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RELIGION: THE PSYCHEDELIC PERSPECTIVE: THE FREEDOM OF RELIGION DEFENSE

Mark R. Brown

The first amendment to the United States Constitution specifically provides: "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof: . . . "[1] The words following the comma in the quoted passage have come to be known as the "free exercise clause," and have taken on a very important role in constitutional law. Originally, the free exercise clause was intended to secure religious autonomy by placing matters of religion beyond the realm of the federal government.[2] Later, the free exercise clause was applied as a limitation on the states as well.[3] Today, the free exercise clause has taken on added significance because it has become the protector of individuals' religious beliefs and practices.

The free exercise clause has taken an active role in prosecutions for the use or possession of psychedelic drugs.[4] There are several religious groups (and many individuals) who profess a belief in one psychedelic drug or another.[5] Several religious sects believe that a given psychedelic drug is a sacrament in their religion, akin to the eucharist in the Catholic faith. Other religious groups claim that the drug or drugs simply help them to get in touch with their god. Finally, at least one religious group worships the psychedelic drug itself as actually being a part of its god. No matter what kind of belief is expressed in the drug, by asserting such belief those charged with crimes for possession or use of the drug have attempted to shield themselves under the free exercise clause. With few exceptions, this defense has proven unsuccessful.

1. U.S. Const. amend. I.
2. L. Tribe, American Constitutional Law § 14-1 (1978).
3. Cantwell v. Connecticut, 310 U.S. 296 (1940) (Supreme Court incorporated the first amendment into the fourteenth amendment, thus making it applicable to the states).
4. Psychedelic substances include LSD, DMT, DET, marijuana, peyote, psilocybin, psilocin, mescaline, and their salts, isomers, esters, and analogs. Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979).
5. The various religious groups include: the Native American Church; the Neo-American Church; the Universal Life Church; the Holy American Church; the Aquarian Brotherhood Church; the Church of the Missionaries of the New Truth; the Moslems; the Church of the Awakening; Tantric Buddhism; Hinduism; and the Ethiopian Zion Coptic Church. These religious groups are discussed throughout the text of this article.

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The drugs most often involved in this kind of case are marijuana, LSD, and peyote. It is important to note the nature and effect of psychedelic drugs as compared to narcotics, poisons, and stimulants.[6] Psychedelic drugs are distinguishable from the others in that there is arguably no harmful effect *to the user*, which lessens any governmental interest in regulating the use of such drugs.[7] Where the drug is of a type that is harmful to the user himself, the governmental interest in regulation is much stronger.[8] With the onslaught of governmental regulation (state as well as federal),[9] inevitably more and more cases will arise involving criminal charges for drug use or possession, along with the accompanying religious claims.

I. *Constitutional Standards*

The Supreme Court of the United States has never addressed a case dealing with both freedom of religion and the use of controlled or dangerous drugs. However, the Supreme Court has handed down several important decisions concerning religious freedom. An analysis of these decisions is necessary to understand how other courts have addressed the issue. The Court's interpretation of the free exercise clause has changed over the years, and for this reason a historical approach is helpful.

Development of Constitutional Standards

One of the earliest and most important decisions concerning the free exercise of religion was *Reynolds v. United States*.[10] The Utah Territory had passed a law making polygamy a criminal offense.[11] The defendant was charged with violating the statute and

6. *See* K. JONES, L. SHAINBURG & C. BYER, DRUGS AND ALCOHOL 21-65 (1969).

7. The argument persists that the user himself is dangerous *to others*, which might justify government regulation. *See* Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *app. dismissed*, 449 U.S. 803, *reh'g denied*, 449 U.S. 1004 (1980). *Compare* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

8. The scope of this article is limited solely to psychedelic drugs. For more information concerning other dangerous drugs, *see* Comment, *Brave New World Revisited: Fifteen Years of Chemical Sacraments*, 1980 WIS. L. REV. 879 n.3.

9. Every state has enacted some form of controlled substances act that regulates psychedelic drugs in some way. The federal government regulates all psychedelic drugs through the Controlled Substances Act, 21 U.S.C. §§ 812, 841-49 (1976).

10. 98 U.S. 145 (1878). Note that this case originated in the Utah Territory and therefore the federal courts had jurisdiction and the first amendment to the United States Constitution was applicable. The free exercise clause at this point in time was not a restriction upon the states. See note 3 *supra*.

11. *Id.* at 146.

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asserted as one of his defenses that enforcement of the statute denied the free exercise of his religion.[12] The defendant was a practicing Mormon, and one of the accepted doctrines of the Mormon Church at that time was the duty to practice polygamy.[13] The defendant claimed that this was not simply encouraged, rather it was *demanded* (where circumstances permitted) and the penalty for failure to so engage was eternal damnation.[14] The Court was not impressed with this argument and, after examining the history of antipolygamy laws, decided that the one under consideration was valid. The Court drew a distinction between religious *beliefs* and religious *practices*, which was to be the basis for several opinions in the future: "Congress was deprived of all legislative power over mere opinion, but was left free to reach *actions* which were in violation of social duties or subversive of good order."[15] The Court in *Reynolds* effectively denied *any* religious freedom as it related to actions, reserving religious freedom for beliefs only.

The *Reynolds* decision was subsequently reinforced in another polygamy case, *Davis v. Beason*.[16] This case involved a statute enacted in Idaho Territory that prohibited a bigamist or a polygamist from voting or holding office. The statute was attacked as being violative of the free exercise clause.[17] The Court rejected this argument, stating: "It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of *acts* inimical to the peace, good order, and morals of society."[18] The Court further stated that "[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . . ."[19] Therefore, as the first amendment was interpreted at the turn of the century, there was no real limitation placed upon Congress, and religious freedom posed no defense to any type of criminal prosecution.

Cantwell v. Connecticut marked a turning point for the Supreme Court and its views toward the free exercise clause.[20] In

12. *Id.* at 161.
13. *Id.*
14. *Id.*
15. *Id.* at 164 (emphasis added).
16. 133 U.S. 333 (1890).
17. The defendant in this case was convicted of conspiring to unlawfully obstruct the due administration of the law. The defendant allegedly had encouraged polygamists and bigamists to register to vote.
18. *Id.* at 342 (emphasis added).
19. *Id.* at 342-43.
20. 310 U.S. 296 (1940).

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this case, a Jehovah's Witness (Cantwell) and his sons were soliciting religious contributions without a state certificate authorizing such activity. The Cantwells solicited in a predominantly Catholic neighborhood, going from house to house, playing an anti-Catholic recording for anyone who consented to listen.[21] Cantwell and his sons were charged with breach of the peace and soliciting without a certificate and were subsequently convicted. On appeal to the Supreme Court, the Cantwells argued that the convictions violated their first amendment rights. The Supreme Court agreed, finding the first amendment applicable to the states through the fourteenth amendment.[22] The Court then proceeded to state that to condition religious solicitation "upon a license, the grant of which rests in . . . determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. . . ."[23] The Court found the state had less drastic means available to prevent fraud and preserve peace, safety, and order, and to achieve these ends there should be "a statute narrowly drawn to define and punish specific conduct. . . ."[24] The Court obviously had deviated from the position taken in *Reynolds* and *Davis* and recognized that the free exercise clause did act to limit the government (both state and federal) in its regulation of *actions* as well as beliefs.[25]

The Supreme Court retreated somewhat from its position taken in *Cantwell* when it later handed down its decision in *Braunfeld v. Brown*.[26] In this case the Court decided that Sunday closing laws did not unduly interfere with an Orthodox Jew's freedom of religion.[27] Two years later, however, the Court decided *Sherbert v. Verner*,[28] and the position taken in *Cantwell* was immensely strengthened.

21. *Id.* at 301.

22. *Id.* at 303.

23. *Id.* at 307.

24. *Id.* at 311. For a further analysis of *Cantwell*, see TRIBE, *supra* note 2, at § 14-10.

25. For other solicitation cases addressed by the Supreme Court, *see* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. Town of Irvington, 308 U.S. 147 (1939).

26. 366 U.S. 599 (1961).

27. Perhaps the Court was attempting to achieve consistency with its prior opinion in McGowan v. Maryland, 366 U.S. 420 (1961). In that case the Court found that Sunday closing laws do not violate the establishment clause of the first amendment. However, such a result does not necessarily follow since the free exercise clause and the establishment clause are separate and distinct limitations placed upon the government.

28. 374 U.S. 398 (1963).

