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Free Exercise of Religion: Will It Go Up in Smoke?

Lorraine Solomon Cohen

CASE COMMENTS

FREE EXERCISE OF RELIGION: WILL IT GO UP IN SMOKE*

Town v. State, 377 So.2d 648 (Fla. 1979)

Members of the Ethiopian Zion Coptic Church[1] and visiting non-members[2] assembled daily at petitioner's residence to worship and use cannabis in accordance with their religious beliefs.[3] The State Attorney for Dade County sought to enjoin the use of cannabis at petitioner's residence.[4] The trial court granted a temporary injunction,[5] determining that the state had an overriding interest in protecting the public health and safety,[6] and that public health and safety was threatened by the cannabis use.[7] On certiorari from the interlocutory

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1. 377 So. 2d 648 (Fla. 1979). The church members belonged to an ancient sect which is recognized as a religion under the first amendment. *Id.* at 650. *See generally* 4 THE NEW CATHOLIC ENCYCLOPEDIA 312 (1969).

2. 377 So. 2d at 649. Visitors who frequented the church were not required to have any religious training before sharing in the Coptic practice of using cannabis. *Id.*

3. *Id.* The trial court found that the church members worshipped three times daily and considered the use of cannabis essential to their religious practice because it brought members closer to their God. The drug was not used solely in connection with worship services but was smoked throughout the day both within and without the confines of the church. Visiting non-members would also congregate at petitioner's residence and cannabis was freely given to all, adult or child, regardless of religious intentions. No religious training was required before receiving cannabis. *Id.* at 649-51.

4. *Id.* at 649. The activity of the church members went officially unnoticed until local newspapers and television stations ran stories on the religion. As a result of the publicity, the state brought criminal charges against the petitioner for illegal possession of marijuana. The state relied heavily on newscasters' reports and films showing Coptic Church members smoking what the newscasters said was marijuana. Counsel for petitioner successfully moved to suppress a search warrant for lack of probable cause. Petitioner alleged that testimony of a newscaster's observation of alleged marijuana was insufficient where no chemist report confirming the substance as marijuana was submitted. Criminal charges were dismissed and the state brought the instant civil action. Telephone interview with Milton M. Ferrell, Jr., counsel for petitioner (Jan. 24, 1980).

5. *Id.* at 649. "The trial court balanced the state's interests in protecting the public health, welfare, safety, and morals against the petitioner's interests in the free exercise of her religion and found injunctive relief proper." *Id.* The trial court also found that the church, located on Star Island, Miami Beach, was in violation of the city's zoning laws. Therefore the trial court also temporarily enjoined the use of petitioner's property as a church. *Id.* Although this separate issue was addressed in the instant case, it is not within the scope of this comment.

6. *Id.* at 651.

7. *Id.* at 650. The state sustained its burden of proving the existing threat in two ways. First, the state convinced the court that, for the State of Florida, cannabis is a dangerous drug. *Id.* Second, the state produced evidence and testimony which established that church participants were constantly coming and going. Added to this was evidence of the use of cannabis throughout the day. This led to "the inescapable conclusion that participants traveling from petitioner's residence in fact posed a threat to public safety and welfare." *Id.* at 651.

order,[8] the Florida supreme court affirmed and HELD, the petitioner's first amendment right to free exercise of religion was outweighed by the demonstrated compelling state interest.[9]

The free exercise clause in the first amendment to the Constitution was designed to prevent government compulsion in religious matters.[10] This goal permeated the views of state and federal legislators who have generally promoted religious freedom and diversity.[11] However, the United States Supreme Court has stricken many claims made under the free exercise clause.

In its initial pronouncement on the free exercise clause, the Supreme Court in *Reynolds v. United States*[12] distinguished between religious beliefs and religious actions. In *Reynolds,* a Mormon convicted of dual marriages contested a federal statute prohibiting polygamy.[13] Formulating the secular regulation rule,[14] the Court stated that although the first amendment protects all religious beliefs, acts that contravene generally applicable legislation are not protected.[15] Support for the constitutionality of anti-polygamy laws[16] coupled with the

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8. *Id.* at 648. Jurisdiction to review the interlocutory order by writ of certiorari was authorized under FLA. CONST. art. V, §3(b)(3) (1968). This section states that the supreme court "[m]ay review by certiorari . . . and interlocutory order passing upon a matter which upon final judgment would be strictly appealable to the Supreme Court; . . . ." FLA. CONST. art. V, §3(b)(3) (1968).

