Psychoactive Substances, Dietary Supplements, and the War on "Drugs": Law, Myth, and Tradition as the Social Control of Consciousness

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Human consciousness has long been a target of social regulation. From the religious control of ritual substances like peyote to the explicit statutory restriction of everything from cocaine to prescription drugs, the need to control substances that change consciousness has evolved into a complex body of laws and practices. The laws governing consciousness, such as the Controlled Substances Act, reflect not always a conscious choice but, rather, a sometimes unprincipled interaction between belief, current practice, and previous laws. This interaction may have unique implications in the future direction of healthcare, including the merger of traditional and alternative medicine.

I. INTRODUCTION: DEFINING CONSCIOUSNESS

Human societies, through the individual and collective agency of leaders, governments, and cultures strive to control that which has a significant ability to influence the cognitive capacity of the individual (and consequently the society at large). Such attempts to control consciousness are manifest in various societies as law, myth, and tradition or, most commonly, as an aggregate interrelationship of all three.[1] Case studies from Native American Peyotism[2] to the use of kava in the Federated States of Micronesia and

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[1] A long history of loaded terminology surrounds the legal and cultural regulation of consciousness in American society. As used in this discussion, the term "society" refers to the collective attributes of a discrete geographical or social unit of collective agency. Terms such as "tradition," "myth," and "culture" refer specifically to the acts of smaller subsets of societal units that often transcend geographical boundaries.

[2] Both the "traditional" as well as the modern political manifestations of the use of peyote (and its constituent active chemical, mescaline) by Native American groups are discussed in greater depth in Parts II, III, and IV.C, *infra*.

abroad[3] demonstrate how law, myth, and tradition are part of a complex adaptive system of response to human stress and are thus manifestations of the normative desire to control reality.

Human consciousness is a complex web of connotations and assumptions, but a basic understanding of consciousness is founded on three essential premises: (1) that consciousness is based on the physiological processes of cognition,[4] (2) that changes to the basic physiology lead to changes in the perceived conscious state,[5] and (3) that certain substances and processes, "psychoactives," are capable of causing changes in the basic physiology of cognition, and hence are capable of altering consciousness.[6]

The study of consciousness is, thus, the study of both human cognition and the internal or environmental stimuli influencing cognition. Debates over kinds of cognition, the role of psychology, and the meaning of rationality or

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[3] Kava is a plant (*Piper methysticum*) that is indigenous to several Pacific Islands and that is used in complex ceremonial rituals. The extract of the root is widely available as a dietary supplement and both the traditional religious, as well as modern "holistic medicine," uses of kava are discussed in greater depth in Parts II, III, IV.D, and V, *infra*.

[4] ROBERT E. KINGSLEY, CONCISE TEXT OF NEUROSCIENCE 525 (Lippincott, Williams & Wilkins 2d ed.) (2000).

> The cerebral cortex is perhaps the most enigmatic part of the mammalian nervous system. Although its essential structure is quite simple, it performs the most complex functions of any living tissue. The functional entities attributed the cerebral cortex include learning, perception, self-awareness, free will, and the most mysterious of all neuronal functions, consciousness.

Id.

[5] "By studying brain activity, neuroscientists can probe complex phenomena such [as] pain perception, meditation, and consciousness." *The Opiate of the Masses*, LANCET NEUROLOGY, Mar. 2005, at 135.

[6] Specific substances can be directly associated with corresponding changes to the normative embodied cognition of individual agents in a given culture. For example, *ayahuasca* (a common psychoactive in the Upper Amazon River Basin) contains components from the *Banisteriopsis caapi* and *Psychotria viridis* or *Diplopterys cabrerana* plants, and its active psychoactive agent, dimethyltryptamine (DMT) acts on the $5\text{-HT}_{2A/2C}$ (serotonin) receptors of the central nervous system. Joedi Riba et al., *Effects of* Ayahuasca *on Sensory and Sensorimotor Gating in Humans as Measured by P50 Suppression and Prepulse Inhibition of the Startle Reflex, Respectively*, 165 PSYCHOPHARMACOLOGY 18 (2002). Other psychoactives have their own unique effects on cognition, and thus consciousness; for example, Δ^9-tetrahydrocannabinol, the active psychoactive in *Cannabis sativa* (marijuana) acts on the CB1 and CB2 cannabinoid-specific receptors. ROBERT M. JULIEN, A PRIMER OF DRUG ACTION: A CONCISE, NONTECHNICAL GUIDE TO THE ACTIONS, USES, AND SIDE EFFECTS OF PSYCHOACTIVE DRUGS 202–07 (9th ed.) (2001). By understanding how a given substance affects human cognition, one can better understand the changes caused by that substance to the culturally-contextual embodied view of consciousness held by the individual.

irrationality are frequently discussed in the literature of various fields, including cognitive archaeology,[7] social anthropology,[8] cognitive systems theory,[9] and psychopharmacology.[10] Whatever the field of study, the nomenclature of studying consciousness is extremely important.

The interaction of the brain with internal and external influences and the perceived effects on cognition can be studied using social psychological, cognitive systemic, and psychopharmacological approaches.[11] The term "altered state of consciousness" is most often used in an attempt to describe changes to a normative Western or European view of embodied cognition.[12] In one view, embodied cognition is the structural coupling of a system and its environment such that both are able to engage in mutual interactions.[13] Rather than a dichotomy between "reality" and "hallucination," the concept of embodied cognition allows one to study changes to consciousness as a local physiological adaptation to environment and culture.[14]

An important distinction must be drawn between the class of all substances or processes that may alter consciousness ("psychoactives"), and the socially contrived nomenclature of Anglo-American legal responses to controlling consciousness, (that is, words such as "drugs" or "controlled substances"). Words frame our understanding of and response to an idea or concept.[15] Strictly speaking, a "psychoactive" substance is anything that

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[7] *See, e.g.*, Ian Hodder, *Social Cognition*, 3 CAMBRIDGE ARCHAEOLOGICAL J. 253, 255–57 (1993); Christopher Peebles, *Aspects of Cognitive Archaeology*, 3 CAMBRIDGE ARCHAEOLOGICAL J. 250, 250–53 (1993).

[8] *See, e.g.*, STANLEY TAMBIAH, MAGIC, SCIENCE, RELIGION AND THE SCOPE OF RATIONALITY 1–2 (1990).

[9] *See, e.g.*, Naoya Hirose, *An Ecological Approach to Embodiment and Cognition*, 3 COGNITIVE SYSTEMS RES. 289, 289 (2002); Alexander Riegler, *When is a Cognitive System Embodied?*, 3 COGNITIVE SYSTEMS RES. 339 (2002).

[10] *See, e.g.*, JULIEN, *supra* note 6, at 209–12.

[11] *See, e.g.*, Scott M. Weiss et al., *Potential for Antipsychotic and Psychotomimetic Effects of A_{2A} Receptor Modulation*, 61 NEUROLOGY 11, Dec. 9, 2003, at S88 (describing the potential psychoactive effects of the antagonistic interaction between dopamine (D_2) and adenosine (A_{2A}) receptors in the treatment and prevention of psychotic disorders).

[12] For example, many popular accounts of experimentation with psychoactive substances are characterized as "research" into "altered states of consciousness." *See generally*, Andrew Weil, *Altered States of Consciousness*, *in* DEALING WITH DRUG ABUSE 329 (1973) (explaining, generally and in specific contexts, the experimental research approach to understanding consciousness through individual autonomy).

[13] Riegler, *supra* note 9, at 347.

[14] *Id.*

[15] Michael H. Cohen & Mary C. Ruggie, *Integrating Complementary and Alternative Medical Therapies in Conventional Medical Settings: Legal Quandaries and Potential Policy Models*, 72 U. CIN. L. REV. 671, 676 (2003). Cohen and Ruggie observe

alters the physiological process of cognition.[16] This definition is independent of culture or societal association; it is based on a normative, objective scientific understanding of consciousness. Psychoactive substances include so-called "street drugs," as well as caffeine, alcohol, tobacco, and chocolate; even such physical changes as sensory deprivation (including lack of sleep, lack of light, lack of food, etc.) may produce psychoactive effects.[17] Whether "hallucinogens," or "prescription drugs," "dietary supplements," or "herbal supplements," substances that change brain physiology by acting on specific receptor sites may be characterized as psychoactive.

That a discussion of consciousness is couched in terms of "drugs" or "controlled substances" is a cue to the pre-framed context of the discussion: namely, its presence in a system of law that has chosen to control certain forms of altered consciousness by controlling the substances inducing such altered consciousness.[18] A discussion of "drugs" is a discussion of social classification in quasi- or semi-scientific terms.[19]

Similar control of substances is found not just in the nomenclature, but also in the cultural practices of certain societies. The mythology and traditions of societies may provide valuable information as to how a particular society chooses to regulate consciousness through social practice outside the scope of the law.[20]

A primary contention of this Note is that the regulation of many substances that alter consciousness shows not a value judgment with respect

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that "nomenclature reflects consciousness (and regulatory and institutional policy), and changes in nomenclature acknowledge changes in political, cultural, and social movements." *Id.*

[16] "Psycho" (dealing with mental processes) + "active" (producing an intended effect). As used in this Note, psychoactive substance means any substance causing change to the normative psychological state.

[17] "[A]ltered mental status can result from depression of both cerebral hemispheres, localized abnormality of the sleep center or global central nervous system dysfunction." Diana King & Jeffrey R. Avner, *Altered Mental Status*, CLINICAL PEDIATRIC EMERGENCY MED., Sept. 2003, at 171–73.

