMITHSONIAN MAGAZINE (Nov. 30, 2018), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/11/30/native-perspectives-american-indian-religious-freedom-act/> [<https://perma.cc/D4CV-ZEF6>].

⁴⁴ 21 U.S.C. §§ 801-904.

⁴⁵ Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1152 (2012).

the peyote context. When Indigenous peoples' sovereignty is ignored, their traditional knowledge about medicinal plants becomes appropriated, extracted, and commodified without regard for Indigenous peoples' scientific contributions or spiritual concerns. For this reason, it is imperative that governments like the United States endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratify the United Nations Convention on Biological Diversity (CBD). Both international frameworks uphold Indigenous peoples' rights to medicinal plants and cultural practices.

This section will explain the current status of peyote, psilocybin, and ayahuasca in regard to Indigenous rights. It will also delve deeper into an ayahuasca case study revealing why the United States Supreme Court and an Oregon district court ruled in favor of permitting ayahuasca use under the Religious Freedom Restoration Act (RFRA). The cases will reveal RFRA's challenges on individual Indigenous practitioners and Indigenous groups.

A. *Peyote*: Plant Medicine Enthusiast Campaign to Decriminalize Peyote for Non-Indigenous People

*To decriminalize the usage of peyote would result in unintended consequences that will destroy our way of life . . . Popularizing the usage of peyote to outside Native communities and allowing recreational usage of peyote would result in mass production efforts and attempts to commercialize this holy sacrament.*⁴⁶

- NAC Member Earl Morris Jr.

Spanish historical records mention peyote in Mexico as early as 1560,⁴⁷ and its history traces back to the Huichol tribe in Mexico.⁴⁸ Many Native nations use peyote as a spiritual practice, including the Comanche and Kiowa, while others have adopted it more recently, like the Navajo.⁴⁹ By the late 19th century, peyote had established its cultural presence among many Native American Nations.⁵⁰ For many Native American Church (NAC) members, “peyote embodies the Holy Spirit” and those who partake in peyote ceremonies “enter into direct contact with God.”⁵¹ Peyote and its chemical property, mescaline, are classified as Schedule 1 drugs under the Controlled Substances Act.⁵² In *People v. Woody*, a California district court explained that “[t]o forbid the use of peyote is to remove the theological heart of Peyotism,” which would interfere with Native Americans' religious practice.⁵³ Nonetheless, Native communities fought for their spiritual and cultural rights to decriminalize peyote when used as a sacrament during NAC ceremonies.

In *Employment Division, Department of Human Resources v. Smith*, two Indigenous members of the NAC were fired for using peyote, and they were denied federal unemployment

⁴⁶ Arlyssa D. Becenti, *Native religious leaders say legalizing peyote use for all would threaten their practices*, AZ CENTRAL (Sept. 17, 2022), <https://www.azcentral.com/story/news/local/arizona/2022/09/17/native-religious-leaders-oppose-moves-decriminalize-peyote/10363740002/> [https://perma.cc/9BX6-5F4F].

⁴⁷ *People v. Woody*, 61 Cal. 2d 716, 720 (1964).

⁴⁸ Muneta, *supra* note 30, at 148.

⁴⁹ Coffey & Tsosie, *supra* note 41, at 208.

⁵⁰ *Id.*

⁵¹ *Woody*, 61 Cal. 2d at 720.

⁵² 21 U.S.C. § 812(c)(1)(c)(11)–(12).

⁵³ *Woody*, 61 Cal. 2d at 722.

Spring 2024

benefits because their use of peyote was deemed “work-related misconduct.”⁵⁴ The United States Supreme Court refused to apply the commonly used *Sherbert v. Verner* balancing test, which helped courts determine whether a government action that substantially burdened a religious practice was “justified by a ‘compelling state interest.’”⁵⁵ Instead, the United States Supreme Court denied the NAC and its Native members the right to use peyote in ceremonies reasoning that it would have been improper to require the government to prove a compelling state interest when it tried to limit the conduct of using peyote—a central aspect to a person’s religion.⁵⁶ The Court decided that the *Sherbert v. Verner* balancing test could not be used on a drug ban,⁵⁷ subjecting Native communities to continued discriminatory treatment by denying them unemployment benefits. The Court should have applied the *Sherbert v. Verner* balancing test because the two fired employees had used peyote for a religious purpose—just like plaintiffs in any other religious case—but the Court treated the use of peyote as the conduct of using a drug in the case.

In response to the *Employment Division* ruling, Congress amended the American Indian Religious Freedom Act (AIRFA) to decriminalize and protect peyote use for Native American ceremonial purposes in 1994.⁵⁸ Congress recognized that for many Native Americans, “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.”⁵⁹ As a result of the AIRFA amendment, the Drug Enforcement Administration (DEA) exempted peyote use from the Controlled Substances Act when NAC members used it as a sacrament.⁶⁰ Today, many non-Indigenous groups across the country are urging state legislators to decriminalize and legalize this medicinal plant for recreational and commercial use. This has not sat well with many existing Indigenous groups who’ve been working to protect their sacred plant.⁶¹ Indigenous communities, including Navajo Nation leaders, oppose efforts aimed at legalizing the use of peyote for recreational and commercial public use. Madam Chair Eugenia Charles-Newton, a Navajo leader from Shiprock, stated:

Azeé [peyote] is sacred medicine that heals our people in Native American Church ceremonies, and that is how it should remain. This medicine is used for religious purposes to heal an individual physically, mentally, and spiritually. States like California that are looking to decriminalize peyote, to allow non-Indigenous people to access it without restrictions, outside of ceremonies is wrong. We must speak up and let those who threaten the religious way of life for many Diné people know that

⁵⁴ *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 874 (1990).

⁵⁵ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁵⁶ *Smith*, 494 U.S. at 885–90.

⁵⁷ *Id.* at 884 (“Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”).

⁵⁸ American Indian Religious Freedom Act, 42 U.S.C. § 1996a.

⁵⁹ *Id.* § 1996a(a)(1).