9. 377 So. 2d at 648. Subsequently the petitioner unsuccessfully filed a petition for rehearing with the Florida supreme court. Petitioner will appeal to the United States Supreme Court under 28 U.S.C. §1257(2) which provides for appeals from a state court where "the validity of a statute of any state [is challenged] on the ground of it being repugnant to the Constitution, . . . and the decision is in favor of its validity." 28 U.S.C. §1257(2) (1978). Additionally, pursuant to 42 U.S.C. §1983 (1978), petitioner brought a federal civil rights action against State Attorney Janet Reno, Circuit Court Judge Overton and the City of Miami Beach. This action was successful and the federal court enjoined the lower circuit court from enforcing the injunction order. Ferrell interview.

10. Reynolds v. United States, 98 U.S. 145, 162 (1878). The first amendment to the Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. CONST. amend. I.

11. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (the first amendment's rights of free exercise, speech and press occupy a "preferred position" in the hierarchy of rights protected by the Constitution). *But see* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 25 (1959) (the "preferred position" controversy is unclear and pernicious if it implies that there is a simple or mechanical basis for determining priorities of values having constitutional dimensions). Examples of legislative actions which favor religion include 50 U.S.C.A. APP. §456j in which religious conscientious objectors are granted draft exemptions and 42 U.S.C. §2000e, which forbids discrimination in employment based on race, color, religion or national origin. *See* 2 CIV. LIB. REV. 138 (1975).

12. 98 U.S. 145 (1878).

13. 40 Rev. Stat. 5352, ch. 47 (1850) (repealed 1909).

14. The secular regulation rule provided that a state statute did not violate the right of free exercise if it was passed for a secular purpose and was meant to control a secular activity. Serving as the basic principle under which free exercise cases were decided until 1963, the secular regulation rule allowed the courts to even-handedly confer constitutional protection only on religious beliefs. Some authors believe the rule is logical and practical. The rule's treatment of religious freedom maintains and honors the "wall of separation" by applying laws uniformly to all regardless of religious affiliation. D. Manwaring, RENDER UNTO CAESAR—THE FLAG SALUTE CONTROVERSY 51 (1962).

15. 98 U.S. at 166.

Court's distaste for such an odious practice[17] resulted in an affirmation of the petitioner's conviction. The Court reasoned that laws are enacted to control actions. Although laws may not interfere with religious beliefs and opinions, they may prohibit practices, even those which are religiously motivated.[18]

As a result of the *Reynolds* decision[19] the state and federal courts interpreted the secular regulation rule to allow the courts to bypass examination of underlying statutory policy and ignore the religious motivation for the prohibited acts.[20] Religious belief in the form of action could be prohibited once it was established that the secular regulation was legitimately made for the general public.[21] For the following half-century[22] the secular regulation rule was used to decide free exercise cases. New standards, however, were eventually formulated by the Court to advance the development of the free exercise clause.[23]

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16. In addition to upholding laws making polygamy illegal, see note 17 *infra*, the Supreme Court has also upheld a law which disenfranchised anyone refusing to take an oath renouncing polygamy. *See* Davis v. Beason, 133 U.S. 333 (1890) (person not entitled to vote if a member of any organization which teaches, advises, counsels or encourages its members to commit the crime of bigamy or polygamy). The Court has also upheld laws dissolving a church corporation which practiced polygamy. See Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890) (church dissolved and property confiscated).

In Cleveland v. United States, 329 U.S. 41 (1946), the Court affirmed the conviction of a Mormon under the Mann Act which prohibits the interstate transportation of females for "any . . . immoral purpose." However, addressing the merits of polygamy as an issue of religious freedom, Justice Murphy stated in his dissent that different religions might imply different moralities. He further stated that "polygamy is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such." *Id.* at 26.

17. 98 U.S. at 162-64. At least one commentator has recognized that a sweeping assertion of governmental power would have been unnecessary to condemn a practice considered so particularly egregious in that day. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969). However, the *Reynolds* Court recognized the legislature had the authority to "reach actions which were in violation of social duties or subversive of good order." 98 U.S. at 164. The Court thought Congress could determine the "social duties" in regard to marriage and family since it was considered "within the legitimate scope of . . . government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166.