In *Sherbert* a member of the Seventh-Day Adventist Church (Sherbert) was discharged for refusing to work on Saturday, her religion's day of rest.[29] Since she would not work on Saturday she was unable to find employment and she filed for compensation benefits under the South Carolina Unemployment Compensation Act. These benefits were subsequently denied because she had refused offered employment "without good cause."[30] The Supreme Court found that this denial of benefits infringed upon Sherbert's free exercise of religion. In reaching this conclusion, the Court laid down a two-pronged test: for the statute to withstand constitutional challenge there must either be no infringement on religion *or* there must be a compelling state interest to justify the burden placed on religion.[31] In *Sherbert* the Court found that there was a burden on religion, with no compelling state interest to justify it.[32] For this reason the statute as applied was unconstitutional. The importance of this case lies in the fact that it marks the first time the Supreme Court expressly applied the highest level of scrutiny to a case involving one's free exercise of religion. This level of scrutiny has persisted and is still the recognized standard today.

The most recent decisions dealing with the free exercise of religion have applied basically the same test used in *Sherbert*, though using slightly different language. In *Wisconsin v. Yoder*,[33] the Court was faced with the issue of whether a compulsory school attendance law infringed on free exercise of religion by the members of the Old Order Amish. The Court answered this query in the affirmative, applying a strict scrutiny analysis. The compulsory attendance law in that case required all children to attend school until reaching the age of sixteen.[34] The Amish wished only to send their children to school through the eighth grade and then teach them the Amish ways of life outside the classroom from then on. The Amish claimed that sending their children to school

29. *Id.* at 399-400.
30. *Id.* at 401.
31. *Id.* at 403.
32. The state has the burden of showing a compelling interest exists and in *Sherbert* it failed to sustain this burden. The state in *Sherbert* attempted to justify its denial of benefits on the ground that there would be a possibility of "spurious" claims diluting the fund and disrupting work schedules. The Court, however, found that the state had the burden of proving no alternative forms of regulation would combat these abuses without infringing on first amendment rights. This the state did not do. *Id.* at 407.
33. 406 U.S. 205 (1972).
34. *Id.* at 207.

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beyond the eighth grade would unduly infringe on their religious practices. In finding that the compulsory attendance law was unconstitutional as applied to the Amish, the Court once again relied on a two-pronged standard: "[I]t must appear either that the state does not deny the free exercise of religious belief by its requirement, or that there is a state interest of *sufficient magnitude* to override the interest claiming protection under the Free Exercise Clause."[35] Although the Court used the phrase "sufficient magnitude" rather than the word "compelling," it clarified itself by stating that "only those interests of the *highest order* and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'[36] As was the conclusion in *Sherbert*, the Court found that there was an infringement on religion that was not justified by any compelling state interest.[37]

It is important to note the significance of the Supreme Court's holding in *Sherbert* and subsequent reinforcement in *Yoder*. Not only did the Court finally apply the strictest level of scrutiny to free exercise claims, but in doing so it also effectively rejected the reasoning used in both *Reynolds* and *Davis*. The Court in *Sherbert* recognized the *result* in *Reynolds* (i.e., that the practice of polygamy can be regulated by the government even though a religious tenet of the Mormon Church), but found this result to be valid on different grounds than those actually applied in *Reynolds*. In *Sherbert* the Court distinguished the finding in *Reynolds* on the ground that polygamy "invariably posed some *substantial threat* to public safety, peace or order."[38] Therefore, the Court was actually applying a strict scrutiny test to the facts presented in *Reynolds*, and achieved the same result outlined by the Court almost ninety years before. However, in *Reynolds* the Court applied a belief-action distinction to justify its result,[39] and it was this *reasoning* that was rejected by the Court in *Sherbert*.[40]

35. *Id.* at 214 (emphasis added).

36. *Id.* at 215 (emphasis added).

37. The *Yoder* standard—that the state have "interests of the highest order"—has recently been applied by the Supreme Court in McDaniel v. Paty, 435 U.S. 618, 628 (1978). In that case the Court invalidated a state statute banning ministers and priests from serving as delegates to a state constitutional convention.

38. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

39. See discussion preceding note 15, *supra*.

40. Several authorities have recognized that the reasoning expressed in *Reynolds* is no longer sound. Professor Laurence Tribe has expressed his belief that in the wake of *Sherbert*, *Reynolds* is one "of the most obvious candidates for review. . . ." TRIBE, *supra* note 2, § 14-10 at 853. Tribe's reasoning is that in light of *Sherbert* the belief-action distinction can no longer be used to justify a burden placed on religion. Rather, the

Requirement of Religion

As established in the foregoing pages, part of the test now used by the Supreme Court in analyzing freedom of religion cases requires some type of burden placed on religion.[41] This prong of the test actually assumes that what is being burdened is in fact a "religion." It is not enough to allege, however, that one's beliefs are "religious"; the court must be convinced of this fact before it need even apply the test established by the Supreme Court.[42] In order to better understand what is considered "religion" for the purpose of this analysis, it is important to review what the Supreme Court has said on the issue in the past.[43]

In *Davis v. Beason*,[44] the Supreme Court stated: "[T]he term religion has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[45] This view has lost favor with the Court, and in *United States v. Ballard*[46] the Supreme Court decided that religion could not be defined so simply:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious ex-

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"question, after *Sherbert*, must be whether the monogamy-promotion goal is sufficiently crucial to the goal's attainment, to warrant the resulting burden on religious conscience." *Id.* at 854.

J. Morris Clark also expressed his belief that the dichotomy presented in *Reynolds* (i.e., distinguishing between beliefs and actions) was rejected by the Court in *Sherbert*. Clark, *Guidelines For the Free Exercise Clause*, 83 HARV. L. REV. 327, 328 (1969). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1406-07 (1967), where it was recognized that the belief-action distinction used in *Reynolds* has been fully discredited; Finer, *Psychedelics and Religious Freedom*, 19 HAST. L.J. 667 (1968), where *Reynolds* was distinguished from *Sherbert* on the grounds that in *Reynolds* there was a substantial threat to public safety, peace, or order.

Note also that because the *Reynolds* reasoning has been discredited, so then has the reasoning used in *Davis* because *Davis* relied almost exclusively on *Reynolds*.

41. See discussion preceding notes 31 and 35, *supra*.

42. "Such a showing is necessary if the concept of required accommodation is not to become a limitless excuse for avoiding all unwanted legal obligation." TRIBE, *supra* note 2, § 14-11 at 859. If one did not have to prove that his beliefs constituted a "religion," one could simply claim that he acted in a given way due to religious beliefs and thus avail himself of a possible freedom of religion defense.

43. For an extended discussion of what constitutes religion, *see* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

44. 133 U.S. 333 (1890), discussed *supra*, text accompanying note 16.

45. *Id.* at 342.

46. 322 U.S. 78 (1944).

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periences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[47]

In making this statement the Court recognized that there is no certain definition for what "religion" is, and contrary to the view expressed in *Davis*, it found that it need not be of a conventional nature.

In *Torcaso v. Watkins*[48] the Court once and for all laid to rest any notion that religion consists of a belief in a Supreme Being. In that case the Maryland constitution required a prospective public officer to declare a belief in the existence of "God." The Court found that the government cannot force one to profess such a belief, for such a requirement would violate the establishment clause.[49] The Court also explicitly identified as religious beliefs the following, none of which profess a belief in a Supreme Being in the conventional sense: Buddhism, Taoism, ethical culture, and secular humanism.[50] In two later cases the Supreme Court reemphasized its finding that religion need not include a belief in a Supreme Being. *United States v. Seeger*[51] and *Welsh v. United States*[52] both involved the interpretation of a provision contained in the Universal Military Training and Service Act of 1948. This provision required a belief "in a relation to a Supreme Being" before one could qualify for conscientious objector status. In *Seeger* the Court construed this language so as not to discriminate between atheists and followers of religions. The Court found that a distinction between the two would lead to obvious constitutional difficulties. *Welsh* later construed the same provision and found that purely ethical and moral considerations are religious in nature. The result of these two decisions not only reemphasizes the fact that religion need not include a belief in a Supreme Being, but also blurs the distinction, if any, between

47. *Id.* at 86-87. *Ballard* was a case involving a mail fraud prosecution. The defendants had solicited money on the representation that they were divine messengers. The Court found that whether the defendants' beliefs were true or not could not be submitted to the jury. All that could be submitted for determination was their sincerity in those beliefs.

48. 367 U.S. 488 (1961).

49. *Id.* at 495.

50. *Id.* at 495 n.11.

51. 380 U.S. 163 (1965).