⁶⁰ U.S. Dept. Peyote Exemption for Native American Church, 5 Op. O.L.C. 403, 403 (1981).

⁶¹ See generally Carlos Plazola, *IPCI, Decriminalize Nature, and Peyote Dialogues*, *DECRIMINALIZE NATURE* (Sept. 20, 2020), <https://www.decriminalizenature.org/education/blog/244-ipci-decriminalize-nature-and-peyote-dialogues>. Decriminalize Nature is a campaign that promotes the legalization of entheogenic plants, fungi, cacti, and plants similar to ayahuasca. *Id.* In 2019, Indigenous leaders at the Indigenous Peyote Conservation Initiative (IPCI) and Native American Church (NAC) demanded that Decriminalize Nature remove peyote from its advocacy. *Id.* Even Decriminalize Nature issued a public statement apologizing to IPCI and NAC for failing to center Indigenous voices at the start of their campaign efforts. *Id.*

their actions to decriminalize peyote threaten the historical, cultural, and biological integrity of its sacredness.⁶²

Unfortunately, peyote is also under threat due to habitat destruction and harmful harvesting practices.⁶³ In Mexico, peyote is threatened by mining and development companies.⁶⁴ Indigenous communities in the United States and Mexico⁶⁵ are concerned with the integrity and survival of their spiritual practices. In Mexico, the Huichol tribe has fought against land developments affecting peyote gardens and their way of life.⁶⁶ For these reasons, Indigenous communities in the United States and Mexico are protecting their sacred plant from cultural appropriation and commodification—both of which are risking peyote’s cultural integrity and availability for Indigenous traditional ceremonies.⁶⁷

B. Psilocybin: Case Study of Western Sciences Extracting Indigenous Knowledge

Psilocybin mushrooms have been used for medicinal purposes in Mesoamerica since at least the sixteenth century.⁶⁸ Maria Sabina was a prominent Indigenous medicine woman from Mazatec, Mexico, whose ancestors stewarded the practice of healing others with medicinal mushrooms.⁶⁹ In 1955, Gordon Wasson, an “American banker and mushroom enthusiast,” sought Maria Sabina to partake in a healing ceremony.⁷⁰ Wasson wrote about his experience for *Life* magazine, which sparked a wave of tourists descending to Huautla, Mexico, to seek healing from Maria Sabina.⁷¹ Unfortunately, while patents and well-funded research were given to psilocybin researchers, Maria Sabina and her fellow Mazatec Indigenous healers did not reap any financial benefits despite having stewarded this medicinal knowledge.⁷² In fact, police harassed and jailed Maria Sabina for her healing practices,⁷³ highlighting the institutional discrimination Indigenous healers faced. In the aftermath, Western scientists used Maria Sabina’s technical knowledge about

⁶² NAVAJO NATIONAL COUNCIL, *The Navajo Nation to Protect the Sanctity of Azeé - Peyote Medicine from Legalization and Commercial Use* (May 26, 2022), https://www.navajonationcouncil.org/wp-content/uploads/2022/05/Peyote_Decriminalization_2022.05.26.pdf. See also Becenti, *supra* note 47.

⁶³ Hannah Guttman, *Outlook on the Future of Peyote - A Religious and Environmental Issue*, 10–12 (2016) (unpublished manuscript) (Academia.edu).

⁶⁴ *Id.* at 10.

⁶⁵ Muneta, *supra* note 30, at 148. The Huichol tribe in Mexico was among the first Native tribes to use peyote for spiritual and medicinal purposes. *Id.*

⁶⁶ See *id.* at 162.

⁶⁷ See *Indigenous Peyote Conservation Initiative, Indigenous Peyote Conservation Initiative*, <https://www.ipci.life/> (last visited Feb. 11, 2024).

⁶⁸ Anna Lutkajtis, *Lost Saints: Desacralization, Spiritual Abuse and Magic Mushrooms*, 14 *Fieldwork in Religion* 118, 118 (2020).

⁶⁹ Fernando Benítez, *La santa de los hongos. Vida y misterios de María Sabina*. REVISTA DE LA UNIVERSIDAD DE MÉXICO, (Sept. 1963), <https://www.revistadelauniversidad.mx/articles/4db03bc9-e91a-49f9-b391-71e97ab02631/la-santa-de-los-hongos-vida-y-misterios-de-maria-sabina> [<https://perma.cc/RX7A-37EX>].

⁷⁰ See BEN FEINBERG, UNDISCOVERING THE PUEBLO MÁGICO: LESSONS FROM HUAUTLA FOR THE PSYCHEDELIC RENAISSANCE, in *PLANT MEDICINES, HEALING AND PSYCHEDELIC SCIENCE* 39 (Beatriz C. Labate & Clancy Cavnar eds. 2018).

⁷¹ *Id.*

⁷² See Konstantin Gerber et al., *Ethical Concerns about Psilocybin Intellectual Property*, 2021 *ACS PHARMACOLOGY & TRANSLATIONAL SCI.* 573, 576 (2021) (“In the case of psilocybin, for which there are now at least 24 registered patent processes (Table 1), no pharmaceutical psilocybin developers have reached any legitimate or reciprocal agreements with the Mazatecs, or any other indigenous communities.”).

⁷³ *Id.* at 573.

Spring 2024

psilocybin's healing properties and received accolades, respect, and financial support.⁷⁴ Meanwhile, the Indigenous community in Huautla, Mexico, continues to live in poverty.⁷⁵

Even though psilocybin is federally classified as a Schedule 1 drug under the Controlled Substances Act,⁷⁶ there is a growing trend of states and municipalities legalizing psilocybin in medical and religious settings. This will likely result in increased patents and businesses profiting from psilocybin. Further, biopiracy practices disenfranchise Indigenous stewards of this plant knowledge through resource extraction. The cultural integrity and sacredness of psilocybin are under threat by cultural tourism, commercial use, and increased patenting. This highlights the urgent need for greater legal protections to ensure Indigenous knowledge-keepers are recognized and compensated for their stewardship and contributions to the sciences.