18. 98 U.S. at 166.

19. *Id.* The Court's general policy objective appeared to limit the scope of the free exercise clause by not automatically extending constitutional protection to an act merely because it was motivated by religious belief.

20. *See, e.g.*, Knowles v. United States, 170 Fed. 409 (8th Cir. 1909) (constitutional guarantees of religious freedom did not justify depositing obscene matter in the mails); Shapiro v. Lyle, 30 F.2d 971 (W.D. Wash. 1929) (religious liberty argument unsuccessful to restore sacramental wine seized under the National Prohibition Act); Owens v. State, 6 Okla. Crim. 110, 116 P. 345 (1911) (parent's refusal to accept medical care for sick child due to religious belief not a defense to prosecution). *But see* People v. Marquis, 291 Ill. 121, 125 N.E. 757 (1919) (statutory exemption for use of sacramental wine upheld during Prohibition).

21. 98 U.S. at 166.

22. *See, e.g.*, Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (Court upheld expulsion of Jehovah Witness children from public school because they would not pledge allegiance to the flag) (overruled by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

23. Comment, *Free Exercise: Religion Goes to "Pot,"* 56 CAL. L. REV. 100, 102 (1968). "[T]he expanding concepts of first amendment liberties finally forced a reevaluation of religious freedom." *Id.* One of the first cases to formulate a new standard was Cantwell v.

In 1961, in *Braunfeld v. Brown*,[24] the Supreme Court distinguished between direct and indirect burdens on religious exercise.[25] In *Braunfeld*, businessmen who closed their stores on Saturday in accordance with their religion challenged a Sunday closing law[26] as a violation of free exercise.[27] The Court, recognizing a burden was placed on the plaintiffs,[28] emphasized that such a burden was indirect because the plaintiffs could continue practicing their religion and still comply with the law.[29] Furthermore, the Court reasoned that the law regulated a secular activity rather than made a religious practice unlawful.[30]

Two years later, the Supreme Court in *Sherbert v. Verner*[31] ultimately rejected the secular regulation test. In *Sherbert*, the appellant was denied unemployment compensation because she refused to accept employment requiring her to work on Saturdays.[32] Because her refusal was religiously motivated, the appellant alleged the state unemployment compensation statute abridged her free exercise of religion.[33] Although not overruling *Braunfeld*,[34] the Court set

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Connecticut, 310 U.S. 296 (1940), where members of the Jehovah's Witnesses were convicted of violating a state statute which prohibited solicitations for any religious charitable cause without prior approval. The Supreme Court used a balancing test, recognizing that the first amendment embraces two concepts: "freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." *Id.* at 303-04. Although *Cantwell* did not establish guidelines, the Court noted that some religious acts would not be subject to generally applicable legislation. *See also* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (one of the last applications of the secular regulation test in which the Court upheld a judgment expelling Jehovah's Witness children from public school because they refused to pledge allegiance to the flag). The Court hinted toward appropriate guidelines in the broad language used in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Court held unconstitutional a school regulation requiring mandatory flag salute even from children whose religious beliefs forbade saluting graven images).

24. 366 U.S. 599 (1961).

25. 366 U.S. at 606. A direct burden is an irreconcilable conflict between the individual's religious doctrines and obedience to the law. In that situation, one must yield. An indirect burden on the exercise of religion is legislation which places a hardship on religious practice but does not make the practice unlawful. *Id.*

26. The closing law was part of the Pennsylvania Criminal Statutes. PA. STAT. ANN. tit. 18, §4699.10 (Purdon). The businessmen were members of the Orthodox Jewish faith which requires the total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They kept their businesses open on Sunday to help compensate for the Saturday closing. 366 U.S. at 600, 601.

27. For Sunday closing cases in which establishment arguments were primarily used, *see* Gallagher v. Crown Kosher Supermarket, 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

28. 366 U.S. at 604.

29. *Id.* The "Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

30. *Id.*

31. 374 U.S. 398 (1963).