[18] *See* Gail Sasnett-Stauffer & E. John Gregory, *A Drug by Any Other Name is Still a Drug: Why the Florida Judiciary Should Start Treating DUI as Any Other Drug Offense*, 13 U. FLA. J.L. & PUB. POL'Y 299, 305 & n.22 (noting that "[i]deally, the term 'Drug Court' . . . would encompass alcohol addiction as well," but a false dichotomy exists in Florida's nomenclature).

[19] Cohen & Ruggie, *supra* note 15, at 675–76.

[20] *See* discussion in Part III, *infra*.

to the substance to be regulated,[21] but rather a value judgment with respect to the group with which the substance is most frequently associated.[22]

Part II of this Note will explore how laws and regulations act to control consciousness by examining the legal mechanisms that regulate psychoactives and the history of such mechanisms. In Part II.A, federal controlled substance statutes in the United States, Canada and the Federated States of Micronesia are compared. Part II.B traces the specific history of legislation in the United States as a culturally contextual response to social pressures and, at times, an example of overt racism.

Part III of this Note discusses how myth and tradition (cultural constructs) act to control consciousness; specifically, the use of peyote among Native American cultural groups (Part III.A) and the use of the kava root among Pacific Island cultures (Part III.B).

Part IV of this Note examines the interplay between legal and cultural controls of human consciousness by examining four discrete case studies from American legal and cultural history: (A) the American consciousness revolution of the 1960s,[23] (B) the osteopathic or allopathic medicine debate,[24] including the role of complimentary and alternative medicine (CAM) in American healthcare,[25] (C) the Native American Church's legal

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[21] *See* DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973) (tracing the prohibition of specific substances as a social response to the disfavored groups with which those substances were associated).

[22] The race-based regulation of opium (associated with Chinese immigrants in California), cocaine (associated with blacks in the South) and marijuana (associated with Mexican immigrants in the South) is discussed in Part II.B, *infra*.

[23] Specifically, the social mythology surrounding the "psychedelic movement" and the academic and literary works of Timothy Leary, Allen Ginsberg, and William S. Burroughs are examined, with particular focus on their respective emphases on the importance of individual autonomy in the societal regulation of consciousness. *See* Part IV. *infra*.

[24] This debate is usually framed in terms of comparing "standard" and "experimental" therapy. Although these "norms" of treatment are applied to allopathic and osteopathic medicine, respectively, the distinction between the two methods of treatment is elusive at best. *See* Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 361–63 (2002) (discussing the difficulty in distinguishing between "standard" and "experimental" treatment in the context of informed consent for medical procedures).

[25] CAM generally refers to "non-traditional," "alternative," or "holistic" healthcare (as associated with Eastern healing techniques). *See* Kathleen M. Boozang, *Western Medicine Opens the Door to Alternative Medicine*, 24 AM. J.L. & MED. 185, 185–91 (1998) (discussing the slow integration of CAM and "traditional" allopathic medical techniques).

success in securing religious use rights to ingest peyote, and (D) the regulation of "dietary supplements" including the kava root.

Finally, in Part V, a proactive approach and pre-reform proposal is offered in the hope that, by understanding the legal and cultural context in which the desire and need to control consciousness arises, U.S. policies with respect to psychoactive substances may prove more economically efficient and productive to the general health of citizens. Specifically, the continued deregulation of dietary supplements may allow for the increased use of CAM as a cost-effective, proactive alternative to traditional (and comparatively cost-inefficient) reactive pharmaceutical medicine.[26]

II. LAW AS THE SOCIAL CONTROL OF CONSCIOUSNESS THROUGH THE REGULATION OF PSYCHOACTIVE SUBSTANCES

The most common means by which consciousness is socially controlled in the United States, Canada, the Federated States of Micronesia, and most countries, is through federal laws that place certain psychoactive substances on a list of "controlled substances" for purposes of pharmaceutical distribution and federal criminal control.[27] In a comparative context, the most

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[26] The potential economic efficiency of herbal supplements as opposed to traditional pharmaceuticals is a topic of increasing public debate. *See, e.g.*, M. Paul Jackson, *More People Are Turning to Herbs to Save Money: Alternatives Carry Risks, Experts Say*, WINSTON-SALEM J., May 20, 2005, at B1 (noting that "alternative remedies [including herbal supplements] allow [users] to treat such ailments as depression and chronic pain without incurring out-of-pocket costs for prescription drugs").

[27] In the United States, state-specific regulation of psychoactives is another means of control. One of the important issues in any debate over how a society will choose to restrict access to a substance is the scale of collective agency. *See, e.g.*, Steven Rosen, *Dawn of a Drug Culture: Beats Sought Spiritual Alternative to Post-War World*, DENVER POST, Dec. 5, 2004, at F13 (noting the origins of "drug culture" in individual autonomy and the desire for a collective autonomy in post-war America). Whereas federal regulation of certain classes of substances is useful for standardization of risk, the state-specific regulation of less harmful substances may foster more of a sense of regionalized, as opposed to nationalized, collective agency. For example, an individual state may, as a collective actor, view the less restrictive regulation of Schedule I controlled substances as beneficial to state health care policy and pursue the deregulation of such substances. *See* Dominica Minore Bassett, Note, *Medical Use and Prescription of Schedule I Drugs in Arizona: Is the Battle Moot?*, 30 ARIZ. ST. L.J. 441, 441–42 (1998) (discussing Arizona's attempts to bypass federal regulatory restrictions under the CSA). *See also* Joseph L. Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition with Regulation*, 18 HOFSTRA L. REV. 831, 831 (1990) (detailing State Senator Galiber's proposal to the New York State Legislature to "regulate all drugs currently proscribed as illegal in precisely the same manner as alcohol").

interesting feature of such controlled substance acts is the amount of international variation in the decision regarding which substances to regulate.[28] Substances that are prohibited from individual ingestion in some countries are permitted in others and the very laws that define controlled substances are not always based on objective scientific classification, but often on perceived societal pressures for the regulation, or lack thereof, of certain substances.[29]

A. *Federal "Schedules" in the United States, Canada, and the Federated States of Micronesia*

In the United States, most psychoactive substances are regulated according to the Controlled Substances Act, 21 U.S.C. § 801 (including Schedules I-V of "controlled substances")[30] and are often referred to as "drugs." For example, peyote, or *Lophophora williamsii* or *Lophophora diffusa*, contains mescaline, and both the organic cactus and its most active constituent chemical are regulated under Schedule I of the Controlled

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[28] Particularly noteworthy is the current international debate over the decriminalization of marijuana as a return to therapeutic approaches to the consumption of psychoactive substances. For an in-depth discussion of this international tension between the United States and Canada particularly, see generally, Kara Godbehere Goodwin, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States' "War on Drugs,"* 22 BUFF. PUB. INT. L.J. 199 (2003) (tracing the history of regulation in both countries and examining the growing international trend in therapeutic approaches).

[29] In this sense, both historical and modern cultural perceptions of a specific substance are necessary to inform any state-action policy decision. For example, the well-publicized decision of the Netherlands to semi-legalize (i.e., make illegal but softly enforce violations of laws restricting) the use of marijuana was a response to a government-sponsored commission (the Baan Commission, formed in 1968) to determine the best state response to excessive use of the already restricted substance. Kurt V. Laker, Note, *Smoke and Mirrors: The Self-Examination of Canadian Marijuana Policy in the Context of Decriminalization in the Netherlands*, 14 IND. INT'L & COMP. L. REV. 341, 365–70 (2003). A similar state-action policy review took place in Canada with the Senate Committee's Cannabis Report of 2002, which led ultimately to softened restrictions on marijuana use in Canada. *Id.* at 354. By contrast, American policy with respect to many Schedule I controlled substances has long been and remains a policy of non-review. *Id.* at 341 & n.3 (citing H.R. 135, 104th Cong., 1st Sess. (1995) (a recent failed attempt by the United States Congress to make official the non-consideration of and to remove funding from any investigation into the medical viability of Schedule I substances, regardless of medical or scientific evidence)).

[30] 21 U.S.C. §§ 801–812 (2000).

Substances Act (CSA).[31] Of further interest is the dichotomy[32] in the United States between alcohol and other psychoactive substances.[33] It seems counterintuitive that a federal system for the regulation of substances deemed potentially dangerous to individuals would disregard the actual irreversibility of excessive use of such substances, yet this is precisely what the false or unnecessary[34] dichotomy between "alcohol" and "controlled substances"

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[31] 21 U.S.C. § 812 (c), sched. I (c) (11)-(12) (2000). There are five "Schedules" of controlled substances under the Controlled Substances Act (CSA). Schedule I is the most restricted Schedule and the only classification that precludes physicians from prescribing the listed substances. Amy J. Dilcher, *Damned If They Do, Damned If They Don't: The Need for Comprehensive Public Policy to Address the Inadequate Management of Pain*, 13 ANNALS HEALTH L. 81, 87 (2004). Substances listed in Schedules II, III, IV, and V may all be prescribed by a licensed physician, with decreasing respective restrictions on use. These restrictions are based on: (1) the potential for abuse, (2) the prominence of accepted medical use in treatment in the United States, and (3) the potential for the substance to cause psychological or physical dependence. *Id.* For an in-depth discussion of the specific differences between and prescriptive requirements for Schedules II through V, see *id.* at 87–89.