At the same time, the analysis shifts when one considers the possible increasing economic opportunities for the Indigenous communities who steward medicinal plants like psilocybin. From the perspective of Indigenous peoples' sovereignty, some might argue that Indigenous peoples should be permitted to sell and share their medicinal plants and ceremonies for profit. What would legal protections look like? Who would decide what knowledge can be shared and with whom? Part III of this article will highlight some proposals other legal authors have put forward.

C. *Ayahuasca*: The Law Protects Churches' *Ayahuasca* Use While Likely Criminalizing Individual Indigenous *Ayahuasca* Practitioners

Amazonian Indigenous healers initially used *ayahuasca* in ceremonies for healing and spiritual purposes. The Declaration from the Spiritual Authorities, Representatives, and Indigenous Organizations of the Amazon Region states:

Thanks to the sacred yagé plant since childhood, communicating with the spirits of Mother Earth we have cultivated wisdom, and have learned which medicinal plants are useful for curing diseases. Yagé is not a hallucinogen and is not a psychedelic plant. Yagé is a plant that has a living spirit and teaches us how to live in peace and harmony with Mother Earth.⁷⁷

In addition to the *ayahuasca*'s medicinal uses, Indigenous communities also used it for "planning when and where to grow crops, hunt, and fish, and in general adopt important decisions for the community's future."⁷⁸ *Ayahuasca*'s main ingredient, dimethyltryptamine (DMT), is listed as a

⁷⁴ See generally Gerber et al., *supra* note 72.

⁷⁵ According to the Mexican government, 40.1 percent of the people living in Huautla, Oaxaca, Mexico lived in extreme poverty in 2020. See GOBIERNO DE MEXICO, POVERTY AND SOCIAL DEPRIVATION INDICATORS (2020), México, *Huautla de Jiménez*, <https://www.economia.gob.mx/datamexico/en/profile/geo/huautla-de-jimenez> [<https://perma.cc/8SXB-CFTA>].

⁷⁶ 21 U.S.C. § 812(c)(1)(c)(15).

⁷⁷ Union of Indigenous Yagé Medics of the Colombian Amazon, *Declaration About Cultural Appropriation from the Spiritual Authorities, Representatives and Indigenous Organizations of the Amazon Region*, <https://umiyac.org/2019/11/01/declaration-about-cultural-appropriation-from-the-spiritual-authorities-representatives-and-indigenous-organizations-of-the-amazon-region/?lang=en> [<https://perma.cc/G3KN-5CK7>].

⁷⁸ Inter-AM. COMM'N HUM. RTS., *supra* note 11, at 76.

Schedule I drug under the CSA, making it illegal for anyone to use ayahuasca.⁷⁹ However, there are three primary Brazilian churches known to use ayahuasca.⁸⁰

One of the churches is Santo Daime—a synchronistic practice that converges Indigenous and Christian traditions.⁸¹ The following section will discuss how some Brazilian churches have successfully argued that the RFRA⁸² protects their religious right to use ayahuasca. In recent years, a growing number of westerners have sought ayahuasca retreats as a form of alternative healing to help cure depression and alcohol and drug addictions, among other health issues.⁸³ Other Western tourists seek to use ayahuasca as a recreational drug or tourist activity instead of a serious medicine.⁸⁴ Some academics are attributing the booming ayahuasca tourism industry to the growing interest in alternative healing practices and the “psychedelic renaissance.”⁸⁵ In 1999, the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA in Spanish) and the Coalition for Amazonian Peoples and Their Environment (Amazon Alliance) sued a U.S. patent claimed on ayahuasca.⁸⁶ Ultimately, the U.S. Patent and Trademark Office rejected the patent on the grounds that the plant was not novel rather than addressing the fact that it should be a protected medicinal plant for Indigenous ceremonies.⁸⁷ Nonetheless, this decision does not protect Indigenous peoples from future similar claims that infringe on their medicinal plants.

i. **Spiritual Rights to Ayahuasca under RFRA Despite CSA Restrictions**

In April of 1980, the United States ratified the 1971 United Nations Convention on Psychotropic Substances⁸⁸ and included a reservation that allowed the Native American Church to continue using peyote.⁸⁹ Under this Convention, both properties of the plant medicines discussed earlier—mescaline and DMT—are classified as Schedule I substances.⁹⁰ When a nation-state

⁷⁹ 21 U.S.C. §§ 801-966.

⁸⁰ Jonathan Hamilton et al., *Ayahuasca: Psychological and Physiologic Effects, Pharmacology and Potential Uses in Addiction and Mental Illness*, 17 *Current Neuropharmacology* 108, 109 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6343205/> [<https://perma.cc/GE3N-SSQU>].

⁸¹ *Id.*

⁸² 42 U.S.C. §§ 2000bb–2000bb-4.

⁸³ David Hill, *Peru’s Ayahuasca Industry Booms as Westerners Search for Alternative Healing*, *THE GUARDIAN* (Jun. 7, 2016), <https://www.theguardian.com/travel/2016/jun/07/peru-ayahuasca-drink-boom-amazon-spirituality-healing> [<https://perma.cc/U94Q-BK7W>]; see Glob. Wellness Inst., *supra* note 25.

⁸⁴ *Id.*

⁸⁵ See *The Psychedelic Renaissance in Medicine*, *THE ECONOMIST*, (Sept. 27, 2022), <https://www.economist.com/psychedelics-pod> [<https://perma.cc/DT5S-EXLA>]; see also Aviad Hadar et al., *The Psychedelic Renaissance in Clinical Research: A Bibliometric Analysis of Three Decades of Human Studies with Psychedelics*, 55:1 *J. OF PSYCHOACTIVE DRUGS* 1 (2022); see also Donna Lu, *Psychedelics Renaissance: New Wave of Research puts Hallucinogenic Forward to Treat Mental Health*, *THE GUARDIAN* (Sept. 25, 2021), <https://www.theguardian.com/society/2021/sep/26/psychedelics-renaissance-new-wave-of-research-puts-hallucinogenics-forward-to-treat-mental-health> [<https://perma.cc/2FGM-P2G8>].