32. *Id.* at 401. Appellant was a member of the Seventh Day Adventist Church and Saturday was the Sabbath day of her faith. *Id.*

33. *Id.* at 404. Discharged by one employer because she would not work on Saturday and unable to find another job, the appellant filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act (S.C. CODE §§68-1 to 68-404). The Employment Security Commission found her disqualified to receive benefits because she failed without good cause to accept "suitable work when offered . . . by the

forth a two step test for adjudicating free exercise claims. Instead of prohibiting religious practices purely because of their secular nature, the *Sherbert* Court required the courts to weigh the burden on an individual's freedom of religion against the state's compelling interest. Then the courts were to consider the availability of any alternatives for achieving the state's objective without infringing on free exercise.[35]

In *Sherbert,* the Court held the state's interest in avoiding speculative fears of fraudulent claims[36] was insufficiently compelling to justify the encroachment.[37] Moreover, even if a compelling interest had been shown, the state would still be required to demonstrate that no alternative regulation would combat the abuses without infringing first amendment rights.[38] Therefore, the Court concluded that a state may not constitutionally apply the statute so as to make people compromise their religious convictions.[39]

The impact of the *Sherbert* test was immediately felt,[40] becoming the

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employment office or the employer. . . ." *Id.* at 401. This finding was affirmed by the lower state court and state supreme court. The state supreme court "held specifically that appellant's ineligibility infringed no constitutional liberties. . . ." *Id.* at 401.

34. *Sherbert* established a free exercise test which differed from tests employed in the past. See note 23 *supra.* Although Justice Brennan was careful not to overrule *Braunfeld, see* 374 U.S. at 403-04, he began with a proposition not recognized in *Braunfeld.* In *Braunfeld,* Chief Justice Warren said that the initial inquiry in an indirect burden case is to determine if "the purpose and effect of [the state regulation] is to advance the State's secular goals." 366 U.S. at 607. Justice Brennan required a much stronger showing. See note 36 *infra.*

35. Actually, there are three steps to the *Sherbert* test. First, the Court looked at the religious interests and if any burdens would be imposed on them. 374 U.S. at 403. Second, the Court considered the state interest and if it justified an infringement on religious rights. *Id.* at 406. After this initial determination, the Court determined which interest outweighed the other. Third, the Court considered alternatives available to achieve the state's objective. *Id.* at 408. In setting forth this two-step test, the Court did not treat the strength of one interest as determinative. Rather, the process called for diligently weighing the adverse interests and arriving at a reasonable conclusion. For an analytical breakdown of the components of the individual and government interests *see* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1390-1423 (*passim*) (1967).

36. 374 U.S. at 407. The Court said, however, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 406, *quoting from* Thomas v. Collins, 323 U.S. 516, 530 (1945) (a public assembly case). See also note 50 *infra.*

37. 374 U.S. at 407. Since the state did not establish a compelling interest, the decision did not furnish a guideline concerning the weights to be attached to each interest. *Id. But see* Wisconsin v. Yoder, 406 U.S. 205 (1972).

38. 374 U.S. at 407. This final step of the *Sherbert* test is seldom used. Note, 25 KANSAS L. REV. 585, 591-92 (1977). *But see* State *ex. rel.* Swan v. Pack, —— Tenn. ——, 527 S.W.2d 99 (1975), *cert. denied,* 424 U.S. 954 (1976) (the state demonstrated that less restrictive means than prohibiting conduct would not fulfill the state's interest).

39. 374 U.S. at 410. The Supreme Court recognized that not all religious actions are free from legislative regulations. Those restricted usually posed a threat to the public peace and safety. *Id.* at 403; *see* State v. Bullard, 267 N.C. 599, 602, 148 S.E.2d 565, 568 (1966) (conviction for unlawful possession of narcotics affirmed, the court stating religious practices shall not be hindered until the practice threatens public safety, morals, peace and order), *cert. denied,* 386 U.S. 917 (1967); Lewellyn v. State, 489 P.2d 511, 515 (Okla. Crim. App. 1971) (in convicting the defendant of possession and use of marijuana, the court recognized that religious practices could not be accepted as justification for an overt criminal act).