[32] Alcohol and tobacco are not listed in the CSA, but are regulated instead by 26 U.S.C. §§ 5001–5701 (2000) (the Internal Revenue Code, which determines taxation of alcohol) and Title 27 of the United States Code on the regulation of alcohol, tobacco, and firearms (a strange triumvirate of disparate entities), which regulates the transportation and sale of alcohol and tobacco. Arguably, tobacco and alcohol are conceptually and functionally more similar to pharmaceuticals and dietary supplements than they are to firearms. On a state-by-state level, drinking ages, smoking ages, and more specific regulations are enacted. *See, e.g.*, Richard J. Pierce Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 659–60 (1985) (citing interstate variation in state drinking laws as the cause of increased interstate traffic accidents).

[33] It is the explicit restraint from including alcohol and tobacco in the Food, Drug, and Cosmetic Act (21 U.S.C. §§ 301–331 (2000)) that effectively takes these substances outside of the regulatory control of the Food and Drug Administration (FDA). *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) ("Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."). Similarly, recent amendments (e.g., the Dietary Supplement Health Education Act of 1994 (DSHEA), Pub. L. No. 103-417, 108 Stat. 4325 (1994) (codified as amended in various sections of 21 U.S.C.)) to the Food Drug and Cosmetic Act (FDCA), 21 U.S.C. § 321(s)(6) (2000), have "effectively neutered the Agency's authority to regulate dietary supplements . . . ." Lars Noah & Richard A. Merrill, *Starting from Scratch?: Reinventing the Food Additive Approval Process*, 78 B.U. L. Rev. 329, 348–49 (1998). *Cf.*, Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1013 (1998) (arguing that the FDA power to regulate "drugs" should extend to the regulation of tobacco).

[34] *See* Galiber, *supra* note 27, at 839 ("It is difficult to convince someone that using (or selling for a profit) one terribly damaging euphoric—alcohol—is a morally neutral

accomplishes.[35] Even within the CSA, the empirical basis for placing certain substances (e.g., marijuana) in Schedule I has been questioned as a quasi-scientific "political ploy."[36]

Similar to the United States' Controlled Substances Act, in Canada and the Federated States of Micronesia, federal schedules place certain substances on a list that necessitates governmental regulation for distribution.[37] In Canada, for example, mescaline is prohibited for unapproved (non-medical) use by Schedule III of the Controlled Drugs and Substances Act.[38] Interestingly, peyote (which contains mescaline) is explicitly exempted from this prohibition.[39] In the Federated States of

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event, yet using (or selling) another damaging euphoric—cocaine—is so immoral that we shall send the user to jail for a long time.").

[35] *See* Peter W. Vik et al., *Cognitive Impairment in Substance Abuse*, 27 PSYCHIATRIC CLINICS N. AM. 97, 100 (2004). Prolonged use of alcohol (i.e., alcoholism) can lead to permanent cognitive impairment. This permanent impairment, called Wernicke-Korsakoff Syndrome, occurs in ten percent of alcoholics. *Id.* By contrast, "controlled studies of the long-term effects of marijuana use fail to demonstrate a relationship between prolonged use and permanent neuropsychological dysfunction." *Id.* at 102. Marijuana remains a Schedule I banned controlled substance; alcohol is not regulated by the CSA. Even the classification of marijuana as a Schedule I controlled substance (which requires that it have *no* medically accepted beneficial use) is contrary to recent evidence. Robert W. Gorter et al., *Medical Use of Cannabis in the Netherlands*, 64 NEUROLOGY 917, 917 (2005). In the Gorter study, over sixty-four percent of patients given cannabis to determine the drug's medical efficacy "reported a good or excellent effect on their symptoms." *Id.*; *see also* Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1158–64 (2000). Given that Δ^9-tetrahydrocanabinol, the primary active constituent in marijuana, is also the active constituent of Marinol, a prescription pharmaceutical, the classification of marijuana as a Schedule I controlled substance with "no medically accepted beneficial use" seems inconsistent with perceived medical wisdom. *Id.* at 1158.

[36] Smith, *supra* note 35, at 1166–67. Smith argues that empirical data suggest that marijuana would be more appropriately classified as a Schedule III controlled substance. *Id.*

[37] *E.g.*, CODE OF THE FEDERATED STATES OF MICRONESIA tit. 11, § 1119 (1999); Controlled Drugs and Substances Act, R.S.C., ch. 19, § 17 (1996).

[38] Controlled Drugs and Substances Act, R.S.C., ch. 19, § 17 (1996).

[39] *Id.* Section 17 of Schedule III bans "Mescaline (3, 4, 5-trimethoxybenzeneethanamine) and any salt thereof, *but not peyote* (*Lophophora*)." *Id.* (emphasis added). This culturally derived exemption for religious use by Natives is analogous to the United States' similar exemption for traditional use by registered Native American uses in religious contexts:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. [Furthermore,] [a]ny person who manufactures peyote for or

Micronesia, by contrast, mescaline and peyote are explicitly prohibited with language identical to the United States' CSA.[40]

The historical development of the controlled substances schedules of the Federated States of Micronesia is a salient example of the interplay between societal values and the promulgation of regulatory laws.[41] The Federated States of Micronesia's schedules were adopted wholly from the Controlled Substances Act of the United States. They read identically. This wholesale adoption explains the similar restrictions on peyote and mescaline as not a societal decision, but, rather, a legal inheritance.[42] An additional

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distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

See 21 C.F.R. § 1307.31 (2000); *see also* American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000) (establishing an explicit exception from criminal liability for peyote use by registered members of the Native American Church). This fairly recent exemption was the product of political lobbying by Native groups and is discussed in greater depth in Part IV(C), *infra*. Interestingly, state-by-state regulation of psychoactive substances (particularly for purposes of religious exemption for traditional groups) varies greatly in scope and motive, from non-extant to broad-sweeping policies. *See* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 821 (2004) ("Most states have adopted a version of the Uniform Controlled Substances Act, which was first promulgated in 1970 both to bring greater uniformity among the states and to complement federal drug policies. Yet, within just a few years, states began to adopt dramatically different penalty schemes for drug offenses.") (citation omitted).

[40] 11 FEDERATED STATES MICRONESIA CODE § 1119(3)(n) & (o) (2000) (makes possession or ingestion of mescaline and peyote a criminal offense).

[41] Claudia Strauss & Naomi Quinn offer an interesting heuristic that shows how cultural preconceptions influence policy decisions: the distinction that shoppers make in supermarkets between different kinds of cheeses. Based on prior cultural or personal experiences—which are typically coextensive with respect to the individual—some shoppers "habitually choose organic goat's cheese, some American cheese, and others brie." CLAUDIA STRAUSS & NAOMI QUINN, A COGNITIVE THEORY OF CULTURAL MEANING 43 (1997). To indiscriminately, and without proper research, apply the supermarket cheese selection of one society (British, for example) on another society (American, for example) is to ignore the traditions of the given society (i.e., its culture) with respect to preexisting preference for one cheese or another. Imagine if American supermarkets were filled with thirty varieties of cheddar; or, conversely, try to find the American singles in a British supermarket. In this same way, when not based on proper cultural (and scientific) health research, the imposition of the United States' controlled substances Schedules on another society (like Micronesia) ignores local culture and negates the importance of regionalized collective agency. In some respects, the United States' restriction of substances without regard to perceived non-medical cultural benefits (i.e., perceived benefits as agents that alter consciousness in unique cultural settings) is arguably similar to the culturally dissociated importation of foreign substances.

[42] *See* Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995) (arguing that the wholesale transplantation of laws is an overly simplified means of understanding how interaction between legal cultures produces changes in legal philosophy).

consequence of this wholesale adoption of the United States' Controlled Substances Act is the failure of the laws of the Federated States of Micronesia to account for local indigenous substances that alter consciousness, such as kava (*Piper methysticum*).[43] Having been exported to multiple other countries as either a traditional tea made from the root or as an herbal supplement, kava has been placed on the controlled substances schedules or otherwise regulated federally in numerous countries including Canada,[44] the United Kingdom,[45] Germany, Australia, and Norway.[46] No real regulation of the use of kava exists in the United States or in the Federated States of Micronesia.[47]

Comparison of the federal regulations of substances in multiple countries quickly reveals that many international attitudes toward psychoactive substances are culturally contextual.[48] Even at the level of federal schedules,

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[43] Kava is also known as "ava, awa, gea, gi, intoxicating pepper, kao, kavain, kawa-pfeffer, kew, long pepper, malohu, maluk, meruk, milik, rauschpfeffer, sakau, tonga, worzelstock, yagona, [and] yangona." *Dirty Dozen: Twelve Supplements to Avoid*, in OB GYN NEWS, May 15, 2004, at 21.

[44] Heather S. Boon & Albert H. C. Wong, *Kava: A Test Case for Canada's New Approach to Natural Health Products*, 169 CANADIAN MED. ASS'N J. 1163, 1163–64 (2003) ("Health Canada . . . announced that kava products were to be regulated as conventional drugs in the future.").

[45] The United Kingdom's Medicines Control Agency placed an order before Parliament banning the importation of kava due to reports of liver toxicity. *See* Joanna Blythman, *Health: Give Us Back Our Sanity*, THE INDEP., Sept. 20, 2004, at A8; Christopher Booker, *Culled Herbs: Kava Kava Is Not a Danger*, SUNDAY TELEGRAPH, Mar. 28, 2004, at A16. *See also* Nutraingredients.com, *Kava Banned in UK*, (Dec. 23, 2002), http://www.nutraingredients.com/news/news-ng.asp?id=37001-kava-banned-in.