⁸⁶ Memorandum from Ctr. for Int’l Env’t. L., *U.S. Patent and Trademark Office Reinstates Ayahuasca Patent Flawed Decision Declares Open Season on Resources of Indigenous Peoples*, 1 (June 25, 2001), <https://www.ciel.org/wp-content/uploads/2015/06/PTODecisionAnalysis.pdf>.

⁸⁷ *Id.* at 4.

⁸⁸ See generally Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, <https://www.unodc.org/pdf/convention1971en.pdf>.

⁸⁹ *Id.* at art. 32(4).

⁹⁰ *Id.*

Spring 2024

ratifies an international convention, it is required to codify it into domestic law. CSA Schedule I substances have the strictest restrictions, including a complete ban on importation and use except for “strictly regulated research projects.”⁹¹ The CSA also imposes criminal sentences for people who possess Schedule I substances with intent to distribute or dispense the substance.⁹²

RFRA aims to protect the right to free exercise of religion and provides that “governments should not substantially burden religious exercise without compelling justification.”⁹³ Congress enacted RFRA to protect religious freedom after the Supreme Court denied the NAC the right to use peyote as a sacrament in *Employment Division*.⁹⁴

Recently, non-Indigenous-led ayahuasca churches⁹⁵ have been utilizing RFRA to defend their religious rights to ayahuasca as explained in this section. The following cases will demonstrate how legal precedent has increasingly permitted churches to use RFRA to defend their medicinal plant use. Meanwhile, independent Indigenous healers, whose ancestors stewarded plants like ayahuasca, would unlikely prevail under RFRA because they are not practicing under an established faith group that can successfully use RFRA. To exemplify, Church of Holy Light of Queen and O Centro Espírita Beneficente União do Vegetal⁹⁶ show the complexities and rigorous requirements that even churches must meet to succeed on a religious rights suit under RFRA.

Santo Daime,⁹⁷ a Brazilian ayahuasca religion, had to choose between following the law or practicing the use of their plant medicine. In *Church of Holy Light of Queen v. Mukasey*, an Oregon federal district court ruled in favor of the church using ayahuasca and compared this plant to the role of peyote in the Native American Church: “The ceremonial use of Daime tea is “the sine qua non of [plaintiffs’] faith. It is the sole means by which [plaintiffs] are able to experience their religion; without [Daime tea] [plaintiffs] cannot practice their faith.”⁹⁸ The district court’s decision permitted Church of Holy Light of Queen to use ayahuasca and prevented the DEA from stopping the church’s importation of ayahuasca.⁹⁹

⁹¹ *Gonzales v. O Centro Espírita Beneficente União do Vegeta*, 546 U.S. 418, 425 (2006).

⁹² *Id.*

⁹³ 42 U.S.C. § 2000bb(a)(3).

⁹⁴ *Gonzales*, 546 U.S. at 436–37.

⁹⁵ Jennifer Ross, *Battle for the Legality and Legitimacy of Ayahuasca Religions in Brazil*, W. Or. U. (2012) (Seminar Paper),

https://kodu.ut.ee/~hellex/aya/kirjandus/kultuur/Ross%202012%20The%20Battle%20for%20the%20Legality%20and%20Legitimacy%20of%20Ayahuasca%20Religions_Digital_commons.pdf. “Ayahuasca is a hallucinogenic concoction that is said to have been used for thousands of years by various indigenous tribes who lived throughout the upper Amazon and Andes.” *Id.* at 1. This medicinal plant was traditionally used in ceremonies led by a *curandeiro*, *vegetalismo*, or *ayahuasquero*. *Id.*

⁹⁶ Both churches were created by non-Indigenous peoples and neither of their websites give credit to the Indigenous communities that introduced them to ayahuasca. See generally Centro Espírita Beneficente União do Vegetal, *Our History*, <https://udvusa.org/our-history> (last visited Mar. 4, 2024); see generally Church of The Holy Light of The Queen, *Who is CHLQ?*, <https://www.chlq.org/about-chlq> [<https://perma.cc/M3FW-ESPJ>].

⁹⁷ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1212–1213 (2009). “Santo Daime is a syncretic religion, blending elements of Catholicism with indigenous Amazonian and African beliefs. Followers of the Santo Daime religion believe that Daime tea is the blood of Christ, analogous to wine in the Catholic Communion. They also believe that Daime tea itself is a holy being of great power. Daime tea is consumed during all Santo Daime services. [Church of Holy Light of Queen] cannot survive as a viable church without the Daime tea.”

⁹⁸ *Id.* at 18–19. *Id.* at 1219 (citing *People v. Woody*, 394 P.2d 813, 820, 61 Cal. 2d 716, 725 (1964)).

⁹⁹ *Id.* at 1221.

The court explained that the federal government may burden a person's exercise of religion *only* if it proves that the burden to the person's religious right will further a compelling governmental interest, and if it is the least restrictive means to fulfill that compelling governmental interest.¹⁰⁰ The court explained that to establish a prima facie RFRA claim, a plaintiff must meet two elements. "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion.' Second, the government action must 'substantially burden' the plaintiff's exercise of religion."¹⁰¹ Here, the plaintiffs met their burden of proof by establishing a prima facie claim, demonstrating they were sincere in their religious practice and that ayahuasca was essential to their religion.¹⁰² The court ruled that the DEA did not meet its burden to show it had a compelling interest—even though DMT is a Schedule I drug under the CSA—because RFRA requires a more "specific inquiry" into the government's compelling interest.¹⁰³