40. *See, e.g., In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963) in which the Minnesota

modern criterion for deciding free exercise disputes.[41] In 1964, the California Supreme Court in *People v. Woody*[42] applied *Sherbert* to a first amendment defense against charges for the possession of narcotics.[43] In *Woody*, members of the Native American Church, to whom the use of peyote[44] played a central role in ceremony and custom, were convicted of illegal possession of a dangerous drug.[45]

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supreme court, before the *Sherbert* decision, reaffirmed the criminal conviction of a woman who, because of her religious beliefs, refused to serve on a jury. The United States Supreme Court reversed and remanded the case for additional consideration in light of *Sherbert*. 375 U.S. 14 (1963). Eventually the state supreme court reversed the conviction because the state did not adequately show that its interest in obtaining competent jurors overrode appellant's right to free exercise. 265 Minn. 96, 120 N.W.2d 515 (1963). *See also* State v. Everly, 150 W. Va. 423, 146 S.E.2d 705 (1966) (refusal to serve on grand jury justified because there was no indication that refusal would affect the peace and safety of the state).

41. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). An Amish farmer challenged a state compulsory attendance statute providing that children must be enrolled in school until age sixteen. The Amish rejected formal education past the eighth grade as it took their children away from their community "during the crucial and formative adolescent period of life." *Id.* at 211. "The single most prominent aspect of Amish faith is the belief that separation from the world, i.e., from the worldliness of contemporary society, is the sine qua non of spiritual salvation." *Id.* Comment, *The Amish and Compulsory School Attendance: Recent Developments,* 1971 WIS. L. REV. 832; 18 VILL. L. REV. 955 (1972). The court struck the statute as applied to the Amish because the state did not demonstrate an interest "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." 406 U.S. at 214. *Cf.* State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966) (mandatory complianc ewith compulsory education law does not infringe on religious freedom), *cert. denied,* 389 U.S. 51 (1967). *But cf.* Giannella, *supra* note 35, at 1422 (there is a greater interference with religious liberty when the law commands an individual to perform an act in violation of his religious belief than when the law prohibits a required act).

In State *ex. rel.* Swann v. Pack, —— Tenn. ——, 527 S.W.2d 99 (1975), *cert. denied,* 424 U.S. 954 (1976), the trial court permanently enjoined the church pastor and elder from handling poisonous snakes in a crowded church during a religious ceremony. The court of appeals modified the injunction to prohibit snake handling "in such a manner as will endanger the life or health of persons who did not consent to exposure to such danger." *Id.* at 103. The Supreme Court upheld the prohibition by using the *Sherbert* test. After establishing that free exercise of religion would be burdened, the Court considered the state interest. The state's burden was met with little difficulty in view of the government's compelling interest in protecting the health and safety of its citizens and snake handling in a public worship service is dangerous. *Id.* at 113. Alternatives were considered but discarded as unacceptable by the church. *Id.* at 114; *see* Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942) (defendant convicted of handling poisonous snakes). *See generally* Note, 25 KAN. L. REV. 585 (1977).

42. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

43. *Id.* at 718-19, 394 P.2d at 816, 40 Cal. Rptr. at 72. Similar claims were unsuccessfully made as early as 50 years ago. *See, e.g.,* State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926) (state refused to allow first amendment protection to Native American Church member).

44. Peyote is a cactus which contains a variety of alkaloids of which the chief hallucinogen is mescaline. It was used extensively in religious ritual in pre-Columbian Mexico. Recently, its use has spread to other tribes. *See generally* Note, *Hallucinogens,* 68 COLUM. L. REV. 521 (1968).

45. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69. At the time of their arrest, the defendants were engaged in a "meeting," a specific ceremony of the Native American Church which convenes in an enclosure at sundown on Saturday night and continues until sunrise the next day. An individual leader controls the meeting which is characterized by uniformity.

Applying the *Sherbert* test,[46] the California court examined the religious "meeting"[47] to determine if denying the exemption would impose a burden. Consequently, the court determined that statutory prohibition of peyote would inhibit the defendant's religious practice.[48] The state's alleged compelling reason[49] for the peyote prohibition was the hardship an exemption would impose on detection of fraudulent claims of religious use of peyote.[50] However, because peyote incorporated the essence of the ancient American Indian religious experience and the danger of fraud was slight, the scales were tipped in favor of the constitutional religious protection.[51] The California Supreme Court concluded that the Indians used peyote in a bona fide pursuit of their religion and the use did not frustrate a compelling state interest.[52] Subsequently, *Woody* became the touchstone for the premise that freedom of religion could be a legitimate defense against criminal prosecution for drug use.[53]