[46] *See generally* Jennifer Anke & Igbol Romzan, *Pharmacokinetic and Pharmacodynamic Drug Interactions with Kava (Piper methysticum Forst. f.)*, J. ETHNOPHARMACOLOGY, Aug. 1, 2004, at 153, 153–60 (discussing the rise in popularity of kava and subsequent ban in several countries due to possible implications in cases of liver failure).

[47] Kava is regulated through federal statutory controls on food supplements. The FDCA and administrative regulations of the FDA form the primary bases upon which kava and other "dietary supplements" are regulated. This regulation includes approval of health claims on dietary supplements. *See* Amber K. Spencer, Note, *The FDA Knows Best . . . Or Does It? First Amendment Protection of Health Claims on Dietary Supplements:* Pearson v. Shalala, 15 BYU J. PUB. L. 87, 96 (2000) (noting that FDA approval of health claims are based on "the totality of publicly available scientific evidence," including agreement among experts and evidence in support of the claims); *see also* Pearson v. Shalala, 130 F. Supp. 2d 105, 118–20 (D.D.C. 2001) (holding that First Amendment rights to free speech are invoked by ability of dietary supplement manufacturers to make legitimate health claims in labeling).

[48] This comports with the socially-contextual presumptions of cognitive models for human behavior. *See, e.g.*, STRAUSS & QUINN, *supra* note 41, at 43.

the control of consciousness is a decidedly contextual practice that differs from society to society. Groups that have a vested interest in a particular substance have more of a motivation for the lessened regulation of that substance.[49] In this way, entire cultural systems of interaction are built and laws are enacted to reflect these practices.[50]

B. *A Brief History of American Regulation: Paternalism and Racist Laws*

The history of psychoactive substance regulation in the United States is littered with mixed and questionable motives for enacting restrictions on use, including largely Judeo-Christian-biased paternalism during the Progressive Era.[51] From explicit racism to paternalistic overreaction to perceived changes in social dynamics,[52] the regulation of psychoactive substances in the United States is a history of somewhat irrational irregularities.[53]

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[49] *See* Vesemaca Rarabici, *Kava Group Lobbies*, FIJI TIMES, Apr. 7, 2004, at 12 (reporting the increased lobbying efforts of Pacific Island groups to reintroduce kava to European countries that have banned the herb, citing recent studies that challenge the previously reported health risks of kava); *see also* Verenaisi Raicola, *Ban on Kava Lifted*, FIJI TIMES, May 15, 2005, at 4 (noting a recent decision of German government to partially lift the ban on kava).

[50] For example, bars and alcohol in America, hooka bars and hashish in the Middle East, and sakau bars and kava in Pohnpei (Federated States of Micronesia).

[51] *See, e.g.*, Barbara Holden-Smith, *Lynching, Federalism and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 71–73 (1996) (discussing how Congress overcame States' rights concerns and enacted the first federal regulation on the use of "narcotics," the 1914 Harrison Act, by drawing particular attention to the "specter of the black rapist preying on white women"); Edward H. Williams, *Negro Cocaine "Fiend," Are A New Southern Menace*, N.Y. TIMES, Feb. 8, 1914, at 12 (a seminal example of racially motivated stigmatization of specific substances as associated with discrete ethnic minorities).

[52] *See* Kathleen R. Sandy, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed By Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 679 (2003) (employing critical race theory and arguing that racist myth and labor market paternalism were primary causes of federal regulation of cocaine between 1914-1918 and beyond).

[53] No principled medically-based distinction exists between many pharmaceuticals, dietary supplements, alcohol, and tobacco (all of which are regulated under wholly disparate federal and state schema). *See* Vik et al., *supra* note 35, at 100, 102 (noting the comparatively more harmful long-term effects of alcoholism when contrasted with excessive marijuana use); *see also* Kevin M. Raduege, *Anesthetic Considerations of the Herbal, Kava*, 16 J. CLINICAL ANESTHESIA 305, 307 (2004). The ability of kavain, a constituent of kava, to block the reuptake of dopamine causes the "sedative and euphoric effects" of other psychoactive substances. *Id.* Yet, kava is a largely unregulated "dietary

Prior to the twentieth century, little or no regulation of any psychoactive substance was statutorily mandated, and physicians could freely distribute many substances now banned by federal statute.[54] Central to the promulgation of federal regulatory schemes for "controlled substances" were two historical trends:[55] (1) increased rights or economic success of minority citizens, and (2) the resulting social and legislative responses of paternalistic white individuals and groups.[56] This white Judeo-Christian response often drew on a popular social mythology that men, more than women, and minorities, more than whites, comprised the majority of "drug" users, often characterized as "heathens" or "fiends."[57]

The increased economic competition of Chinese immigrants in California was a likely cause of the first desires to regulate, on both a state and federal level, the distribution and consumption of opium.[58] State-level legislation

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supplement." *See also* Galiber, *supra* note 27, at 839–40 (discussing the irrationality of distinguishing regulatory schemes for alcohol, tobacco and controlled substances).

> The hypocrisy of imposing severe penalties on one form of potentially self-destructive personal behavior while all but ignoring criminal sanction for other forms of the same conduct is not easily justified to those who believe that reason and consistency should be the hallmark of public policy and criminal laws.

Id. at 840 (citation omitted).

[54] "'[P]ractitioners of nineteenth-century medicine had little power to cure disease. The main thing the physician could do was to make the patient feel better, and [narcotics] were preeminent for these functions and were apparently used with great frequency.'" Sandy, *supra* note 52, at 678 (quoting Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2605 (1994)).

[55] These trends were prevalent long before the original adoption of the CSA in 1970, from which the nomenclature of "controlled substances" sprang.

[56] *See* MUSTO, *supra* note 21, at 255 n.15 (discussing specific instances of racial stereotyping as leading to regulation of substances associated with the disfavored group); *see also* Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 55–56 (1995) (citing and discussing MUSTO, *supra* note 21, in a broader discussion of racist motivations in American criminal justice with respect to minorities). "The prohibition of certain drugs has [long] reflected racial stereotyping. . . . 'Cocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps in the slums.'" *Id.* (quoting MUSTO, *supra* note 21, at 255 n.15).

[57] *See* Williams, *supra* note 51, at 12; *infra* Part II.B. Contrary to this social mythology, America's "rather large addict population included more females than males, more whites than blacks, and was confined neither to particular geographical regions nor to areas of high population concentration." Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 982–83 (1970) (citations omitted). See discussion of myth functioning as law in Part IV, *infra*.

[58] "[A]lthough mainstream [white] women were the modal category of opiate users, images of Chinese opium smokers and opium dens were invoked by opponents of drug

was quickly enacted in West Coast states with high Chinese populations to specifically prohibit the sale of opium for non-medical use.[59] This regulation, however, was motivated by thinly disguised anti-Chinese animus[60] and represented less of an attempt to prohibit a "vice" and more of a "desire to vex and annoy the 'Heathen Chinee' [sic]."[61]

Similar to the racially motivated state regulations on opium, the first federal regulation of cocaine in the United States was an arguably racist response to social mythology concerning black Americans.[62] Unnerved by emancipation and the resultant job competition and inevitably changing social structure, white activists lobbied against not just substances, but the individuals with whom those substances were most intimately or "dangerously" associated.[63] Unsubstantiated myths abounded about cocaine giving blacks "superhuman strength, cunning and efficiency" prompting these "superhuman" minorities to "rape White women," obtain improved marksmanship, and become "impervious to .32 caliber bullets."[64]

Similar to the restriction of opium as a response to anti-Chinese animus and the regulation of cocaine as a social response to anti-black sentiments, the initial restriction on the use of marijuana in the United States was arguably a class-based, anti-Mexican prohibition designed to target a disfavored ethnic minority.[65] State legislation was passed to stop the spread

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use and form part of the backdrop [of the first federal regulation of opium]." Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 39.

[59] Bonnie & Whitebread, *supra* note 57, at 996.

[60] Holden-Smith, *supra* note 51, at 71 ("Many in the nascent drug reform movement viewed Chinese immigrants as primarily responsible for the spread of opium addiction to the larger white society.").

[61] Bonnie & Whitebread, *supra* note 57, at 997 (quoting *Ex parte* Yung Jon, 28 F. 308, 312 (D. Ore. 1886)).

[62] Sandy, *supra* note 52, at 679. An in-depth discussion of myth functioning as law in various contexts is found in Part IV, *infra*.

[63] MUSTO, *supra* note 21, at 255 n.15.

[64] Sandy, *supra* note 52, at 679. Ironically, few would argue today that cocaine-riddled low-income minority neighborhoods are riddled with "superhuman . . . cunning and efficiency." Yet, such a mythology was itself part of the basis for making the substance illegal. *Id.*

[65] Bonnie & Whitebread, *supra* note 57, at 1012. Not comforting in the origin of marijuana regulation, but distracting from the probable racist intent by Western states, the motivation for marijuana prohibition in the East seems to have been the a-scientific belief that marijuana has "practically the same effect as morphine and cocaine." *Id.* at 1017. In a modern pharmacological context, this contention is indefensible. *See* Eric W. Reynolds & Henrietta S. Bada, *Pharmacology of Drug Abuse*, 30 OBSTETRICS GYNECOLOGY CLINICS N. AM. 501, 512 (2003) (noting the unique action of marijuana on the cannabinoid receptors, CB_1 and CB_2).

of the "Mexican herb."[66] Ultimately, federal legislation[67] limiting the sale of marijuana was passed without a single federal or state empirical or scientific study of the effects of marijuana.[68]

The restriction of opium, the regulation of cocaine, and the limited use (and ultimate ban) of marijuana may all be viewed, in the above contexts, not only as racist responses to perceived threats to authority, but also as the collective product of the paternalism of Judeo-Christian mores during the Progressive Era. The regulation of individuals (minorities) was accomplished via restrictions on the use of the substances with which those individuals were associated.[69] These cultural decisions by the United States show, in part, how the mythology and traditions of a culture can masquerade as—and ultimately be promulgated as—substantive statutory laws.