In 2006, the União do Vegetal (UDV) church, which uses ayahuasca tea in its religious ceremonies, won a landmark case before the United States Supreme Court. In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, UDV brought a RFRA claim against the DEA for confiscating its ayahuasca and threatening prosecution if the church continued to use ayahuasca.¹⁰⁴ The government's primary argument before the Court was that it had three compelling interests: to enforce the CSA, to prevent the diversion of ayahuasca from the church to recreational users, and to comply with the 1971 U.N. Convention on Psychotropic Substances.¹⁰⁵ The government argued that no exception could be made for hallucinogens, even if it was part of UDV's sincere religious practice.¹⁰⁶ The Court issued a groundbreaking ruling on ayahuasca when it affirmed that the government had not met its burden under RFRA and that the government failed to demonstrate that the CSA was in furtherance of compelling interests in the least restrictive means with respect to the church's religious exercise.¹⁰⁷ The Court concluded that under RFRA's inquiry in the compelling interest test, the government's reliance on ayahuasca being a Schedule I substance could not carry the day.¹⁰⁸

Importantly, Indigenous peoples were not represented in the cases above because neither groups in the ayahuasca cases claimed to be Indigenous nor have a "unique relationship" with the federal government, which is governed by the federal trust responsibility doctrine. The federal trust doctrine holds that tribes are not foreign nations but domestic-dependent nations with a relationship with the federal government that resembles that of a "ward to his guardian."¹⁰⁹ Native tribes' *sui generis* classification is a political relationship not afforded to other groups.¹¹⁰ In the *Gonzales* case, the government tried to argue that *Employment Division* was an exception to the CSA because the United States had a "unique relationship" with tribes.¹¹¹ The Supreme Court did not give much weight to the federal trust responsibility in the *Employment Division* nor *Gonzales*,

¹⁰⁰ *Id.* at 1219; 42 U.S.C. § 2000bb-1(b).

¹⁰¹ *Church of Holy Light of the Queen*, 615 F. Supp. 2d at 1219.

¹⁰² *Id.*

¹⁰³ *Id.* at 1220.

¹⁰⁴ *Gonzales*, 546 U.S. at 425.

¹⁰⁵ *Id.* at 426.

¹⁰⁶ *Id.* at 423.

¹⁰⁷ *Id.* at 429.

¹⁰⁸ *Id.*

¹⁰⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

¹¹⁰ *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

¹¹¹ *Gonzales*, 546 U.S. 418 at 433–34

Spring 2024

so the cases do not seem to advance Indigenous cultural rights to their traditional ceremonies and plants as a religious right.

The case law is concerning. It tells us that to establish a prima facie case under RFRA, a plaintiff must demonstrate that the government's prohibition of their medicinal plant under the CSA would (1) substantially burden (2) [their] religious exercise (3) based on sincerely held beliefs.¹¹² If established, then the burden shifts to the government to show that the prohibition compels governmental interests by the least restrictive means.¹¹³ While RFRA has proven to protect the right to traditional plant medicines for the NAC and some ayahuasca-based churches, RFRA has only protected their religious rights so long as the medicinal plants were integral to a "sincere religion." This is problematic because Indigenous communities should have the right to self-determine their spiritual ways of healing without an established religious institution that fits the Western construct of a 'sincere and bona fide' religion. To make matters worse, the Supreme Court also held in *Lyng v. Northwest Indian Cemetery Protective Association* that AIRFA does not create a cause of action under which tribes can sue because it is only a policy statement.¹¹⁴

ii. Major Inequities Blocking Indigenous Peoples' Rights to Medicinal Plants

First, RFRA protects religious exercise but neglects Indigenous traditional and spiritual practices that do not resemble the dominant Christian-based construction of religion. Spirituality and religion are similar but not the same. As Andrew Wakonse Grey explained, many Native Americans were forced to hide their spiritual practices under the religious church structure of the NAC.¹¹⁵ There is a critical need to continue developing legal discussions on how Indigenous peoples' rights to their traditional plants are just as important as recognized religious institutions having access to their religious customs, e.g., having peyote in the NAC or wine in the Catholic Church.

Second, RFRA's sincerity element requires religious churches to prove that members sincerely exercise a religion. Again, this places requirements that are common practices among Western churches but not necessarily applicable to Indigenous ceremonies and cultural practices. The sincerity element would likely force Indigenous communities to add such requirements to their traditional practices just to be able to qualify as a church. Indigenous communities in the United States would only have a chance at winning under a RFRA argument to use their medicinal plants by aligning with Western notions of religious institutions. But this would ultimately harm Indigenous peoples' sovereignty to their cultural and traditional practices.

Third, Indigenous peoples are not treated equally under United States law. If the plaintiffs are members of a federally recognized tribe, they may be eligible for some protections for their medicinal plants like peyote. If they are not members of a federally recognized tribe but instead Indigenous migrants engaging in cultural practices that involve medicinal plants listed under the CSA, then they are not afforded those same protections. Bolivia and Ecuador are some of the few countries whose constitutions include legal protections recognizing Indigenous peoples' rights to

¹¹² *Id.* at 428.

¹¹³ *Id.*

¹¹⁴ 485 U.S. 439, 455 (1998).

¹¹⁵ Zotigh, *supra* note 43.

traditional plant medicines.¹¹⁶ So what does it mean for Indigenous medicine leaders from these countries who wish to continue using their ceremonial plants when they enter the United States? Could they argue that their medicinal plants are part of a sincere religious purpose? Could Indigenous spiritual practices be seen as valid forms of sincere religious practices? This Note argues Indigenous communities should be able to practice their traditional plant ceremonies across all colonial borders through which they migrate.

Legal inequities persist because the CSA was constructed in favor of Western notions of religion like the UDV and Santo Daime from Brazil. In contrast, Indigenous healers, whose ancestors stewarded sacred plants used by churches like UDV and Santo Daime would be unlikely to win a case under RFRA because they would face difficulty meeting its requirements. This is fundamentally unequal and goes against international human rights standards that recognize Indigenous peoples' rights to traditional knowledge, cultural heritage, and ancestral traditions as will be discussed in a later section.