It is a solemn and special occasion attended by families, although children and young women do not actively participate. At the meeting the members pray, sing, and make ritual use of religious symbols. The central event is to produce a hallucinatory state through the use of peyote. *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73. Initially, each member takes four peyote buttons although at a certain time in the ceremony he may ask for more. Peyote is more than a sacrament to the church; prayers are directed toward it and devotees treat it as a "protector." *Id.* at 721, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74. At sunrise the ritual ends, breakfast is served, the effects of the peyote disappear and the members depart. *Id.*, 394 P.2d at 817, 40 Cal. Rptr. at 73.

46. *Id.* at 718-19, 394 P.2d at 816, 40 Cal. Rptr. at 72.

47. See note 45, *supra* for a description of the "meeting."

48. 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

49. 61 Cal. 2d at 723, 394 P.2d at 819, 40 Cal. Rptr. at 75. The state included in its "chronicle of harmful consequences of the use of peyote" the allegation that the Indians used peyote in place of medical care. *Id.* The state also feared the threat of indoctrination of small children and the possible correlation between the use of peyote and the possible propensity to use some other more harmful drug. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 75. The court held these consequences were unsupported by the facts. *Id.* at 722-23, 394 P.2d at 818, 40 Cal. Rptr. at 74. This was the same argument advanced by the state in *Sherbert.* See note 6 and accompanying text, *supra.*

50. 61 Cal. 2d at 723, 394 P.2d 819, 40 Cal. Rptr. 75. This was the same argument advanced by the state in Sherbert v. Verner, 374 U.S. 398 (1963). See note 36 *supra* and accompanying text.

51. 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

52. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69; *see also In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). Decided by the California Supreme Court on the same day as *Woody*, the free exercise argument was not successful on the facts of the case. In *Grady*, a self-styled preacher was convicted of unlawful possession of peyote. *Id.* The petitioner claimed he was a spiritual leader and that his use of peyote was for religious purposes. In light of *Woody*, the court found the petitioner guilty because he "[had] not proved that his asserted belief was an honest and bona fide one." *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.

53. Although courts outside California are not bound by *Woody*, several jurisdictions cite to the case in their decisions. *E.g.*, State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), in which appellants were convicted of ingesting peyote during a bona fide ceremony of the Native American Church and claimed first amendment protections. *Id.* at 28, 504 P.2d at 951. Using the *Sherbert* test and guided by the *Woody* decision, the court set aside the convictions. *Id.* at 32, 504 P.2d at 955. *See also* Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977) (in a conviction for the possession of peyote, it is a defense to show that the

Subsequent federal[54] and state[55] decisions further restricted the permissible religious situations justifying narcotic use by narrowly construing the *Woody* holding. In considering free exercise claims,[56] courts have held either that the defendants did not prove they used the drug in accordance with a sincere religious belief[57] or that the defendants could not claim an infringement on religious rights because the drug was not essential to their faith.[58] This latter

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peyote was used in connection with a bona fide practice of the Native American Church). *See generally Note, Constitutional Law: Whitehorn v. State: Peyote and Religious Freedom in Oklahoma,* 5 AM. INDIAN L. REV. 229 (1977).

54. *See* Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied,* 409 U.S. 115. In sharp contrast to *Woody,* the court in *Kennedy* refused to extend the peyote exemption to a comparably valid religious organization. The Church of the Awakening, seeking review of an order rejecting its petition to amend a state statute, stated that a due process violation had occurred. The appellants argued that to allow an exemption to the Native American Church while denying one to their church created an arbitrary classification. The Court criticized the prevailing regulation as constitutionally infirm. However, it reasoned that to exempt both the Native American Church and the Church of the Awakening while classifying all other peyote-using churches as non-exempt would be no better than the old regulation. The court disposed of the case solely on the due process issue, declining to reach the remaining constitutional contentions. The United States Supreme Court denied certiorari, thereby declining to decide the constitutionality of the *Woody* reasoning. *See* Comment, *Drugs and Religion — How Well Do They Mix,* 42 U.M.K.C.L. REV. 272 (1973). The court of appeals declined to consider the issue again in Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974) (neither the Supreme Court nor the Ninth Circuit had extended the first amendment protection to the religious use of peyote by the members of any church).