III. MYTH AND TRADITION AS THE SOCIAL CONTROL OF CONSCIOUSNESS

In the same way that federal schedules and agency regulations seek to control consciousness through the direct regulation of the chemical substances that may alter consciousness, so too do myth and tradition often serve to constrain or shape both individual and collective understandings of consciousness. One example of such social control is seen in the role of tradition as a means of social control in the peyotism of Native Americans.[70] Another example is found in the mythology and social practices surrounding the ingestion of kava in the Pacific Islands.

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[66] Bonnie & Whitebread, *supra* note 57, at 1014. "'When some beet field peon takes a few rares of this stuff . . . [h]e thinks he has just been elected president of Mexico . . . [and] stage[s] imaginary bullfights. . . . '" *Id.* (quoting THE MONTANA STANDARD, Jan. 27, 1929, at 3 (comments of Dr. Fred Flusher).

[67] Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970). In 1970, the Marijuana Tax Act was repealed upon adoption of the CSA, which was substantially more restrictive on the use of marijuana, making it a Schedule I controlled substance.

[68] Bonnie & Whitebread, *supra* note 57, at 1021.

[69] *See, e.g.*, MUSTO, *supra* note 21, at 255 n.15.

[70] The modern political lobbying efforts of Native Americans and the successful attainment of federal legislation exempting Native use of peyote are further discussed in Part IV(C), *infra*.

A. *Peyotism—Tradition and Social Practice as the Control of Consciousness*

Peyote has been used by the indigenous cultures of North America for thousands of years as part of a complex cultural tradition embedded in social practices that serve to regulate the consciousness of individuals.[71] However, not all Native American groups used peyote as a part of rituals.[72] Among groups that did, though, the social practice of its cultural use internally regulated access to peyote and the situations in which peyote could be ingested.[73]

Peyote was and is used in limited contexts, such as healing and divination ceremonies in which individuals would attempt to commune with ancestral spirits to ask for their aegis in current social problems.[74] The nature of such rituals is decidedly control-based. Indeed, some modern groups of Native Americans so regulated the use of peyote in rituals that they imposed an internal cultural ban on its ingestion.[75]

Peyote use was and is typically confined to a peyote circle in which those given the authority to ingest peyote gather and perform complex rituals based on tradition to gain access to spiritual guidance.[76] The use of peyote outside of such purposeful divination is sufficiently shamed by Native American society at large that the abuse of peyote is not a significant cultural problem.[77]

Problems in the regulation of peyote are frequently the result of cultural clashes between "western" and "native" beliefs about the proper role of

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[71] *See* Jan G. Bruhn et al., *Mescaline Use for 5700 Years*, 359 LANCET 1866, 1866 (discussing the historical longevity of the use of Peyote's constituent psychoactive substance, mescaline, in the cultural practices of pre-Columbian and modern populations in Mexico and North America).

[72] *See generally* DAVID F. ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO (1966) (describing the process by which Peyotism was imposed on and often rejected by certain native populations).

[73] RICHARD RUDGLEY, THE ALCHEMY OF CULTURE: INTOXICANTS IN SOCIETY 74 (1993).

[74] *See, e.g.*, L. Bryce Boyer et al., *Shamanism and Peyote Use Among the Apaches of the Mescalero Indian Reservation*, *in* HALLUCINOGENS AND SHAMANISM pt. IV (Michael Harner ed., 1973) (articulating the role of peyote among Apache Natives as based in a system of shamanic divination).

[75] *Id.* at 53.

[76] ABERLE, *supra* note 72, at 117.

[77] *Id.*

society or government in the control of consciousness.[78] Generally, though, the tradition of Peyotism is sufficient to allow the internal regulation of its use by a particular native group, without the influence of federal laws.[79]

B. *Kava—Mythology and Social Practice as the Control of Consciousness*

Kava consumption is an important social ritual in various contexts within many Pacific Island cultures.[80] From the Federated States of Micronesia to Hawai'i, the ingestion of kava signals valuable information about political, religious, and economic structures in the societies in which it is consumed.[81] In fact, the very practice of kava consumption and the observed right of different individuals to access the tea made from the root of kava both give clues as to social relationships and perceived status within a group.[82] Put differently, "[r]egulations on kava usage—who drinks and who does not, where one drinks and with whom—separate important categories of people in island cultures."[83]

Distinctions are made in many contexts between the right of access based on differences and divisions between polarized groups, that is, men and women, chief and commoner, religious traditionalist and Christian, old and young.[84] Kava is also mythologized to impart access to the ancestral spirits on the individual ingesting the tea in a ritual context. Kava is thus an important traditional exchange item that is regulated both by traditional social hierarchies as well as mythological or spiritual guidelines.[85]

Evolving mythology plays an important role in the regulation of kava consumption. Origin myths about the first ancestors to consume kava shed light on the reflexive relationship between modern social demands and the evocation of myth as a sort of law: "[p]opular tales of the origins of kava shape people's appreciation and consumption of the drug. Conversely, changes in everyday kava use may reflect back to transform how Islanders tell their kava myths (or which versions they choose to tell)."[86] Mythologies

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[78] *Id.* at 56.

[79] *Id.* at 117.

[80] *See generally* VINCENT LEBOT ET AL., KAVA: THE PACIFIC DRUG (1992) (detailing the prevalence of kava consumption in various Pacific Island cultures).

[81] *Id.* at 119.

[82] Raduege et al., *supra* note 53, at 306.

[83] LEBOT ET AL., *supra* note 80, at 120.

[84] *Id.*

[85] *Id.* at 121–22.

[86] *Id.* at 121–24.

vary from internal myths about the discovery of kava by locals to external myths about the importation of kava by a god or wandering religious or spiritual figure. Depending on the particular affinity that a culture has for the use of kava, the mythology may change to reflect desired modern perceptions. For example, one internal myth claims that kava was discovered by following a kava-inebriated rat to the plant.[87] This comports with a sense of pride in the intra-cultural development of an important tradition.[88]

External mythologies often tell of a supernatural being having given the root to a culture.[89] This external justification for kava entering a given society is often used to justify the lack of necessity for the consumption of kava.[90] This use of extrinsic mythology to give negative connotations to kava is likely a cultural response to a desire for heightened internal regulation of the substance: a sort of "law" of cultural mythology.[91]

Mythological justifications and social practice in Pacific Island societies provide a powerful example of the regulation of consciousness through non-traditional "legal" frameworks. Differences in accounts of kava origins thus vary correspondingly with the unique demands of particular societies.[92]

IV. LAW AS MYTH AND TRADITION—MYTH AND TRADITION AS LAW

In the same way that law may function as myth and tradition, so too may myth and tradition function in certain contexts as law.[93] Four unique contexts can provide a means by which to understand the interaction of these two related yet divergent concepts: (1) America in the 1960s highlights the clash between governmental and individual interests in the control of

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[87] Other internal myths include the spontaneous sprouting of the plant from a buried human corpse, and most often from the vagina of a dead woman. *See* Edmund Leach, *The Structure of Symbolism*, *in* THE INTERPRETATION OF RITUAL 239 (J. S. LaFontaine ed., 1972) (describing various origin mythologies for the introduction of kava).

[88] LEBOT ET AL., *supra* note 80, at 122.

[89] *Id.*

[90] *Id.*

[91] RON BRUNTON, THE ABANDONED NARCOTIC: KAVA AND CULTURAL INSTABILITY IN MELANESIA 95 (1989).

[92] LEBOT ET AL., *supra* note 80, at 122–24.

[93] This view of law is a conjunctive and more anthropological perspective of Alan Watson's general thesis that the growth of legal culture is the product of the cross-fertilization (or transplantation) of other cultures' laws. *See generally* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (outlining the development of Watson's theory and in particular the idea that if the transplantation of laws explains changes to legal culture, then the positive law concept of law as response to forces external to the law is called into question).

"consciousness"; (2) the long-term development of osteopathic medicine as challenged by the institutional interests of allopathic physicians shows how the ability to regulate consciousness produces a guarded effect with the intent to limit access to resources; (3) the modern Peyotism movement among Native American groups shows how modern political activism can alter the dominant social approach to regulating consciousness; (4) the expansion of kava into a global market shows how global market forces act to produce unique interactions between law, myth, and tradition in a modern international system of exchange.

A. *America in the 1960s*

During the 1960s, America was internally divided and at odds with its own sense of culture. Reflections of this internal dissonance are found in the reality of law having functioned as myth and tradition and the consequences of myth and tradition having functioned as law. Many examples exist of such cross-fertilization of influences, including the "psychedelic movement," its reflections in literature, societal proposals for drug policy reform or pre-reform,[94] and the human consequences of these varied influences. Advocates for the responsible control of the "psychedelic movement" were justifiably at odds with the unchecked presumptive governmental regulation of potentially society-altering substances with the real power to unite and divide individuals and entire groups.[95] The modern making of legal mythology was an inevitable consequence of the clash between the desire for governmental control and the desire of individuals to be free to experiment with their own consciousness.