52. 398 U.S. 333 (1970).

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religion and morality.[53] In any event, the important point that results from the foregoing Supreme Court decisions is that no concrete definition exists of the term "religion." Basically, all that has been delineated is that religion does not have to include a belief in a Supreme Being.[54]

Requirements of Sincerity and Centrality

Closely tied with the question of whether a religion does in fact exist are the questions of whether one sincerely follows the professed beliefs and whether the tenets actually burdened are central to the religious belief. In *Ballard*[55] the Court held that the truth of one's religious beliefs could not be questioned; however, the *sincerity* of the defendant in following that belief could be submitted for determination by the trier of fact. Therefore, while the court cannot decide whether what the defendant believes is true, it can decide the factual question of whether the defendant is sincere in his beliefs.

Centrality on the other hand is not so easily disposed of. Whether a tenet is *central* to one's religious beliefs seems to be closely tied in with the balancing test applied by the Court in *Sherbert*.[56] Under that test, the state's compelling interests, if any, must be balanced against the burdens imposed upon the religion. The more central the burdened belief is to the religion, the more compelling it will be to deny the interest of the state. The less central the belief is to the religion, the easier it becomes to justify the burden through some state interests. Thus, in *Sherbert* the Court found the belief in one's Sabbath not to be overcome by the state's interests in preventing fraudulent claims and enhancing administrative convenience. Also, in *Yoder*,[57] the Court found the Amish interest in life-style coupled with religion to be sufficient to overcome the state's interest in compulsory education. Thus, in deciding whether a belief is central to a valid religion, the Court actually seems to be engaging in the balancing test it prescribed in *Sherbert*.[58]

53. *See* Note, *supra* note 43, at 1065.

54. At least one authority has set forth the proposition that whatever is "arguably religious" should be considered as such and therefore satisfies the religion requirement. TRIBE, *supra* note 2, § 14-6 at 828.

55. United States v. Ballard, 322 U.S. 78 (1944).

56. Sherbert v. Verner, 374 U.S. 398 (1963).

57. Wisconsin v. Yoder, 406 U.S. 250 (1972).

58. For a further analysis of "sincerity" and "centrality," *see* TRIBE, *supra* note 2, § 14-11; Comment, *supra* note 8, at 925-31.

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In psychedelic drug cases, the centrality issue has taken on added significance. Courts have been reluctant to find a belief in drug use to be central to a religious belief and therefore have rejected free exercise claims. However, throughout the cases discussed, the question that arises is whether the court is applying centrality in the balancing test used, or whether the court is simply using centrality as a reason to reject the defense outright. The latter seems to be the prevailing view.[59]

II. *The Psychedelic Drug Cases*

With the basic constitutional standards and requirements established by the Supreme Court addressed, how have they been applied by courts faced with a freedom of religion defense in a psychedelic drug case? Most of the cases involving this defense have come about subsequent to *Sherbert*, with the exception of one, *State v. Big Sheep*.[60] The Montana Supreme Court was faced with the issue of whether a statute making it illegal to sell, furnish, or give away peyote was violative of the Montana constitution as applied to a Crow Indian.[61] The defendant in that case was a member of the Native American Church and alleged that as a member of this church he used peyote for sacramental purposes.[62] After dealing with a fundamental jurisdictional ques-

59. The connection between centrality and the freedom of religion defense in psychedelic drug prosecutions is examined throughout this article on a case-by-case basis. It should be noted that several of the cases never address centrality at all due to their ruling that as a matter of law religion is no defense. Several other cases fail to address centrality because they have disposed of the issue by other means. For an extended discussion of centrality as applied in various free exercise of religion cases, see Comment, *supra* note 8, at 925-28.

60. 75 Mont. 219, 243 P. 1067 (1926).

61. The Montana constitution provided:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify *practices inconsistent with the good order, peace, or safety of the state*, or opposed to the civil authority thereof, or of the United States.

MONT. CONST. art. 3, § 4 (emphasis added). It is easy to see why the court would not recognize this defense since it is basically excluded from this provision.

62. 75 Mont. at 221, 243 P. at 1068. The religious belief in peyote was founded on chapter 14 of Romans, chapter 53 of Isaiah, second verse, and chapter 2 of Revelations, verse 17 of the King James' Version of the *Holy Bible*. *Id*. The court responded to this contention by stating:

> We do not find peyote or any life herb mentioned by Isaiah, or by Saint Paul in his

tion,[63] the court turned to the defendant's freedom of religion claim. The court rejected this defense and ruled as a matter of law that under the Montana constitution no freedom of religion defense existed.[64] The court stated: "[W]hile laws cannot interfere with mere religious beliefs and opinions, they may inhibit acts or practices which tend toward the subversion of the civil government, or which are made criminal by the law of the land."[65] Even though the court relied on state constitutional grounds to reject the freedom of religion defense, its holding was consistent with the federal constitutional standard applied in the polygamy cases.[66] Questions arise, however, as to whether courts in the years following *Sherbert* have applied the appropriate standard demanded by that case and whether they have applied that standard correctly.

California Sets the Stage

In 1964 the California Supreme Court handed down an interesting decision. In *People v. Woody*[67] the defendants were members of the Native American Church and had been arrested for possessing peyote. The defendants were subsequently convicted of this offense even though it was stipulated at trial that at the time of their arrest the defendants were engaging in a religious ceremony.[68] On appeal the defendants continued to assert that the statute as applied violated their right to the free exercise of

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> epistle to the Romans, nor does it seem from the language employed that Saint John the Divine had any such in mind. It is true that Isaiah speaks of a root out of a dry ground. There is a slight resemblance here, as peyote is said to be a product of the cactus plant. . . . These excellent precepts are worthy of much greater observation than they receive; but, if carried to the length defendant insists upon, the use of opium, cocaine, and even "moonshine" might be justified under the guise of religious observance.

Id. at 239, 243 P. at 1073.

63. The defendant had been arrested on Indian land, and thus the court was forced to examine jurisdictional precedent extensively. Finally, the court decided to remand the case to the trial court for the sole purpose of answering whether the defendant was arrested on "emancipated" land. *Id.* at 236, 243 P. at 1072.

64. Note that at this point in time the first amendment to the United States Constitution had not been made applicable to the states. This did not take place until the Supreme Court so applied it in Cantwell v. Connecticut, 310 U.S. 296 (1940).

65. 75 Mont. at 240, 243 P. at 1073.

66. The court cited *Davis* favorably as standing for the distinction made between beliefs and actions. *Id.* at 239, 243 P. at 1073.

67. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), *rev'g* 35 Cal. Rptr. 708 (1963).

68. 61 Cal. 2d at 717, 394 P.2d at 815, 40 Cal. Rptr. at 70.

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their religion. In analyzing this contention, the California Supreme Court first recognized the standard set forth in *Sherbert*, stating that "the Court in Sherbert thus utilized a two-fold analysis which calls for a determination of, first, whether the application of the statute imposes any burden upon the free exercise of the defendants' religion, and second, if it does, whether some compelling state interest justifies the infringement."[69]

In applying this test to the facts at hand, the court proceeded to study the Native American Church's religion to see if it was burdened by the enforcement of the statute. The court concluded that it was, finding the "central event" to be the use of peyote at the religious meeting, and the meeting itself to be the "cornerstone" of the religion.[70] The court also relied on the long history of peyotism and the belief of church members that it was sacrilegious to use peyote for any purpose other than for sacramental use.[71] Since peyote itself was the object of worship and so important to the religion,[72] the court concluded that "[t]o forbid the use of peyote is to remove the theological heart of Peyotism."[73] Once the court had come to this conclusion, the burden was on the state to demonstrate some compelling interest to justify its intrusion on the religious belief. The state asserted that peyote had deleterious effects on the Indian community and that an exemption would make enforcement of the laws extremely difficult. The

69. *Id.* at 719, 394 P.2d at 816, 40 Cal. Rptr. at 72.

70. *Id.* at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

71. *Id.* The articles of incorporation of the Native American Church of the State of California provide in part:

> That we as a people place explicit faith and hope and belief in the Almighty God and declare full, competent, and everlasting faith in our church things which and by we worship God. That we further pledge ourselves to work for unity with the sacramental use of peyote and its religious use.

Id. at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.

72. The court found that "[a]lthough peyote serves as a sacramental symbol similar to bread and wine in certain Christian Churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

73. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. Note that the court was never faced on appeal with whether this was a religion since it was stipulated at trial that the defendants were engaged in a religious meeting. What the court had determined at this stage of the appeal was that the belief infringed upon was actually a central part of the religion. The court also determined that the defendants were sincere in their belief and stated that "the court makes a factual examination of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendants' adherence to it." *Id.* at 726, 394 P.2d at 821, 40 Cal. Rptr. at 77.