A. State Efforts to Legalize and Decriminalize Plant Medicines

More recently, state and municipal lawmakers have considered decriminalizing certain medicinal plants, including those with psychedelic properties such as psilocybin, mescaline, and ayahuasca. In 2019, the City of Oakland in California passed a local ordinance that decriminalized using entheogenic plants and psilocybin.¹¹⁷ Similarly, in 2020, Oregon voters passed Measure 109, which legalized psilocybin mushrooms for behavioral health purposes and created a regulatory scheme that would allow private businesses to deliver these services.¹¹⁸ That same year, Oregon voters also passed Measure 110, which decriminalized small possessions of all drugs, including peyote and mescaline.¹¹⁹ Measure 110 provides that defendants facing prosecution for possession of peyote will be able to use the new law as an affirmative defense if peyote was used “(a) [i]n connection with the good faith practice of a religious belief; (b) [a]s directly associated with a religious practice; and (c) [i]n a manner that is not dangerous to the health of the user or others who are in the proximity of the user.”¹²⁰ This permits non-Indigenous people to use peyote, threatening its availability for Indigenous communities who work with the plant. Similarly, in 2021, California proposed Senate Bill 519 to decriminalize the possession and recreational use of certain psychedelic drugs for non-commercial purposes, including psilocybin and non-peyote-derived mescaline, but it was ultimately not passed.¹²¹

¹¹⁶ BOL. CONST. art. 42; ECUADOR CONST. art. 57.

¹¹⁷ On June 4, 2019, the City passed a resolution titled Decriminalizing Entheogenic Plants From: Councilmember Gallo Recommendation: Adopt A Resolution Supporting Entheogenic Plant Practices And Declaring That The Investigation And Arrest Of Individuals Involved With The Adult Use Of Entheogenic Plants On The Federal Schedule 1 List Be Amongst The Lowest Priority For The City Of Oakland. <https://oakland.legistar.com/LegislationDetail.aspx?ID=3950933&GUID=5E53E7F6-F79F-433D-B669-0D687786590F&Options&Search> [<https://perma.cc/SQV7-5W8X>]; see Merrit Kennedy, *Oakland City Council Effectively Decriminalizes Psychedelic Mushrooms*, NPR (Jun. 5, 2019), <https://www.npr.org/2019/06/05/730061916/oakland-city-council-effectively-decriminalizes-psychedelic-mushrooms11> [<https://perma.cc/Z93L-XZ8F>].

¹¹⁸ Chris Roberts, *Oregon Legalizes Psilocybin Mushrooms and Decriminalizes All Drugs*, Forbes (Nov. 4, 2020), (last visited Feb. 11, 2024), <https://www.forbes.com/sites/chrisroberts/2020/11/04/oregon-legalizes-psilocybin-mushrooms-and-decriminalizes-all-drugs/?sh=3af263144b51> [<https://perma.cc/4QRJ-M5DP>].

¹¹⁹ *Id.*; see also S.B. 755, 81 Leg., Reg. Sess. (Or. 2021).

¹²⁰ Or. S.B. 755, 81 Leg., Reg. Sess. (Or. 2021).

¹²¹ S.B. 519, 2021–22 Leg., Reg. Sess. (Ca. 2021).

Laws like Oregon's Measure 110 are precisely what many Native American communities are advocating against in efforts to preserve one of the only exclusive rights granted to Indigenous peoples—the right to use peyote as a sacrament under federal law.¹²² Peyote is threatened by environmental degradation, harmful harvesting practices, cultural tourism, misappropriation, and laws that allow non-Indigenous people to use the cacti recreationally and commercially. An increase in non-Indigenous peoples' consumption of peyote will inevitably continue exacerbating the challenges affecting Indigenous groups like the NAC. There are also efforts to decriminalize ayahuasca at the state level.¹²³ Varying state laws surrounding access to Indigenous peoples' traditionally used medicinal plants could result in harmful effects on Indigenous communities and the availability of the plants. For example, Shunya Wade revealed how state regulatory schemes that limit the number of licenses to certain plant-medicine facilities could result in serious infringement on Indigenous peoples' rights by limiting their access to their traditional medicinal plants.¹²⁴

Indigenous voices should be centered in conversations affecting their traditional knowledge, medicinal plants, and spiritual and cultural practices. The Special Rapporteur on the Rights of Indigenous Peoples asserts, “[w]ithout the meaningful participation of Indigenous Peoples in the design, implementation, monitoring and benefit-sharing of tourism projects, there will be risks of commodification, misrepresentation, appropriation and disruption of Indigenous culture. . . .”¹²⁵ Thus, states and municipalities should refer to international standards and allow Indigenous traditional healers, Indigenous organizations, and Indigenous communities to lead conversations pertaining to decriminalization efforts of their ancestral medicinal plants. This also raises the question of whether states should even pass laws that allow non-Indigenous peoples to use peyote recreationally when federal laws like AIRFA expressly limit peyote use for Native practices under umbrella organizations like the NAC. It's important to note that federal law preempts state law on this matter. It is long overdue for U.S. domestic laws to incorporate international human rights standards from the UNDRIP and the CBD, recognizing and permitting Indigenous peoples to exercise their cultural sovereignty over their ceremonies and medicinal plants.

II. Adopting International Standards from the UNDRIP and CBD to Protect Indigenous Peoples' Right Medicinal Plants and Cultural Practices

While the U.S. government ostensibly protects Indigenous communities' religions, the reality is that its laws fail to protect Indigenous rights to their cultural ceremonies and traditional medicinal plants. Western and constitutional constructions of religion continue to deprive Native communities of their ability to exercise their spiritual practices as recognized religious rights. U.S.

¹²² 42 U.S.C. § 1996a (1994); see Louis Sahagún, *Why are Some Native Americans Fighting Efforts to Decriminalize Peyote?*, LOS ANGELES TIMES (Mar. 29, 2020), <https://www.latimes.com/environment/story/2020-03-29/native-americans-want-mind-bending-peyote-cactus-removed-from-efforts-to-decriminalize-psychedelic-plants> [https://perma.cc/KZT8-LKPA].

¹²³ Tiffany Kary, *Psychedelic Movement Sees 2023 Catalysts in State Laws, Drug Trials*, BLOOMBERG (Jan. 9, 2023) <https://www.bloomberg.com/news/newsletters/2023-01-09/for-psychedelics-california-and-new-york-are-the-states-to-watch-in-2023?embedded-checkout=true>.