One proponent of the psychedelic movement was Timothy Leary, whose adoption of the use of LSD in educational settings forced Harvard University—and the country—to consider the risks associated with such behavior. Leary's notion of the "turn on, tune in, drop out" approach to psychoactive substances was based in some part of the revolutionary

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[94] *See* Stanley K. Laughlin, Jr., *LSD-25 and the Other Hallucinogens: A Pre-Reform Proposal*, 36 GEO. WASH. L. REV. 23 (1967). Laughlin's pre-reform proposals, including alternatives to the strict criminalization process that was ultimately adopted, are particularly resonant when weighed in light of the relative failure of the "War on Drugs" in terms of reform of individuals and governmental regulation of "controlled substances." *See* Tally M. Wiener, Note, *Drug Policy Priorities in the Wake of the June 1998 Drug Summit*, 25 BROOK. J. INT'L L. 759 (1999).

[95] *See* Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967) ("[The concern of the court] is with the laws of the United States, which appellant [Timothy Leary] admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices.")

examination of various media as both a process and a result of the process.[96] Leary's approach to the social control of consciousness was a prophetic description of what kinds of positivistic laws should govern altered consciousness. He proposed two "commandments" for the "Molecular Age" (modern age of understanding psychoactive interactions): (1) "Thou shalt not alter the consciousness of thy fellow man," and (2) "Thou shalt not prevent thy fellow man from altering his own consciousness."[97] These arguably natural law concepts were couched, instead, as a positivist reaction to advanced scientific knowledge and, hence, were an example of current cultural practice and belief masquerading as a normative kind of "law."[98]

A further example of myth and tradition as "law" during the 1960s (and, indeed, in a larger diachronic frame) is found in the political essays of Allen Ginsberg.[99] Very much like the positivist justifications of Leary, Ginsberg proposed a brand of modern spiritualism that required the suspension of federal regulation of psychoactives for the purpose of experimentation in collective consciousness. Arguing that the mass experimentation with psychoactives by society was the solution to our global tensions, Ginsberg pushed for a "law of the spirit," a strange blend of positivism and natural law that called for the development and regulation of spirituality outside of the normal confines of the American legal system:

> [I]ndividual soul development . . . is our law transcending the illusions of the political state. . . . I propose, then, that everybody including the President and his and our vast hordes of generals, executives, judges and legislators of these States go to nature, find a kindly teacher or Indian peyote chief or guru guide, and assay their consciousness with LSD.[100]

Ginsberg's brand of chemical spiritualism and similar suggestions of the right to individual altered consciousness were largely ignored by those in positions of power, but echoed repeatedly in the popular social attitude to experimentation during the 1960s.

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[96] MARSHALL MCLUHAN, UNDERSTANDING MEDIA 5 (1964).

[97] TIMOTHY LEARY, THE POLITICS OF ECSTASY 95 (1980).

[98] *See* Watson, *supra* note 42, at 470–73 (showing how religious "commandments" can trace the development of legal culture as either a reflection of natural law or as a positivist reaction to cultural history, or both).

[99] *See, e.g.*, Allen Ginsberg, *Personal Consciousness*, *in* DELIBERATE PROSE: SELECTED ESSAYS 1952-1995, at 125 (2000) [hereinafter Ginsberg, *Personal Consciousness*] *Everybody Should Get High for the Next Ten Years (1959)*, *reprinted in* GINSBERG, PROSE, *supra*, at 134.

[100] Ginsberg, *Personal Consciousness*, *supra* note 99, at 126–27.

Whereas Leary and Ginsberg advocated the expansion of the individual right to alter consciousness, the human side of the negative effects and social limitation of the use of psychoactives is evident in the literature of William S. Burroughs.[101] Burroughs, whose autobiography, *Naked Lunch*, was the subject of intense litigation over its alleged obscenity,[102] was a heroin addict and wrote about the natural cultural constraints of such behavior outside of the role of the law. The "law" of social pressures and human relationships is another form of control that exerts influence over individuals to limit altered consciousness in certain ways. Burroughs analogizes the law of social pressure with respect to addicts to the responsive physiology of a rabid dog.[103] Burroughs argued that no federal law could justifiably punish an individual for a physiological dependence that alters the ability to consciously decide whether to ingest a given substance; the "algebra of need" rather than the Federal Controlled Substances Act dictates the individual control of consciousness at a chemical level.[104]

As seen in the struggles of Burroughs and others similarly affected by addictive psychoactives, the regulation of consciousness, even in America, often has not only legal, but also cultural mechanisms for control, including common social practice and even financial restrictions on access to resources.

In general, the American consciousness revolution of the 1960s is an important heuristic that may show how law acts as a constraint on social ideas about the control of consciousness. Law is both the boundary and the catalyst for challenges to the boundary of what a society will allow individuals to change about their own consciousness. In many ways, the failure of criminal responses to "drug" crimes is very much a product of the refusal of federal legislators to recognize the true social and cultural limits of controlled substances. A balance must be struck in any society between religious or spiritual practices and the paternalistic right of government to regulate.[105] Mismatched cultural and legal limits must inevitably lead to a high rate of "criminal" but socially-normative behavior that seeks to alter individual consciousness.

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[101] *See, e.g.*, WILLIAM S. BURROUGHS, NAKED LUNCH (1959).

[102] Attorney Gen. v. A Book Named "Naked Lunch," 218 N.E.2d 571 (Mass. 1965).

[103] Robert Batey, Naked Lunch *for Lawyers: William S. Burroughs on Capital Punishment, Pornography, the Drug Trade, and the Predatory Nature of Human Interaction*, 27 CAL. W. INT'L L.J. 101, 131 (1996).

[104] *Id.* at 130.

[105] *See* Adam Fraser, Note, *Protected from Their Own Beliefs: Religious Objectors and Paternalistic Laws*, 18 BYU J. PUB. L. 185, 194 (2003) (arguing that paternalistic laws regulating psychoactives have the potential and frequent tendency to over-regulate the religious freedom of individuals).

B. *Organizational Control of Consciousness: Allopathic Versus Osteopathic Medicine*

Doctors, the primary point of contact for access to psychoactives with governmentally perceived medical benefits, are not immune to the use of the law to control both the structure of medicine and the right of access to individual practitioners to "controlled substances." Leading up to the last twenty years, a long struggle existed between traditional (allopathic) physicians (i.e., M.D.s) and holistic or preventative (osteopathic) physicians (i.e., D.O.s) over the right to proscribe prescription substances, including psychoactives.[106] This struggle for recognition by D.O.s, which met with continued resistance by M.D.s, shows how the long-term development of osteopathic medicine was challenged by the institutional interests of allopathic physicians.[107] The ability to regulate consciousness produces a guarded effect with the intent to limit access to professional resources, which in turn has an effect on the ability of individuals to gain access to psychoactive substances.[108]

The debate over the expansion of "traditional" medicine to include "nontraditional," that is, holistic or preventative medicines, is a culturally-specific but international debate,[109] as well as an exercise in cultural linguistics over how to refer properly to complimentary and alternative medicine (CAM).[110] The converse debate exists in many foreign countries where "nontraditional" medicine as defined in the United States has been traditional for some time.[111] This imposition of western medicine on a

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[106] Boozang, *supra* note 25, at 186.

[107] Oddly, the low cost of preventative medicine and alternative healthcare is sometimes cited by legislators as a reason *not* to encourage the widespread acceptance of CAM. *See* Kristen J. Josefek, Note, *Alternative Medicine's Roadmap to Mainstream*, 26 AM. J.L. & MED. 295, 304 (2000) (noting that opponents of CAM worry that "disadvantaged or under-represented classes feel more comfortable visiting these practitioners and may be seduced by their attentiveness [and lower cost]"). Given the historical background of the regulation of psychoactives in the United States, this "concern" coincides with the frequent tendency of Congress to enact legislation that controls access to substances and services that may benefit or already be associated with underprivileged or impoverished social or cultural classes of individuals.

[108] *See* Boozang, *supra* note 25, at 187.

[109] In the United States, a sharp increase in the use of CAM highlights the difficulty and obvious relativism of defining treatments as "alternative." Fred M. Frohock, *Moving Lines and Variable Criteria: Differences/Connections Between Allopathic and Alternative Medicine*, 583 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 216–17 (2002).

[110] *See, e.g.*, Cohen & Ruggie, *supra* note 15.

[111] In South Asia, particularly in India, the struggle between "modern" and "alternative" medicines is best demonstrated by the process of modernizing "Ayurveda,"

historically "nontraditional" cultural approach to medicine has important implications with respect to the need for development of controlled substance laws that reflect the influx of foreign cultural practices. In China, for example, increased advertising by American pharmaceutical companies has led to the increased diagnosis of psychological disorders such as schizophrenia.[112]

Further complications for access to medicine, including behavioral psychoactives in developing countries, are added by challenges to the property rights of drug discovery processes[113] and the struggle between third-world traditional medicine and western synthetic drug production.[114] In addition to property rights issues, the use of human subjects for testing of pharmaceuticals in third-world countries presents a novel conflict between the desire to effectively control consciousness through clinical testing and the human rights of local populations in developing nations.