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state further argued that the Indians might try to use peyote in place of medical care, and that the drug might lead them to the use of more harmful drugs. Finally, it was claimed that there was a threat of indoctrination of small children. The court summarily rejected the arguments concerning indoctrination of children, the supplanting of medical care, and the possible use of more harmful drugs as not being supported by the record. The court also found that peyote has no deleterious effects. Finally, the court analogized the "difficulty of enforcement" argument to a similar argument rejected in *Sherbert*.[74] For the state to succeed under such an argument, the court found that it must be able to demonstrate that *no* alternative forms of regulation would combat such abuses without infringing on first amendment rights.[75] The state failed to demonstrate a lack of feasible options and, therefore, the defendants' convictions were reversed.[76]

The California Supreme Court applied the standard established in *Sherbert* and achieved a legitimate result.[77] The result should not have been too surprising given the context in which it arose and the test that was applied. The Native American Church was an established church, first incorporated in Oklahoma in 1918, and was now incorporated in California. Peyotism had roots dating back to 1560 A.D., and the Indians who used peyote were responsible in its use. All of these factors led to the result achieved by the court.

California Revisited

Immediately following *Woody* the California Supreme Court handed down another opinion that followed the same lines of reasoning previously discussed. In *In re Grady*[78] the petitioner

74. *Id.* at 719, 394 P.2d at 818, 40 Cal. Rptr. at 72.

75. *Id.* at 723, 394 P.2d at 819, 40 Cal. Rptr. at 75.

76. For some reason the court felt compelled to distinguish *Reynolds* from the case at hand. The court found that in *Reynolds* the burdened belief (polygamy) was not essential to the practice of the Mormon religion, and also that the degree of danger to state interests in that case far exceeded any danger in the present situation. Since the court had to apply the *Sherbert* analysis, there is no real reason why the court should have bothered distinguishing *Reynolds*, which at this point in time (though never expressly overruled) was not good law. See *supra* note 40.

The court also distinguished *Braunfeld* as being a case where there was only an "incidental" infringement on religion and a strong state interest. *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76.

77. *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. 76.

78. 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

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had been arrested and charged with possession of peyote. The petitioner pled guilty at trial, but subsequently applied for a writ of habeas corpus to achieve his release. On petition to the California Supreme Court, the petitioner claimed that he used peyote for religious purposes and therefore could not be prosecuted. The court granted the writ and ordered a new trial for the reason that "[a] factual question remains as to whether defendant actually engaged in good faith in the practice of a religion."[79] The court recognized that in light of *Woody*, freedom of religion was a valid defense, even though petitioner did not claim to be a member of the Native American Church.[80] If on retrial, the petitioner could show that he engaged in the good faith practice of a bona fide religion, the court ordered that he could not be prosecuted. This result is somewhat inconsistent with the analysis applied in *Woody*. In *Grady* the court effectively abandoned the second part of the *Sherbert* analysis, thus not allowing the state an opportunity to prove its compelling interest. The error in this approach is that in cases not involving the Native American Church the factors used to overcome the state's interests may not exist. The *Grady* court assumed as a matter of law that where peyote was being used there could be no compelling state interest. The court interpreted *Woody* to mean that "the state may not prohibit the use of peyote in connection with bona fide practice of a religious belief."[81] This was obviously a misinterpretation of *Woody* because the court in *Woody* had laid great emphasis on the characteristics of the Native American Church in comparison with the state's interests. Other religions and beliefs would have to be analyzed in a similar fashion as they presented themselves to the courts.

The California Court of Appeals began the process of clarifying the holdings in *Woody* and *Grady*. In *People v. Mitchell*[82] the defendant had been convicted of possession of marijuana and

79. *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.

80. Petitioner claimed to be a "peyote preacher" and a "way shower" acting as the spiritual leader for a certain group of individuals. *Id.*

81. *Id.* The court obviously misinterpreted what it decided in *Woody*. The only way the court could have logically achieved the result reached in *Grady* would be if the petitioner himself claimed to be a member of the Native American Church. Then the compelling state interests analysis discussed in *Woody* would have been applicable. Absent this fact it would seem that the court once again would have to compare the compelling interests with the bona fides of the petitioner's particular religion. Perhaps petitioner's belief was to administer peyote to children, etc.; then the state's interests in preventing this might justify prosecution.

82. 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966).

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planting and cultivating marijuana. At trial, the defendant testified that he used marijuana pursuant to a religious belief and quoted various passages from the Bible as authority for its use.[83] The trial court, however, refused to instruct the jury concerning these religious beliefs, and the defendant was subsequently convicted. On appeal, the court found that the trial judge was correct in refusing to give the requested jury instructions. The court distinguished *Woody* on two grounds; first, the defendant in *Woody* was a member of an organized religion, and second, peyote was central to the practice of religion in that case.[84] The court also found that the evidence presented in *Woody* "showed that such use of peyote, under the safeguards prescribed by the church, had no antisocial consequences and that the danger of misuse of the substance, under improper claim of religious immunity was minimal."[85] Finally, the court stated that the defendant failed to show that he used marijuana for religious purposes; rather, "he was expressing only his own personal philosophy and way of life."[86] Thus the court decided as a matter of law that there was no religion being burdened in the case.

In *People v. Collins*[87] the California Court of Appeals reached the same result, but through slightly different reasoning. Here, the defendant had stipulated before the trial judge that he "subjectively, holds a belief in marijuana, with respect to its being used for religious purposes, honestly and in good faith. . . ."[88] Defendant was subsequently convicted of possessing marijuana, and on appeal his conviction was sustained. The court found that "defendant does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication."[89] For this reason, the court found that marijuana was not "indispensable" to his faith.[90] However, the court did not use this reasoning to conclude that no religion existed, rather, the court proceeded to find that a compelling state interest did exist,[91] which justified the intrusion upon the religion.

83. *Id.* at 179, 52 Cal. Rptr. at 886.
84. *Id.* at 182, 52 Cal. Rptr. at 888.
85. *Id.*
86. *Id.*
87. 273 Cal. App. 2d 486, 78 Cal. Rptr. 151 (1969).
88. *Id.*, 78 Cal. Rptr. at 152.
89. *Id.*
90. *Id.*
91. This would seem to fit into the "centrality" theme expressed earlier. Where a belief is not central to the religion it is easier to find a compelling interest to overcome it.

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In *People v. Werber*[92] the California Court of Appeals faced facts similar to those presented in *Mitchell* and *Collins*. The defendant had been charged with possession and cultivation of marijuana, and at trial testified, along with various acquaintances and authorities, that he used marijuana for religious purposes. The trial court ruled that the defendant's use of marijuana did not constitute a religious practice, and the defendant was subsequently convicted.[93] The California Court of Appeals affirmed, finding that in the absence of evidence that marijuana is an object of worship, the state has compelling interests to prevent its use.[94] The court once again failed to decide whether there was in fact a religion, but instead simply found, upon the facts presented, that the state was justified in prohibiting the drug's use.[95]

Finally, in *People v. Mullins*[96] the defendant was charged with possession of marijuana and as a defense claimed that he used it for religious purposes. The defendant offered to prove through his own and other witnesses' testimony that he worshipped marijuana, that marijuana was exclusively a religious ritual, that marijuana constituted an integral part of his religious belief and practice, and that he used marijuana pursuant to an honestly held good faith religious belief. Defendant also claimed that he provided safeguards against the misuse of the drug. Despite this elaborate offer of proof, the trial court refused to hear the claim, ruling that the evidence did not constitute a defense.[97]

On appeal, the court recognized the two-step analysis applied in *Woody* and attempted to apply it to the present set of facts. The court found that the first step actually encompassed two separate determinations, "i.e., whether the statute imposes any burden upon the free exercise of the religion whose religious beliefs the defendant asserts he embraces *and* whether the defendant actually engaged in good faith in that religion."[98] The court found the first determination to be a question of law and the second determination to be a question of fact. If these two questions

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See *supra* text accompanying note 58.

92. 19 Cal. App. 3d 598, 97 Cal. Rptr. 150 (1971).

93. *Id.* at 607, 97 Cal. Rptr. at 156.

94. *Id.* at 608.

95. *Id.*

96. 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1975).