¹²⁴ Shunya D. Wade, *Protection of Indigenous Peoples' Rights in the Commodification of their Intangible Cultural Heritage: Approaches and Best Practices*, CAL. INDIAN LEGAL J. 24, 41 (Fall 2023).

¹²⁵ Tourism and Indigenous Peoples, *supra* note 25 at ¶ 33.

laws like the Native American Graves Protection and Repatriation Act,¹²⁶ the AIRFA,¹²⁷ and the Peyote Act¹²⁸ claim to protect Native rights. But they also create challenges for Native communities by forcing them to “*defend* their cultural rights using the technical language of the statutes.”¹²⁹ Meanwhile, the international community has created standards encompassing the dimensions of Indigenous peoples’ rights to traditional knowledge and cultural practices. The federal government, its policymakers, and plant-medicine advocates should look to existing international frameworks for guidance on how to center Indigenous peoples’ sovereignty in discussions about plant medicines, ceremonies, and traditional knowledge.

Most importantly, Tribal Nations should highly consider codifying international human rights principles into their tribal laws to strengthen the legal weight of international human rights instruments that recognize Indigenous Peoples rights.¹³⁰ It is well known that international human rights instruments are either not legally binding or difficult to enforce on signatory countries. However, those international human rights principles could be better realized if codified into law. As a result, tribes codifying internationally recognized Indigenous rights into tribal law would strengthen Indigenous peoples’ rights advocacy in domestic judicial, legislative, and administrative forums.

Some relevant international frameworks that mention Indigenous peoples’ rights to traditional medicines, spiritual practices, and culture include: International Labor Organization Convention No. 169 (Art. 25.2),¹³¹ UNDRIP (Art. 11, 24, 25 and 31),¹³² the American Declaration on the Rights of Indigenous Peoples (Art. 13, 18, and 28),¹³³ the Universal Declaration of Human Rights (Art. 18)¹³⁴ the CBD (Art. 8 [j], 16, and Annex 1)¹³⁵ and its Nagoya Protocol on Access and Benefit-sharing (Art. 7 and 12),¹³⁶ the 2003 Convention for the Protection of Intelligible Cultural Heritage of the United Nations Educational, Scientific, and Cultural Organization (UNESCO),¹³⁷ and the International Covenant on Civil and Political Rights (ICCPR) (Art. 18 and 27).¹³⁸

¹²⁶ 25 U.S.C. §§ 3001–13.

¹²⁷ 42 U.S.C. § 1996.

¹²⁸ 42 U.S.C. § 1996a.

¹²⁹ Coffey & Tsosie, *supra* note 41, at 207 (emphasis in original). It is problematic for federal statutes to require Indigenous communities to justify and prove that their traditional cultural practices and medicinal plants are used for a sincere and bona fide purpose. *Id.* Some issues that arise during evidentiary court hearings are that Indigenous knowledge keepers are forced to share their knowledge about their traditional ceremonies and stories behind their spiritual beliefs. *Id.* For many Indigenous communities, not all knowledge can be publicly shared so much knowledge may not make it onto any legal documents to support a case for religious rights. *Id.*

¹³⁰ Professor Heather Whiteman Runs Him explained this critical aspect of strengthening international human rights principles during a *Tribal Water Law* class at the University of Arizona on April 23, 2024.

¹³¹ ILO, Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries, Jun. 27 1989, 1650 U.N.T.S. 383 (entered into force 5 September 1991) [hereinafter ILO 169].

¹³² UNDRIP, *supra* note 3.

¹³³ American Declaration on the Rights of Indigenous Peoples, G.A. Res. 2888 (XLVI-O/16) (June 15, 2016), <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

¹³⁴ Universal Declaration of Human Rights, G.A. Res. 217(III) art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹³⁵ CBD, *supra* note 4, at arts. 8 [j], 16, and annex 1.

¹³⁶ U.N. Nagoya Protocol on Access and Benefit-sharing arts. 7 & 12, Oct. 29, 2010, 3008 U.N.T.S. 3.

¹³⁷ Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2002, 2368 U.N.T.S. 3 [hereinafter CSICH].

¹³⁸ International Covenant on Civil and Political Rights [hereinafter “ICCPR”], Dec. 16, 1966, 999 U.N.T.S. 171.

The United States supports the UNDRIP, which carries moral force like all international human rights instruments.¹³⁹ The United States is also one of two member nation-states that has not ratified the CBD. These international instruments hold valuable principles and standards that would significantly strengthen legal protections for Indigenous peoples' sovereignty, traditional knowledge, and rights to their cultural practices.

A. UNDRIP and CBD: International Principles Upholding Indigenous Cultural and Spiritual Practices

U.S. domestic law is deficient in protecting Indigenous peoples' use of their ancestral and sacred medicinal plants. AIRFA is not legally binding and it is highly unlikely that Congress will amend RFRA to comply with international standards that aim to protect Indigenous rights. Therefore, the U.S. should expand the notion of religious exercise to include Indigenous peoples' rights to freely practice their cultural ceremonies and their rights to medicinal plants by implementing UNDRIP principles into domestic law and ratifying the CBD. Both the UNDRIP and CBD call for greater protection of Indigenous peoples' traditional knowledge, culture, and spirituality. They establish guiding principles and minimum standards for protecting Indigenous peoples' rights to medicinal plant knowledge and sovereignty while emphasizing benefit sharing.

The UNDRIP affirms Indigenous peoples' rights to their cultural heritage, traditional knowledge, and traditional medicines and health practices. For example, Article 31 reads:

(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. (2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.¹⁴⁰

The UNDRIP's Article 24 focuses on traditional medicinal plants and reads:

(1) Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals

¹³⁹ Indigenous Peoples, US AID, [https://www.usaid.gov/indigenous-peoples-0#:~:text=The%20UNDRIP%20is%20not%20legally,agreed%20to%20support%20the%20Declaration%20\[https://perma.cc/465V-EA2T\]](https://www.usaid.gov/indigenous-peoples-0#:~:text=The%20UNDRIP%20is%20not%20legally,agreed%20to%20support%20the%20Declaration%20[https://perma.cc/465V-EA2T]).