From the biotechnology perspective, corporations often view negative local health situations not as crises, but rather as good opportunities for clinical trials. The crystallization, rather than the elimination of health inequalities, fuels the growing industry of human subjects research. This is inherently in opposition to the ideals of many bioethicists and presents a socio-economic dilemma that must somehow be reconciled. Anthropologist Adriana Petryna suggests that the autonomy of individuals is lost in the quest for cheaper pools of clinical trial subjects: "Understanding the existing variability in the regulation of ethics and the coinages through which consent, autonomy, and drug markets evolve helps build an ethnographic

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which is the equivalent of and has contributed to the development of osteopathic medicine in the United States. Sita Reddy, *Asian Medicine in America: The Ayurvedic Case*, 583 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 102 (2002). Ayurveda consists of both "humoral diagnostics," (based on a "tripartite system of mind-body typologies") and a combination of internal medicine, herbal remedies, and rejuvenation programs, similar to the holistic and preventative approach of osteopathic physicians in the United States. *Id.* at 101. In response to challenges of legitimacy, the approach taken by Ayurvedic practitioners in India was to create "parallel institutions and an official, professionalized system of Ayurvedic knowledge for [modern India]." *Id.* at 102.

[112] Arthur Kleinman, Harvard University, Department of Anthropology, Chair (personal communication, May 2002). *See generally* ARTHUR KLEINMAN, PATIENTS AND HEALERS IN THE CONTEXT OF CULTURE: AN EXPLORATION OF THE BORDERLAND BETWEEN ANTHROPOLOGY, MEDICINE, AND PSYCHIATRY (1980) (discussing the interrelationship between increased cultural contact and the development of medical and psychiatric policy in other cultures, with specific emphasis on Asia).

[113] *See* Michael J. Huft, Comment, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U. L. REV. 1678 (1995).

[114] Carlos M. Correa, *Internationalization of the Patent System and New Technologies*, 20 WIS. INT'L L.J. 523, 523–24 (2002).

context that may ultimately provide the basis for a critique of market-driven human research."[115]

Whereas osteopathic physicians would seek to prevent such health crises, in a responsive allopathic approach the real-world benefits of testing psychoactive substances for depression and mental health regulation are often weighed against the human rights of individuals and whole populations.[116] Similarly, "[m]arket-oriented medical ethics creates the semblance of [normatively] ethical [practices]."[117] The struggle between traditional and nontraditional medicine in America and other countries shows how the needs of one country and the laws promulgated by developed nations can have a proportionate disparate impact on undeveloped nations that may be exploited under biased substantive international laws.

C. *Peyotism as Consolidated Political Power*

Although peyote has been used by Native American groups for thousands of years, the modern religious movement of Peyotism is a recent cultural exercise of tradition to dictate substantive federal law. In essence, the modern Peyotism movement among Native American groups shows how modern political activism can alter the dominant social approach to regulating consciousness by changing federal law.

Perhaps echoing the ideas of Leary and Ginsberg from the 1960s, the Native American Church (a recent social conglomeration of various Native groups) successfully pursued the acquisition of individual rights to alter consciousness—in direct opposition to the Controlled Substances Act.[118] In 1994, in direct response to a flurry of legal activities surrounding the religious rights of indigenous groups to alter consciousness in a spiritual context,[119] amendments were made to the American Indian Religious

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[115] Adriana Petryna, *Ethical Variability: Drug Development and Globalizing Clinical Trials*, 32 AM. ETHNOLOGIST 183, 192–93 (2005).

[116] Nancy Scheper-Hughes, *The Last Commodity: Post Human Ethics and the Global Traffic in "Fresh" Organs*, *in* GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 145, 163 (Aihwa Ong & Stephen J. Collier eds., 2005).

[117] *Id.*

[118] Autumn Gray, Note, *Effects of The American Indian Religious Freedom Act Amendments on Criminal Law: Will Peyotism Eat Away at the Controlled Substances Act?*, 22 AM. J. CRIM. L. 769, 770 (1995).

[119] *See* Ann E. Beeson, Comment, *Dances With Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1149–1162 (1992) (discussing the legal history of attempts to decriminalize the religious use of peyote by Native Americans in ritual contexts).

Freedom Act that decriminalized peyote use by the Native American Church.[120]

This decriminalization of native ingestion of peyote was the hard-fought result of years of political lobbying for indigenous rights among Native Americans. Tradition and social practice were effectively transformed into federal law on the control of consciousness. Interesting in this transformation, though, is that the Native American Church, the group for whom the exemption for peyote use exists, is a modern socially-contrived vehicle for decriminalization as much as it is a legitimate indigenous religious organization.[121] Similarly interesting is the potential that such political activism has for the use of similar consolidation tactics by other minority groups desiring to self-regulate the control of consciousness in a religious or spiritual context.[122]

D. *Kava in a Global Market*

Kava is one of many supplements that will likely serve as a test case[123] for future statutory reforms to the FDA control of dietary supplements, and particularly those that may alter consciousness; any such reform should and must take into account the social contexts in which kava has traditionally been used.[124] The use of kava in both recreational settings and in CAM is

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[120] American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a (2000). This statutory nod to Native interest groups is given further force by 21 C.F.R. § 1307.31 (2000), the regulatory exemption from Schedule I classification for religious "nondrug" use of peyote by the Native American Church. Neither the American Indian Religious Freedom Act nor the regulatory exemption define "nondrug" use.

[121] *See* John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the* Peyote Way Church of God *Case*, 22 AM. INDIAN L. REV. 475, 478 (1998).

[122] *See* Christopher Andrew Eason, Note, O'Centro v. Ashcroft*: American Indians' Efforts to Secure Religious Freedoms Are Paving the Way for Other Minority Religious Groups*, 28 AM. INDIAN L. REV. 327, 343 (2003-2004).

[123] Indeed, kava has already been identified as such in the context of Canadian regulation of "natural health products." Boon & Wong, *supra* note 44.

[124] *See* Chris Landers, *The Kava Crackdown*, GOVERNING MAG., Jan. 2005, at 14 (reporting the recent law enforcement trend in California to apprehend individuals for "driving under the influence of kava"). Given kava's classification as a dietary supplement and not a controlled substance under the CSA (kava is, thus, not subject to the regulatory schema of alcohol and tobacco), these successful prosecutions of individuals for driving under the influence of kava are analogous to successfully prosecuting an individual for driving under the influence of coffee. Based on little more than an admission of consumption and expert testimony as to its effects (including any

increasing sharply in the United States. Unlike the adoption of "traditional" Peyotism as a political tactic for legitimation of traditional practices, the use of kava has jumped its cultural boundaries in an almost entirely unregulated market in which cultural context is absent and no social norms govern the control of consciousness via kava use.[125] The very substance that is banned in numerous European countries is unregulated in the rest of the world.

Potential health risks are studied by federal agencies like the Food and Drug Administration in the United States, but kava use, once divorced from its Pacific Islands origins, is governed primarily by social practice, which is often unfounded on traditional understanding or traditional means of control.[126]

Rather than the traditional control of cultural practice and mythology that regulates kava in most Pacific Island cultures, the use of kava in western or westernized contexts presents a unique problem. A substance that can alter consciousness, but is unregulated by either federal law or traditional cultural practices has the high potential for abuse by individuals who may be unaware of adverse effects known only to the socially acculturated kava user. From *sakau* bars in Pohnpei,[127] to the widespread distribution of kava as an herbal supplement,[128] the unregulated use of certain substances must lead inevitably

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impairment of motor skills), prosecutors in San Mateo, California (or anywhere) could theoretically prosecute anyone for driving "under the influence" of anything. *See id.* Interestingly, the FDA has just recently begun comprehensive testing of the actual chemical composition and physiological effects of kava. *See* U.S. Food and Drug Administration, Food and Drink Products Containing Kava Analyzed, MED. & LAW WKLY., Feb. 18, 2005, at 416 (explaining the development by the FDA of a "method for the determination of six kava lactones, methysticin, dihydromethysticin, kawain, dihydrokawain, yangonin, and desmethoxyyangonin, in solid foods and beverages").

[125] *See, e.g., Are Diet Supplements Safe?*, USA TODAY, Nov. 11, 2004, at 20A (noting that kava and numerous other dietary supplements, though linked to liver damage and death, are largely unregulated). *See also* Raduege, *supra* note 53, at 309 ("Kava may cause neurological side effects. . . . [and] has hepatotoxic side effects.") *But cf.* Rarabici, *supra* note 49 (discussing the efforts by certain Pacific Island lobbying groups, citing recent medical research, to deregulate kava in currently restrictive European markets).

[126] *See, e.g.*, Joshua H. Beisler, Note, *Dietary Supplements and Their Discontents: FDA Regulation and the Dietary Supplement Health and Education Act of 1994*, 31 RUTGERS L.J. 511 (2000) (arguing that the control of dietary supplements is much looser in the wake of federal legislation to relax FDA control).

[127] Stanley K. Laughlin, Jr., Professor of Law, The Ohio State Univ., Moritz College of Law (personal communication Nov. 2004).

[128] Kava is available at most herbal supplement or vitamin stores in the continental United States, for example, in a standardized 250 milligram or 400 milligram capsule with regulated (though not standardized) concentrations of kava. *But see* Edzard Ernst, Commentary, *Prescribing Herbal Medicines Appropriately*, 53 J. FAM. PRAC. 985, 987 ("The quality of an herbal preparation partly determines its efficacy as well as its safety.

to conflicts between law, myth, and tradition. Such conflicts will be resolved not only through legal responses, but also through social perceptions and responses to such legislative and judicial remedies.

In many ways, traditions for the use of kava and other relatively unregulated supplements are already developing in the form of the health supplement industry's self-regulation. Given the strong industry interest in standardization and consumer demands for a consistent product, most herbal supplements (including kava) include recommended dosage information. Unfortunately, most supplements lack any direct information on the intended uses and consequences of ingestion (owing to FDA regulatory imposition of restrictions).[129] The control of consciousness is often a commercial enterprise involving such disparate interests as indigenous practices (and local knowledge) and international health standards or the desire to experiment with individual health (i.e., nontraditional medical practices).