55. For examples of California decisions following *Woody* in which statutes making possession of marijuana a crime were found not to infringe freedom of religion, *see* People v. Collins, 273 Cal. App. 2d 486, 78 Cal. Rptr. 15 (1969); People v. Wright, 275 Cal. App. 2d 738, 80 Cal. Rptr. 335 (1969); People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966).

56. Whether the religion is old and well-established has become another consideration. *See* Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds,* 395 U.S. 6 (1969); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); State *ex. rel.* Swann v. Pack, —— Tenn. ——, 527 S.W.2d 99 (1975), *cert. denied,* 424 U.S. 954 (1976).

57. The defendant generally has the burden of demonstrating that his religious beliefs require the use of drugs. Often the defendant does not sustain this burden. *See* United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (defendant must demonstrate adherence to a spiritual discipline); People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966) (court found the defendant planted and used marijuana according to his own personal philosophy); People v. Crawford, 69 Misc. 2d 500, 328 N.Y.S.2d 747 (Supp. Ct. 1972), *aff'd,* 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (App. Div. 1973) (no proof that defendant used drugs as part of a religious ceremony); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (court doubted defendant's sincerity pertaining to religious beliefs, *cert. denied,* 386 U.S. 917 (1966); Lewellyn v. State, 489 P.2d 511 (Okla. 1971) (minister advocated use of any drug to bring him closer to God). *But see* United States v. Ballard, 322 U.S. 78 (1944) (court cannot inquire into the truth of appellant's religious beliefs because to do so violates the free exercise clause); *In re* Karr, 66 Misc. 2d 912, 323 N.Y.S.2d 122 (Fam. Ct. 1971) (the law cannot require uniformity in religious beliefs; therefore, bizarre and strange sects of worship are equally protected under the Constitution). *See generally* Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religious Clauses,* 75 W. VA. L. REV. 213, 237 (1973) (*Yoder* extends free exercise protection only to well-established churches); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause,* 1973 DUKE L.J. 1217 (1973).

58. *See* United States v. Spears, 443 F.2d 895 (5th Cir. 1971) (follower of Black Muslim

reasoning was used by the Fifth Circuit Court of Appeals in *Leary v. United States*[59] to affirm the appellant's conviction for drug related offenses.[60]

The *Leary* court noted the determinative factor in *Woody* was the central use of peyote in the ceremony of the Native American Church.[61] In contrast, the court found no evidence presented in *Leary* to confirm the appellant's allegations that marijuana use was a requirement of Hinduism.[62] Because no burden would be imposed on the free exercise of religion, the sincerity of the appellant's belief regarding the use of marijuana as a religious sacrament was not at issue.[63] Furthermore, the court rejected the appellant's reliance on the *Sherbert* test, calling it misplaced and irrelevant on the facts.[64] Consequently, the court did not balance the interests. Instead, the governmental interest in protecting society by enforcing laws relative to marijuana was upheld because the drug had been demonstrated a serious public threat.[65]

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faith convicted for smuggling drugs even though he contended the drugs were prescribed for meditation and religious ceremonies), *cert. denied*, 404 U.S. 1020 (1972). United States v. Hudson, 431 F.2d 468 (5th Cir. 1970) (use of drugs as part of Moslem religion not a valid defense against drug smuggling), *cert. denied*, 400 U.S. 1011 (1971); Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) (drug use not essential to religion); People v. Collins, 273 Cal. App. 2d 486, 78 Cal. Rptr. 151 (1969) (by prohibiting the use of drugs, the law does not bar defendant from practices indispensable to his faith); People v. Wright, 275 Cal. App. 2d 738, 80 Cal. Rptr. 335 (1969) (statute making marijuana possession a crime is not unconstitutional as an infringement on defendant's freedom of religion). *See generally* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377 (1974).

59. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). Dr. Timothy Leary was arrested at the Mexican border by a United States Customs Inspector who spotted marijuana on the floor of his automobile. At trial, Dr. Leary testified he was aware of the United States laws pertaining to marijuana and that he knew his actions were against the law. *Id.* at 856. Dr. Leary is well known in the academic world in the field of psychology. Since 1960, however, he has devoted his life to understanding and researching the religious experience. Dr. Leary is also a Hindu convert and ascribes to the teachings of his sect which used marijuana for religious illumination and meditation. *Id.* at 857. *See* Comment, *Free Exercise: Religion Goes to "Pot,"* 56 CALIF. L. REV. 100 (1968).