¹⁴⁰ UNDRIP, *supra* note 3, at art. 31(1).

also have the right to access, without any discrimination, to all social and health services.¹⁴¹

Both Articles assert Indigenous peoples' right to practice their traditional ceremonies and plant medicines. Article 31 recognizes that Indigenous communities' sovereignty means that they should be able to maintain, control, and protect their traditional knowledge.

Moreover, the United States ratified the ICCPR in 1992, becoming the supreme law in the country because the supremacy clause gives ratified treaties the status of federal laws.¹⁴² Article 18 addresses the right to religion by explaining that it includes "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."¹⁴³ As explained in this article, Indigenous cultural and spiritual practices are different from religions. But there is space for Indigenous peoples' spiritual practices, ceremonies, and sacred plants to be recognized within the notion of religious freedom.

Further, CBD Article 8(j) recognizes Indigenous peoples' cultural livelihoods are inextricably connected to healthy environments and biodiverse systems. It also recognizes Indigenous peoples' rights to traditional knowledge and calls for equitable benefit-sharing should they authorize non-Indigenous peoples to use such knowledge, innovations, and practices.¹⁴⁴ This article encapsulates the protections and important considerations necessary to discussing Indigenous peoples' knowledge of medicinal plants and spiritual practices. It also calls for equitable benefit sharing should Indigenous communities' permit non-Natives to use their medicinal plants with permission. Similarly, the U.N. Special Rapporteur on the Rights of Indigenous Peoples recommended in his tourism report that states should provide redress in cases of cultural appropriation of Indigenous cultural and spiritual property without their free, prior, and informed consent.¹⁴⁵

Both the UNDRIP and CBD uplift Indigenous peoples' sovereignty and rights to their cultures, traditional knowledge, and scientific contributions and would create stronger protections for their rights to medicinal plants. This brings to the discussion the following questions: (i) which groups, if any, would claim ownership of certain medicinal plants; (ii) which Indigenous groups would receive protection; and (iii) whether there should be a database of protected medicinal plants. As an exercise of sovereignty, Indigenous communities should be able to identify their plants, and countries must recognize them as stewards of the medicinal plants and their knowledge. Shunya Wade's article proposed solutions, including adopting a *sui generis* human rights-based approach similar to the Swamkpond Protocol in Kenya, which would allow Indigenous communities to hold exclusive authority to approve or deny the request to use their medicinal plants in commercial practices.¹⁴⁶ Further, Indigenous communities would be the licensing and approval body for using traditional medicines; this could "significantly reduce the risk of cultural

¹⁴¹ *Id.* at art. 24(1).

¹⁴² ACLU, *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, <https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/L94M-66FD>].

¹⁴³ ICCPR, *supra* note 138, at art. 18(1).

¹⁴⁴ CBD, *supra* note 4, at art. 8(j).

¹⁴⁵ Tourism and Indigenous Peoples Report, *supra* note 24, at ¶ 8.

¹⁴⁶ Wade, *supra* note 124, at 41. Wade also highlights that the ICCPR protects Indigenous traditional knowledge in three ways by: (1) providing collective and individual rights; (2) recognizing Indigenous knowledge's right to land-based resources; (3) protecting indigenous peoples' ability to modernize their cultural practices. *Id.* at 34.

Spring 2024

appropriation and exploitation while safeguarding the rights and interests of Indigenous communities.”¹⁴⁷

In addition to protecting Indigenous knowledge through intellectual property law, federal law and policy should reflect these international principles in domestic law, policies, and legal arguments in courts. Although the UNDRIP does not impose legal obligations on governments, the U.S. has agreed to support the declaration. International principles like those in the UNDRIP and ILO 169 carry international support and moral force.¹⁴⁸ In practice, this could take the form of judicial consideration of international principles, such as UNDRIP Articles 24 and 31, when assessing whether Indigenous cultural ceremonies and ancestral traditions should be considered a religious practice. It can also look like the DEA's CSA Exemption Guidelines placing different requirements and standards that consider Indigenous peoples' rights to traditional ceremonies and cultural practices. Indigenous cultural practitioners and groups should be held to a lesser standard of scrutiny when demonstrating that their ancestral ceremonial practices are part of a “sincere religion.”

For states with existing plant decriminalization laws, like Oregon and Colorado, regulatory schemes should centrally involve input from Indigenous healers and Indigenous-led organizations to ensure that state implementation of those laws does not result in human rights violations for Indigenous communities. While those state laws were passed with the goal of expanding the general public's rights to use medicinal plants, there is no social justice or social advance if those same laws come at the cost of threatening Indigenous cultural practices and their access to their traditional medicinal plants.

CONCLUSION: INDIGENOUS PEOPLES' VOICES SHOULD BE CENTERED IN CONVERSATIONS REGARDING THEIR SACRED PLANTS AND CEREMONIES

As Western cultures increasingly accept Indigenous plant medicines for recreational, religious, and wellness purposes, laws need to uphold and prioritize Indigenous peoples' cultural sovereignty. Current domestic laws do not expressly protect Indigenous peoples' rights to these traditional and cultural practices. With medicinal plant decriminalization efforts gaining traction, Indigenous peoples, Indigenous advocates, and Indigenous allies should remain wary of any policies that fail to center on Indigenous voices. Western laws have historically afforded more rights to non-Indigenous people while harming and limiting Indigenous peoples' sovereignty and cultural rights. As sacred plants continue to be deeply politicized in the American dichotomy of religious freedom rights, it is imperative that the U.S. and other countries adopt existing international principles to better safeguard Indigenous peoples' knowledge and cultural practices involving their ancestral medicinal plants.

¹⁴⁷ *Id.* at 42.

¹⁴⁸ U.S. Agency for Int'l. Dev., *Indigenous Peoples*, <https://www.usaid.gov/indigenous-peoples-0> [<https://perma.cc/96UY-RXB3>].