97. It seems clear that even under the previous California Court of Appeals decisions, if the defendant could have proven these allegations he should have at least proceeded to invoke the second stage of the analysis, i.e., shifting the burden of proof to the state to show some compelling interest.

98. *Id.* at 72, 123 Cal. Rptr. at 206-07 (emphasis added).

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were answered in the affirmative, then the second step of the *Woody* analysis had to be addressed. The second part of the analysis, whether there is a compelling state interest to justify the burden placed on religion, is then a question of law. In this case, the court found it unnecessary to reach the second part of the analysis because, as a matter of law, the defendant's offer of proof was insufficient to satisfy the first step of the *Woody* analysis.[99] Obviously, if the offer of proof made by the defendant in this case was insufficient, it will be very difficult indeed to ever make a sufficient offer of proof. It appears that if what the defendant offered to prove were actually proved, this would have been sufficient to shift the burden to the state. Therefore, the court's reasoning in foreclosing such proof is highly suspect.

Through its holdings in *Mitchell, Collins, Werber*, and *Mullins*, the California Court of Appeals effectively narrowed *Woody* to the specific set of facts found in that case. Though recognizing the analysis adopted in *Woody* and applying it in some respects, the court of appeals was able to manipulate the various parts of the analysis in order to achieve the desired result. Finally, in *Mullins*, the court effectively wiped out any freedom of religion defense advanced by an individual by finding the offer of proof made to be insufficient as a matter of law. If the offer of proof made in *Mullins* was insufficient on its face, then it would seem that no offer of proof would be enough to satisfy the first step of the *Woody* analysis, which would effectively abolish any freedom of religion defense in the psychedelic drug context, at least when brought by an individual not belonging to an organized religion.[100]

99. *Id.*, 123 Cal. Rptr. at 208.

100. In People v. Torres, 133 Cal. App. 3d 265, 277, 184 Cal. Rptr. 39, 46 (1982), the California Court of Appeals distinguished *Woody* in a case involving the defendant's possession and distribution of marijuana:

> Defendant's testimony makes it apparent that marijuana is not, as peyote was in *Woody*, such an integral part of defendant's religion that prohibition of marijuana will inhibit defendant's free exercise of religion. Furthermore, there was no evidence presented . . . indicating that defendant's church had prescribed safeguards against the dangers of misuse of marijuana.

Therefore, the court of appeals did recognize that where the drug's use forms an "integral part" of the religion, the first amendment may pose a defense to prosecution. However, the court's analysis is not quite clear. The defendant's free exercise of religion was obviously inhibited if his claims were true. Whether the use of marijuana was so "integral" a part of the religion as to result in an *unjustifiable* denial of the religion's free exercise is a question that should properly be addressed as a part of the second part of the *Sherbert* analysis, i.e., whether a compelling state interest justifies the infringement. *See infra* note 196 and accompanying text.

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Following the Lead of Woody

Very few courts have fallen in line with the decision set forth in *Woody*. The first court to do so was the Arizona Court of Appeals in *State v. Whittingham*.[101] In that case the defendants were charged with possession of peyote after being arrested during a raid on a ceremony. They were convicted of the charges and appealed on the ground that they were being denied the free exercise of their religion. On appeal, the court recognized the test set forth in *Sherbert* and applied it to the facts of the case at hand.[102] First, the court found that, as defendants were members of the Native American Church, peyote was an integral part of the defendants' worship. The court also found that absent the use of peyote the defendants could not practice their religious beliefs.[103] The burden then shifted to the state to show some compelling interest to justify the burden placed on defendants' religious beliefs. This the state failed to do and the convictions were reversed.[104] In its conclusion the court stated that:

> [I]t is a defense to . . . prosecution to show that the peyote was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals.[105]

To this date, the only other court to follow the reasoning of *Sherbert* and *Woody* has been the Oklahoma Court of Criminal Appeals. In *Whitehorn v. State*,[106] the defendant was convicted of possession of peyote. The defendant was a member of the Native American Church and claimed that at the time he possessed the peyote it was being used for religious purposes. On appeal, the court recognized that the Native American Church is an established religion with a long and continuous history. The court

101. 19 Ariz. App. 27, 504 P.2d 950 (1973), *petition denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 417 U.S. 946 (1974).

102. 19 Ariz. App. at 29, 504 P.2d at 952.

103. *Id.*

104. The court noted that had the drug been narcotic or addictive the state would have had a much stronger argument. However, because peyote is neither, the state could not show a compelling interest to justify its prohibition. *Id.* at 30, 504 P.2d at 953.

105. *Id.* at 31, 504 P.2d at 954. Compare this view with that expressed in *In re Grady*. *Grady* misinterpreted *Woody* to mean that it is a defense simply to show that peyote is being used in connection with a bona fide religious practice, without giving the state an opportunity to demonstrate any compelling interests.

106. 561 P.2d 539 (Okla. Crim. App. 1977).

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also recognized the test set forth in *Sherbert* and applied it to the facts before it. First, the court found that the question of membership in the Native American Church was to be decided by the trier of fact. Second, the court ruled that whether the facts were sufficient to prove that the defendant was engaged in a bona fide religious practice was a question of law to be determined by the court.[107] Finally, applying the last part of the *Sherbert* analysis, the court ruled that, as a matter of law, there was no compelling state interest to prevent the members of the Native American Church from possessing peyote.[108] Therefore, in the future when one is charged with possession of peyote, all that need be proved is that the person is a member of the Native American Church and that the person is engaging in a bona fide religious practice.[109]

The cases that have followed the *Sherbert* and *Woody* rationale have basically stayed very close to the same factual situation presented in *Woody*. The two cases that have expressly followed the *Sherbert/Woody* two-step analysis have both dealt with peyote and the Native American Church. No courts have yet attempted to expand this approach to include other religions and perhaps other psychedelic drugs.[110]

Rejecting the Lead

State Court Decisions

In *State v. Bullard*[111] the North Carolina Supreme Court decided that the free exercise clause in no way protects defendants who are charged with possessing drugs.[112] In that case the defen-

107. *Id.* at 547.

108. *Id.* Note that the court was concerned here with whether the drug was actually being used for religious purposes at the time of the arrest and therefore made this one of the elements to be decided by the court. In the case at bar the defendant was arrested while driving across the state and had the peyote in his possession. The court was satisfied that it was a religious practice of the Native American Church to *continually* possess peyote and ruled accordingly.

109. Compare this with how the Oklahoma courts have dealt with marijuana, see *infra* text accompanying note 124.

110. At least one state has statutorily adopted the exemption afforded the Native American Church and its use of peyote. *See* N.M. STAT. ANN. § 30-31-6 (1978). The federal government has also allowed for such an exception to the Controlled Substances Act. *See* 21 C.F.R. § 1307.31 (1982), which exempts peyote used for bona fide religious purposes by members of the Native American Church from 21 U.S.C. §§ 812, 841-849 (1976). This had led to several problems discussed in text accompanying note 179 *infra.*

111. 267 N.C. 599, 148 S.E.2d 565 (1966).

112. *Id.* at 602, 148 S.E.2d at 568.

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dant was charged with possessing marijuana and peyote. The defendant was a member of the Neo-American Church and argued that "peyote is most necessary and marijuana is most advisable" in the practice of his beliefs.[113] The court found that the free exercise clause did not protect the defendant even if he were sincere in his religious beliefs. The court relied on *Reynolds* and came to the conclusion that the free exercise clause "does not authorize [the defendant] . . . to commit acts which constitute threats to the public safety, morals, peace and order."[114] The court neither cited nor attempted to distinguish *Sherbert* and thereby left itself open to serious criticism.[115] Though *Reynolds* has never been expressly overruled, it has in fact been expressly limited,[116] and there is considerable debate as to whether it has any precedential value at all.[117] The appropriate standard that should have been applied in this case was that expressed in *Sherbert*, and since the court failed even to cite *Sherbert*, the soundness of its decision is questionable.

In *Lewellyn v. State*[118] the Oklahoma Court of Criminal Appeals applied much the same reasoning as that used in *Bullard* and is therefore subject to the same criticism. The defendant was arrested for the possession of marijuana and subsequently convicted. At trial, the defendant testified that he was a priest in the Universal Life Church and that he used marijuana as a sacrament in the church. On appeal, the court rejected the defendant's argument that the statute was unconstitutional, citing *Reynolds* for the proposition that "[t]o permit a man to excuse unlawful practices because of his religious belief would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[119] However, the court concluded by stating that the use of marijuana imposes a "substantial risk to society."[120] Whether this was a reference to the strict scrutiny analysis required by

113. *Id.*

114. *Id.* at 603, 148 S.E.2d at 568-69.