V. A PRE-REFORM PROPOSAL: MAKING ROOM FOR THE CULTURAL CONTROL OF DIETARY SUPPLEMENTS IN COMPLIMENTARY AND ALTERNATIVE MEDICINE

In the complex adaptive system of human interaction that seeks to control consciousness—on either an individual or a societal level—the inevitable exchange and cross-fertilization of law, myth, and tradition produces interesting syntheses. Whereas law acts normally as the cultureless positivism of a society at large, the myth and tradition of particular societies temper such unchecked relativism by serving as the natural law of individual agency. These disparate interests are weighed repeatedly as cultures and societies interact and encounter unique problems with respect to the control of consciousness.[130] Iterations of this theme of cross-fertilization[131] breed

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Herbal dietary supplements are not usually regulated as drugs and have repeatedly been found to vary in quality, sometimes being suboptimal.").

[129] Although the DSHEA allows for lessened restrictions on dietary supplements, the FDA has attempted to limit the ability of dietary supplement manufacturers to make specific health claims by adopting and applying ambiguous or undefined criteria for determining whether the claims are supported by "significant scientific agreement." Spencer, *supra* note 47, at 97.

[130] Among such problems is the potential to create internally inconsistent regulations or statutes that promote "corrosive and confusing moral hypocrisy" that reflects not the policy choices of collective agency, but rather the "true moral judgments" of individual actors in positions of power. *See* Galiber, *supra* note 27, at 840.

[131] *See generally* Batey, *supra* note 103 (discussing law as tradition, law as culture, law as myth, tradition as culture, tradition as myth, and culture as myth—all as studied through various media).

infinite, unique anthropological issues that may be studied through the converse eyes of individuals or the laws that human societies enact.

Differential access to health resources is a natural product of capitalism in the strict sense that costlier treatments will be available only to those who can afford them.[132] One lesson from the history of psychoactive substance regulation in the United States is that many statutory and agency-based regulations restrict the right of access with respect to resource-deprived groups.[133] Current U.S. policy toward controlling psychoactive substances should and must both allow for and encourage the testing of the empirical basis for regulation as well as current social perceptions of the actual effects or harms of a given substance.[134] Similarly, substance control policy should be economically efficient.[135] Laws that mimic such findings may ultimately

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[132] One area in which differential access is not as prevalent is in the management of pain in terminally or chronically ill patients. Access to the management of pain is less differential because the ability of physicians to prescribe effective medications is ubiquitously inadequate. *See* Dilcher, *supra* note 31, at 82–83, 99 (arguing that the liberalization, both federal and state, of opioids could decrease the inefficacy of pain management in the United States as such liberalization "would benefit a significant number of patients suffering from acute and chronic pain").

[133] Another lesson, of course, is that Congress seems generally unaware of or willfully blind to the scientific rationale for categorizing psychoactive substances into distinct regulatory schema. The false trichotomy in the United States between "drugs," "alcohol and tobacco," and "dietary supplements" ignores the scientific reality of how specific substances function physiologically on brain chemistry. *See, e.g.*, Vik et al., *supra* note 35, at 100, 102; *see also* Boon & Wong, *supra* note 44, at 1163 (reporting the reclassification of kava by the Canadian government from a "natural health product" to a "drug"). Furthermore, courtroom evidence procedure has sometimes removed the necessity to even identify substances as being "controlled." Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557, 590 (1998) (noting the increased occurrence of prosecution testimony identifying "controlled substances" based on nothing more than visual identification).

[134] The scientific verification of dietary supplement efficacy was one of the FDA's goals in implementing the DSHEA. Joseph A. Levitt, *Regulation of Dietary Supplements: FDA's Strategic Plan*, 57 FOOD & DRUG L.J. 1, 3 (2002).

[135] Much research and recent discussion suggest that current pharmaceutical-based, reactive allopathic approaches to healthcare encourage both economic inefficiency and federal legislation based on the lobbying interests of highly profitable pharmaceutical companies, rather than the general healthcare needs of individuals and state actors. Marcia Angell, *Over and Above: Excess in the Pharmaceutical Industry*, 171 CAN. MED. ASS'N J. 1451, 1451–52 (2004). Although the DSHEA presumably makes access to dietary supplements easier, restrictions on the ability of supplement manufacturers to make claims as to medical efficacy of supplements to "treat, prevent, cure, mitigate, or diagnose a specific disease" limits the competition of dietary supplements with traditional

have to reflect facts that differ from social mythology or our cultural traditions.[136] In the same way that osteopathic physicians have gained increased respect and legitimacy, so too will alternative "dietary supplements" that actually regulate human consciousness gain increased support.[137] By allowing these "non-traditional" medicines to remain outside of the scheme of strict FDA regulation, the risk of product safety remains on the manufacturer, not on the U.S. government. The combined effect of this minimal regulation of increasingly accepted treatments would likely be the lowering of mainstream healthcare costs.[138]

A converse argument could also be made that explicit *inclusion* of dietary supplements could lead to higher economic efficiency and broader access to CAM and healthcare, generally.[139] Through the process of

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pharmaceuticals. Stephen Bent & Richard Ko, *Commonly Used Herbal Medicines in the United States: A Review*, 116 AM. J. MED. 478, 479 (2004).

[136] For example, if drug addiction is an involuntary brain disease, our current penal code would likely prove an inappropriate means for the regulation of controlled substances. *See* Sally L. Satel, *Is Drug Addiction a Brain Disease?*, *in* DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE? 118, 140 (Philip B. Heymann & William N. Brownsberger eds., 2001) (arguing against the brain disease model) [hereinafter DRUG ADDICTION AND DRUG POLICY]; George E. Vaillant, *If Addiction Is Involuntary, How Can Punishment Help?*, *in* DRUG ADDICTION AND DRUG POLICY, *supra*, at 144, 146 (calling for more treatment-based approaches to controlling substance abuse). *See also* Laughlin, *supra* note 94 (arguing against the retributive approach to the regulation of psychotomimetic substances).

[137] It should be noted, however, that the increased acceptance of dietary supplement alternatives to traditional pharmaceuticals will come slowly and at the expense of current state regulatory and insurance schemes. *See* Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 86 (1996) ("[The] current scope of practice and [state] disciplinary schemes [for physicians] inhibit the integration of alternative and complementary medicine into modern health care, and unfairly discriminate against physicians and others who utilize holistic therapies.").

[138] *See* Michael S. Goldstein, *The Emerging Socioeconomic and Political Support for Alternative Medicine in the United States*, 583 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 46 (2002) (noting that in the last twenty years CAM "has emerged as part of the mainstream practice of medicine in the United States"). *See also* Jackson, *supra* note 26 (noting that "[a]bout 13 percent of the 38 million Americans who used alternative remedies [in 2004] did so mainly to lower their prescription bills"). The potential economic efficiency of CAM was also a primary reason for the recent decision of the government of Bangladesh to establish the "Bangladesh Institute of Medicinal and Aromatic Plants." *See Govt to Set up Institute for Herbal Plants*, UNITED NEWS OF BANGLADESH, June 15, 2005, http://www.unbnews.com/index.php?show=all&id=2&date=15-06-2005.

[139] This argument is founded on the essential free market economic construct that competition tends to lead to efficiency. Specifically, competition in the context of pharmaceutical/dietary supplement access would remain efficient without regard to the

explicitly mainstreaming CAM and integrating dietary supplements into the pharmaceutically regulated pharmacopoeia, alternatives to many common pharmaceuticals could increase options for consumers and create competition for drug companies.

Federal and local regulation has often served as an expression of collective social agency, on various levels, and has frequently been directed at controlling the impact of potentially influential *external cultural groups*, not directed at appropriately regulating the individual activity of actors within American society.[140] The Federal CSA and our national policy of a "war" on selected "controlled substances" is, in many ways, the political and historical embodiment of collective Judeo-Christian ideology and functionally ignores the scientific reality of psychoactive substances. Recognition of this cultural bias is a key to enacting legislation and regulations that will look past cultural preconceptions and build sound public policy from both positive law and normative shared understandings.

VI. CONCLUSION

Whether a manifestation of law, myth, or tradition, the regulation of consciousness is an inevitable function of organized society. The interrelationships between law, myth, and tradition in historic, modern, and cross-cultural perspectives demonstrate the wide variety of approaches to control, from strict classifications of "controlled substances" to flexible intra-cultural pressures at the level of individual agency. The unique development of any government's attempts to regulate consciousness must be understood in a historical perspective, but also must account for the current needs of both government (i.e., collective agency) and individuals (i.e., personal autonomy).

In the United States, multiple stimuli, from international deregulation of certain psychoactives to the quickly syncretizing practices of traditional allopathic medicine and CAM, are already imposing the need to reevaluate federal schemes of classification. A part of this reevaluation should include a reevaluation of the empirical justifications for classification of substances on the current Schedules under the CSA. Furthermore, given a history of misclassification and paternalism with respect to both CAM and psychoactive substances, in particular, the current U.S. policy of relaxed regulation of nutritional supplements should be continued so as to allow for the competitive application of CAM to the current crisis in the American health care system.

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allocation of product liability. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5–7 (1960) (without transaction costs, the assignment of liability does not affect allocation of resources, and that allocation remains efficient).

[140] *See* discussion in Part II.B, *supra*.