115. At least one authority has singled out this decision as being questionable: "In an unsatisfactory opinion [*State v. Bullard*] the North Carolina Supreme Court appeared to rely on the generally discredited belief-action distinction of *Reynolds*, . . ." Giannella, *supra* note 40, at 1406-07.

116. *See* Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953).

117. See *supra* note 40 and accompanying text.

118. 489 P.2d 511 (Okla. Crim. App. 1971).

119. *Id.* at 515 (citing *Reynolds*, 98 U.S. at 167).

120. 489 P.2d at 516.

Sherbert is an open question since the court failed to cite that decision. In any event, it would appear that the court here relied exclusively on *Reynolds*, which in light of *Sherbert* leaves the court's reasoning open to serious question.[121]

The Oklahoma Court of Criminal Appeals had a chance to reexamine its reasoning in *Lewellyn* in a subsequent case with similar but distinguishable facts. In *Lewellyn v. State*[122] (*Lewellyn II*), the defendant was a priest in the Holy American Church. He was convicted of unlawful delivery of marijuana to an undercover police officer.[123] The defendant asserted the free exercise clause as his defense and appealed the conviction as being unconstitutional. On appeal, the court recognized that the *Reynolds* decision had eroded and therefore decided that the appropriate standard to be applied was that expressed in *Sherbert*.[124] In the case before it, however, the court found that it was unnecessary to apply the two-stage analysis of *Sherbert* since the conviction was not for simple possession; rather, the defendant had been convicted of *selling* marijuana. Since the buyer was not even a church member, the court found it obvious that the freedom of religion defense did not apply. Though the conviction was affirmed, the court did adopt the appropriate standard laid down in *Sherbert*, and in effect corrected its previously erroneous reasoning expressed in *Lewellyn I*.[125]

At least two other courts have exhibited questionable reasoning in rejecting the freedom of religion defense in psychedelic drug prosecutions. In *Gaskin v. State*,[126] the Tennessee Supreme Court rejected the defendants' claim that their right to the free exercise of religion had been violated and stated: "The argument of the

121. Compare this decision with Whitehorn v. State, 561 P.2d 539 (Okla. 1977), discussed *supra* note 108 and accompanying text, which exempted peyote. In light of that court's application of the two-stage analysis found in *Sherbert*, the holding in *Lewellyn* would seem to have even less value.

122. 592 P.2d 538 (Okla. Crim. App. 1979).

123. *Id.* at 539.

124. *Id.* at 541.

125. Lewellyn, the defendant in both cases cited, is a persistent and interesting character. He claimed to be a priest in the Universal Life Church in the first prosecution, and in the second prosecution alleged that he was a priest in the Holy American Church.

Lewellyn was also subsequently involved in another case, L'Aquarias v. Maynard, 634 P.2d 1310 (Okla. 1981). In that case, Lewellyn (or L'Aquarias as he was then known) as an inmate brought an action to compel the prison to provide him with marijuana, a sacrament in his religion. This was rejected by the Oklahoma Supreme Court in a *very* short opinion.

126. 490 S.W.2d 521 (Tenn.), *app. dismissed*, 414 U.S. 886 (1973).

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defendants that the statute as applied to them violates their rights under the First and Fourteenth Amendments to the Constitution of the United States is without merit."[127] In that case the defendants had been convicted of manufacturing marijuana. The court relied heavily on *Reynolds* for the authority to reject their freedom of religion claim.

Similar reasoning was used in the Missouri case of *State v. Randall*,[128] where the defendant was charged with possession of marijuana, hashish, and LSD. The defendant argued that as a minister in the Aquarian Brotherhood Church, he used the drugs for purposes of meditation. The court rejected this argument and the reasoning used in *Woody*, citing instead *Davis v. Beason*[129] for the proposition that "'[I]t was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.'"[130] Neither of these courts cited or distinguished the Supreme Court's reasoning in *Sherbert*. Rather, both seemed to rely on the belief-action distinction originally set forth in *Reynolds* and later applied in *Davis*. Since this distinction has eroded (and arguably has been completely overruled by *Sherbert*),[131] the decisions are open to serious question.[132]

There have been several other courts that have recognized and applied the constitutional analysis set forth in *Sherbert* and utilized in *Woody*. These courts, however, have applied the *Sherbert* test only to reject the freedom of religion defense on one of two separate grounds: either that no religious beliefs were being burdened, or that a compelling state interest existed to justify the burden placed upon religion. In the New York case of *People v. Crawford*,[133] the defendant had been arrested for possession of marijuana and LSD. The defendant was a parishioner and minister of the Church of the Missionaries of the New Truth, whose

127. 490 S.W.2d at 524.

128. 540 S.W.2d 156 (Mo. Ct. App. 1976).

129. 133 U.S. 333 (1890).

130. 540 S.W.2d at 160 (citing *Davis*, 133 U.S. at 342-43).

131. See *supra* note 40 and accompanying text.

132. The court in *Randall* did recognize that there may arise circumstances where freedom of religion *could* be a defense. The court stated that "[defendant] has not shown in any manner that he could bring himself within the *tightly drawn confines* of the religious exemption for a violation of the law of this state." 540 S.W.2d at 160 (emphasis added).

133. 69 Misc. 2d 500, 328 N.Y.S.2d 747 (Crim. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (Sup. Ct. 1973).

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members used marijuana and LSD to achieve a religious experience and also to "find God."[134] The defendant was convicted and on appeal relied on the holding in *Woody* to support his defense. Assuming *Woody* to be persuasive precedent, the court rejected the defendant's claims on the ground that he had failed to prove that the state had inhibited any part of his religious belief.[135] The court found that the defendant could exercise his religious beliefs in other ways and therefore his defense failed.[136]

A similar approach was taken in New Mexico in *State v. Brashear*,[137] where the court recognized the two-stage analysis applied in *Sherbert*, but found it unnecessary to apply the second stage because the defendant was not engaging in the practice of a religion. Therefore the conviction for possession of marijuana was affirmed. In deciding that there was no religion involved, the court relied heavily on the Supreme Court's decision in *Yoder*. The court found that *Yoder* suggested two considerations: first, whether the belief is of an organized group, and second, whether it is a traditional belief.[138] In the case then before it, the court found the belief to be neither; rather, it was simply a "personal" belief.[139] The court also stated that even if the defendant had been acting pursuant to a religious belief, the burden on his religion would still have been justified since a compelling state interest did exist.[140]

In *Town v. State ex rel. Reno*,[141] the Florida Supreme Court discussed and distinguished in some detail the California Supreme Court holding in *Woody*. The state of Florida sought to enjoin members of the Ethiopian Zion Coptic Church from using marijuana on their church property. At trial the court made several

134. 69 Misc. 2d at 501, 328 N.Y.S.2d at 748.

135. *Id.* at 507, 328 N.Y.S.2d at 755.

136. *Id.* at 508, 328 N.Y.S.2d at 755. The court concluded by reserving for future determination the question of whether it should even adopt the *Woody* analysis should the proper facts present themselves. *Id.*

137. 92 N.M. 622, 593 P.2d 63 (1979).

138. *Id.*, 593 P.2d at 67.

139. *Id.*, 593 P.2d at 68. The court found that whether a belief is religious is a question of law for the court. *Id.*, 593 P.2d at 69. If the belief were found to be religious, the court then had to decide as a matter of law whether it was in fact burdened by the statute. Only then would the issue of a compelling state interest be addressed. *Id.*

140. *Id.*, 593 P.2d at 71. The court found that the final question, to be answered only if all the aforementioned questions were satisfied, consisted of defendant's sincerity. This was to be left to the trier of fact.

141. 377 So. 2d 648 (Fla. 1979), *app. dismissed*, 449 U.S. 803, *reh'g denied*, 449 U.S. 1004 (1980).

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findings of fact, including: (1) the Ethiopian Zion Coptic Church is a religion; (2) the use of cannabis (marijuana) is an essential portion of the religious practice; (3) cannabis, though freely used, is not itself an object of worship; (4) members of the church believe that cannabis is the mystical body and blood of Jesus; and (5) through cannabis, members purportedly find a spirit of love, unity, and justice, which brings them close to their god.[142] Despite these findings the court issued the injunction and the church appealed. On appeal, the Florida Supreme Court first recognized that to justify infringement upon a particular religious practice the state must demonstrate a compelling interest.[143] Since the trial court had already determined that there was a religious belief being infringed upon, it was necessary to decide only if a compelling interest justified the infringement. The court found such a compelling interest and in doing so went to great lengths to distinguish the facts presented in *Woody*. In the *Woody* case, the use of peyote had been restricted to adults and was used only during a particular ceremony. There was little chance of danger to outsiders because the ceremony took place in a desert hogan, and the Indians were very responsible in the use of the drug.[144] However, in the instant case, the use of cannabis was found to be continuous throughout the day without restriction. Children and nonmembers of the church were encouraged to use the drug. People were constantly coming and going from the premises, which created a danger to outsiders.[145] Therefore, applying a balancing test, the court found that the state's interests in protecting the health of its citizenry was sufficient to overcome the free exercise interests of the Coptics.

Finally, two other state courts have found compelling interests sufficient to outweigh free exercise interests, though not applying the in-depth analysis found in *Town*. In *State v. Soto*,[146] the Oregon Court of Appeals upheld a trial court's refusal to allow the presentation of evidence concerning defendant's religious beliefs. The court recognized that under *Sherbert*, "only the gravest

142. 377 So. 2d at 649.

143. *Id.* at 650. The court relied on *Yoder* and McDaniel v. Paty, 435 U.S. 618 (1978), for this proposition.

144. 377 So. 2d at 651.

145. *Id.*

146. 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976). In this case the defendant was charged with possession of peyote.

abuses, endangering paramount interests, give occasion for permissible limitation."[147] The court went on to find the preservation of health and safety to be a compelling enough interest to justify the "limitation" on religious freedom.

Almost identical reasoning was applied by the Supreme Court of Vermont in *State v. Rocheleau*.[148] In that case the defendant had been convicted of the unlawful possession of marijuana. On appeal, the court found that the trial court was correct in rejecting the defendant's evidence of his religious beliefs. The court held that the legislature's criminalization of marijuana possession was sufficient in itself to demonstrate a compelling interest on the part of the state.[149] "It is not the role of this Court to substitute its judgment for that of the legislature in such matters where, as here, the legislation challenged has a *rational basis*."[150] Though claiming to find a "compelling interest" on the part of the state,[151] the court in reality was applying a rational basis test. If the court had truly applied a strict scrutiny test, it would not have hesitated to question the means applied by the state and balance any state interests against the interests of religious freedom.[152]

As can be seen in the opinions discussed above, some courts have exhibited sounder reasoning than others in arriving at similar results. The courts that have relied on early Supreme Court precedent, such as the polygamy cases, seem to be highly suspect in their analysis. The courts applying the two-stage analysis set forth in *Sherbert* are on much stronger ground and, for the most part, exhibit much better reasoning.

Federal Court Decisions

The federal courts have not been overly receptive to the California Supreme Court's decision in *Woody*. In fact, to date, not one federal court has sustained a freedom of religion defense in a psychedelic drug prosecution. *Leary v. United States* presents an interesting illustration.[153] Dr. Timothy Leary and his daughter

147. 21 Or. App. at 794, 537 P.2d at 143.

148. 451 A.2d 1144 (Vt. 1982).

149. *Id.* at 1148.

150. *Id.* (emphasis added).

151. *Id.*

152. Though not using it as a basis for its holding, the court seemed quite skeptical as to whether the defendant was actually practicing a religion.

153. 383 F.2d 851, *reh'g denied*, 392 F.2d 220 (5th Cir. 1967), *cert. granted*, 392 U.S. 903 (1968), *rev'd on other grounds*, 395 U.S. 6 (1969).

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were stopped while traveling in their car from Mexico back into the United States. Marijuana was found on the floor of the car and both passengers were indicted for transporting marijuana in violation of federal statute.[154] In his testimony at trial Dr. Leary attempted to justify his possession of the drug on religious and scientific grounds. Leary asserted that as a convert to Hinduism and a member of the Brahmakrishna sect, he used marijuana for religious illumination and meditation.[155] The Fifth Circuit Court of Appeals was not impressed with these claims and believed that Leary's reliance on *Sherbert* was "misplaced and inapposite of the facts."[156] The court instead relied on *Davis* and *Reynolds* in stating that "Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society."[157] The court found that *Sherbert* had recognized a certain category of cases that required governmental regulation regardless of religious freedom.[158] The present case fell into that category, and therefore the court recognized no need to further address *Sherbert*.[159] Though the *Leary* decision might be interpreted as finding some type of compelling interest to justify religious infringement, it is more likely that the court simply erred in its reasoning. The court continuously relied on the polygamy cases to support its analysis and in effect failed to recognize the *Sherbert* test. The court's reasoning, therefore, is highly suspect and the issue presented is ripe for reevaluation.[160]

Another interesting case was presented to the United States District Court for the District of Columbia in *United States v. Kuch*.[161] The defendant had been indicted for obtaining and transferring marijuana and also for the unlawful sale, delivery, and possession of LSD. As a defense, the defendant alleged that he was a member of the Neo-American Church and also occupied

154. 383 F.2d at 856.

155. *Id.* at 857.

156. *Id.* at 860.

157. *Id.* at 859.

158. *Id.* at 860.

159. The court did distinguish the holding in *Woody* on the grounds that peyote was a central part of the religion in that case, and the religion in fact was organized.

160. Two subsequent Fifth Circuit opinions have expressly relied on *Leary* and therefore have rejected freedom of religion defenses. *See* United States v. Spears, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); and United States v. Hudson, 431 F.2d 468 (5th Cir. 1970), *cert. denied*, 400 U.S. 1011 (1971).

161. 288 F. Supp. 439 (D.D.C. 1968).

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the position of "primate of the Potomac" within that church. Since the church advocated the use of psychedelic drugs, the defendant claimed the statutes under which he was indicted violated his right to the free exercise of religion. The court found the Neo-American Church to be an interesting, though not a bona fide, religion. In order to join the church a person had to subscribe to the following tenet: "The psychedelic substances, such as LSD, are the true Host of the church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the self, and therefore belong to everyone."[162] What the court found to be interesting was the fact that the church's motto was "Victory over Horseshit!"; its symbol was a three-eyed toad; and its official hymns were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat."[163] The court stated that "one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term."[164] The court went on to find the aforementioned facts "helpful in declining to rule that the church is a religion within the meaning of the First Amendment."[165] The court also concluded that even if this were a religion, it would present no defense to the prosecution. The court relied on *Leary* in coming to this conclusion, but also found a "sufficiently important governmental interest" to justify the limitations placed on first amendment freedoms.[166] Though not applying the two-stage analysis set forth in *Sherbert*, the court did recognize that to justify any infringement on religion there must be some sort of "substantial state interest."[167] This recognition shows that the court's reasoning does seem to be in line with that prescribed by the Supreme Court.

In another federal district court case, *Randall v. Wyrick*,[168] the United States District Court for the Western District of Missouri also found a compelling state interest to justify the state's limitation of petitioner's religion. The petitioner sought a writ of habeas corpus to gain relief from a state court conviction for possession of marijuana, hashish, and LSD. The court assumed

162. *Id.* at 443.
163. *Id.* at 444-45.
164. *Id.* at 444.
165. *Id.* at 445.
166. *Id.* at 448.
167. *Id.* at 445.
168. 441 F. Supp. 312 (W.D. Mo. 1977).

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that the petitioner's religion was valid and proceeded to apply the standard used in *Kuch*.[169] In applying this standard the court found that a compelling state interest did exist which justified the infringement on religion.[170]

Similar reasoning was applied by the Eleventh Circuit Court of Appeals in *United States v. Middleton*.[171] In that case, the defendant had been convicted of importing marijuana. He testified that he was a member of the Ethiopian Zion Coptic Church and that marijuana was an "indispensable" part of his religion.[172] On appeal, the court assumed for the sake of argument that what the defendant claimed was true and proceeded to find a compelling interest on the part of the federal government that justified any burden placed on defendant's religion.[173] The court distinguished *Yoder* on the grounds that in that case there was no compelling state interest.[174] In finding the compelling interest in *Middleton*, the court placed great weight on the fact that Congress had prescribed severe penalties for the possession of marijuana. The penalties were viewed as evidence of Congress' "grave concern" in the matter,[175] which led to the finding of a compelling interest. The court's reasoning was circular, relying on the statute itself to justify the infringement. As expressed earlier, this type of an analysis is more in line with a rational basis test rather than a strict scrutiny standard. In applying a strict scrutiny standard the court must determine whether the interest itself is compelling, rather than focusing on whether Congress thought it was compelling.[176]

Related Matters

There have been several decisions not directly involving, but still affecting, the freedom of religion defense. In the Ninth Circuit case of *Golden Eagle v. Johnson*,[177] the plaintiff was a member of the Native American Church who had been arrested and jailed for possession of peyote. Though he persistently told

169. *Id.* at 315.
170. *Id.* at 316.
171. 690 F.2d 820 (11th Cir. 1982).
172. *Id.* at 822.
173. *Id.* at 824.
174. *Id.* at 825.
175. *Id.*
176. The court obviously felt bound by the decision in *Leary* and therefore adjusted its reasoning accordingly.
177. 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1005 (1975).

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authorities that he was constitutionally protected, they refused to investigate the matter, and as a result he was incarcerated for more than thirty days. Plaintiff then brought an action under sections 1981, 1982, and 1985 of title 42 of the United States Code and sections 2201 and 2202 of title 28 of the Code, seeking injunction and monetary relief. Plaintiff claimed that some prearrest procedure was necessary "to reduce the 'chilling effect' of the possibility of arrest on the free exercise of religion by a member of the Native American Church."[178] The court refused to order such a prearrest procedure, finding that the ordinary rules of criminal procedure were sufficient.[179]

The Director of the Bureau of Narcotics and Dangerous Drugs has exempted from the Controlled Substances Act the use of peyote by members of the Native American Church.[180] In *Kennedy v. Bureau of Narcotics & Dangerous Drugs*,[181] the Church of the Awakening sought review of an order of the Director of the Bureau rejecting its petition to amend this exemption to include the Church of the Awakening.[182] The Ninth Circuit Court of Appeals agreed with the church and found the distinction made between the Native American Church and all other religions to be arbitrary and capricious. However, the court also found that a new classification including the Church of the Awakening would be no better and would still be in violation of substantive due process. For this reason the church's claim was dismissed.[183] A similar complaint was filed in *Native American Church of New York v. United States*.[184] The petitioner in that case was not affiliated with the Indians' Native American Church, yet wished to be included in the exemption provided by the federal government. The court agreed with this contention and stated that "peyote is equally available to the plaintiff, the Native American Church of New York, if in fact it is a bona fide

178. 493 F.2d at 1182.

179. *Id.* at 1184.

180. *See* 21 C.F.R. § 1307.31 (1982).

181. 459 F.2d 415 (9th Cir.), *cert. denied*, 409 U.S. 1115, *reh'g denied*, 410 U.S. 959 (1973).

182. 459 F.2d at 415-16.

183. The court also stated that "[t]he question of whether or not the religious use of peyote by the members of any church is protected by the First Amendment is not properly before us." *Id.* at 417. In a concurring opinion, Crocker, J., found that the "'police power' will prevail over an individual's right to freely practice his religious beliefs where the practice involves criminal conduct." *Id.*

184. 468 F. Supp. 1247 (S.D.N.Y. 1979).

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religious organization and would make use of peyote for sacramental purposes and regard the drug as a duty."[185] The court rejected the claim by the petitioner that it be allowed to use proscribed drugs other than peyote. "Congress can constitutionally control the use, even for religious purposes, of drugs that it determines to be dangerous."[186] The court seems to have been misled by earlier federal court decisions which made this same contention.[187]

Conclusion

The proper analysis to be applied in a freedom of religion case consists basically of two inquiries: first, whether the government has burdened a religious practice, and second, whether a compelling state interest justifies the burden imposed.

The first inquiry to be made by the court can be broken down into three parts, though each of these parts is very much interrelated to the other two. The court must first ask itself whether a "religion" actually exists. The burden to prove whether there is a religion should properly rest on the defendant (as an affirmative defense), and this question should be decided as a matter of law by the court. Since the first amendment protects the free exercise of "religion," whether a religion actually exists is a proper question for the court to resolve rather than the trier of fact.[188] In addressing this question, the court should keep in mind that a religion need not be of a conventional nature,[189] and it need not profess any sort of belief in a supreme being.[190] Rather, religion arguably can consist wholly of ethical and moral considerations.[191] The court should avoid delving into the religion itself, since it is not

185. *Id.* at 1251.

186. *Id.* at 1249.

187. For other cases that indirectly involve the freedom of religion defense and psychedelic drugs, *see* Oliver v. Udall, 306 F.2d 819 (D.C. App. 1962), *cert. denied*, 372 U.S. 908 (1963) (court decided Indian Tribal Council not restricted by federal Constitution and therefore could ban peyote); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (Indian Tribal Council not bound by federal Constitution); Native Am. Church of Navajoland v. Arizona Corp. Comm'n, 392 F. Supp. 907 (D. Ariz. 1971), *aff'd*, 405 U.S. 901 (1972) (denial of certificate of incorporation does *not* infringe on freedom of religion).

188. What "religion" is actually involves the defining of a term contained in the Constitution and therefore should be decided as a matter of law.

189. *Ballard*, 322 U.S. 78.

190. *Torcaso*, 367 U.S. 488.

191. *Welsh*, 398 U.S. 333.

for the court to decide the validity or feasibility of what one believes.[192] The focus of the inquiry should be prevention of the use of religion as a "limitless excuse" for avoiding all prosecution,[193] resolving any and all doubts in favor of finding a religion.

Next, the court should simply look to the religion and the statute in question, and then decide whether there is a burden of some sort imposed upon the religion. All that need be answered at this point is whether there is *any* burden imposed upon the religion, the degree of the burden being unimportant at this stage of the analysis. The determination should be an easy one to make and once again should be decided by the court rather than the trier of fact.[194] All doubts should be resolved in favor of there being a burden imposed upon the religion.

The final part of this first inquiry basically encompasses the "sincerity" test. The question is this: Accepting the religion to be bona fide, does the defendant truly believe in what he professes? This is a wholly subjective determination and, being a factual question, should be determined by the trier of fact.[195]

The second inquiry of the two-pronged analysis is whether a compelling state interest justifies the burden placed upon the religion. This stage of the analysis is only reached where the first inquiry is answered in favor of the defendant,[196] i.e., there is a burden placed on defendant's religion. It is at this stage of the analysis that the question of "centrality" and degree of burden should come into play. The test applied is a balancing test, weighing the interests of the state against the interests of the defendant. The scales are weighted in favor of the defendant

192. *Ballard*, 322 U.S. 78.

193. TRIBE, *supra* note 2.

194. Whether there is a burden can be deduced basically from the language of the statute. In a drug case it should prove relatively simple if the defendant professes a belief in the drug, since government regulation of the drug obviously would "burden" this belief. The balancing of the government interests with the degree of the burden takes place in the second stage of the two-stage analysis.

195. This being the only factual determination to be made, it could be reserved for trial with all other questions previously being answered by the court. Thus the court could arguably assume that the defendant is sincere in his beliefs (saving such a question for trial) and proceed to address the other parts of the two-stage analysis. If the rest of the determination results in favor of the defendant, then the sincerity issue could be presented to the trier of fact. This is not to say that the evidence of religious practices need be presented at a different stage of the proceedings. Rather, the court can simply make its findings before forcing the jury to determine the sincerity issue.

196. Note the discussion *supra* note 195. The order in which the questions are addressed is merely a matter of logistics for the court to determine.

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because a religion is involved, and for the state to tilt the scales back in its favor, it must demonstrate a compelling interest on its part to infringe upon the religion. In a balance of interests, whether defendant's drug use is a central or integral part of his religion becomes a relevant consideration. The more central the drug is to the religion, the greater the interest that must be demonstrated by the state. In the same fashion, the less central drug use is to the religion, the easier it should be for the state to demonstrate an interest that would justify the burden placed upon the religion. However, in any case the interest must prove to be compelling. The only point of fluctuation should be exactly where the compelling state interest *overcomes* the defendant's interests in his religious practice. This balancing test is to be performed by the court rather than by the trier of fact.

The foregoing analysis is basically that laid down by the Supreme Court. It has been broken down into various parts in an effort to make the analysis more systematic and easier to apply. The main point to be recognized is that the freedom of religion defense deserves careful consideration when raised and requires the strictest level of scrutiny by the courts.

The freedom of religion defense has not met with much success. The courts have not been overly receptive to the defense and have applied various methods to avoid it. Some courts have applied the proper constitutional standards and have used sound reasoning in rejecting the defense. Other courts have simply avoided the proper constitutional guidelines developed by the Supreme Court and instead have relied on questionable Supreme Court decisions nearly a century old. Finally, there are those courts that have applied the proper analysis, only to fail in the reasoning used to arrive at their final results. Only the Native American Church has been successful with the defense.

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