60. Dr. Leary was charged with transportation and concealment of marijuana in violation of 21 U.S.C. §176(a) (1974) (current version at 21 U.S.C. §952(2) (1976)) and of failing to pay the transfer tax imposed by the Internal Revenue Code in violation of 26 U.S.C. §4744(a)(2) (1964) (repealed 1970). 383 F.2d at 854.

61. 383 F.2d at 861.

62. *Id.* at 860. "If (Dr. Leary) could not use marijuana it would not affect his religious beliefs but he would consider it a violation of those beliefs and practices if he were denied its use." *Id.* at 857.

63. *Id.* at 860.

64. *Id.* "[T]he paramount Government interest in the enforcement of the laws relative to marijuana is the protection of society. We cannot reasonably equate deliberate violation of federal marijuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits." *Id.*

65. 21 U.S.C. §§841(a)(1), 844(a) (1976) and FLA. STAT. §893(1)(c) (1979) prohibit the distribution or possession of marijuana. Classified as a Schedule I drug, marijuana is ranked with heroin and morphine. Equal protection arguments have been made criticizing the legislative classification of marijuana with these more dangerous drugs as irrational. *E.g.*, Hamilton v. State, 366 So. 2d 8 (Fla. 1978) (classification of cannabis not arbitrary). Empirical studies have found that marijuana is not as harmful as expected. *See generally Report of the National Commission on Marijuana and Drug Abuse*, MARIJUANA: A SIGNAL OF MISUNDERSTANDING 69

Congruent to the *Leary* rationale, the instant court was unwilling to allow religious drug use exemptions although a free exercise claim was propounded.[66] The Florida supreme court, concurring with the trial court, found that the Coptic Church was a recognized religion[67] in which the use of cannabis was an essential religious practice.[68] However, the court emphasized further findings which established that cannabis was used indiscriminately throughout the day thereby creating a public danger.[69] In determining whether the injunction was proper, the court stated that although religious practices may be subject to government regulation, there must be a showing of a compelling state interest to justify the cannabis restriction.[70]

To support the curtailment of cannabis use in the instant case, the court relied on a legislative determination which categorized cannabis as a dangerous drug[71] over the petitioner's claim that the legislative classification was irrational and arbitrary.[72] The existence of a public danger was further substantiated in the majority's view by evidence that religious participants under the influence of narcotics regularly drove to and from petitioner's residence.[73] Additional evidence illustrating the easy access to cannabis for non-church

(1972) ("No conclusive evidence exists of any physical damage, disturbances of bodily processes or proven human fatalities attributable solely to even very high doses of marijuana.")

66. 377 So. 2d at 651.

67. *Id.* at 649.

68. *Id.* However, the court qualified that statement by saying that prayer is directed not to cannabis but to a spiritual god. Cannabis is believed to be the body and blood of "Je-sus" and is used to "find a spirit of love, unity and justice, which brings them close to their god." *Id.*

69. *Id.* at 651. The court heard testimony from an eleven-year-old boy who went to petitioner's house several times. After telling a guard he had come to pray, he entered the residence and was given cannabis. The boy testified that he did not have to pray although occasionally members would talk to him about god. *Id.*

70. *Id.* at 650.

71. FLA. STAT. §893.03 (1979). This act classified cannabis as a Schedule I drug, meaning the substance has a high potential for abuse. See note 65 *supra.*

72. 377 So. 2d at 650-51. Petitioner argued that FLA. STAT. §402.36 (1979) made the classification of cannabis as a Schedule I drug irrational. This act, called the "Controlled Substance Therapeutic Research Act," controlled research regarding the drug's use and potential to alleviate the ill-effects of glaucoma and chemotherapy. FLA. STAT. §402.36 (1979). Defendants often assert the irrational classification of marijuana as a defense. *E.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

In determining that state intervention was warranted, the court reaffirmed its decision in Hamilton v. State, 366 So. 2d 9 (Fla. 1978). In *Hamilton* the court held that inclusion of cannabis within the statutory class defined in FLA. STAT. §893.03 was not arbitrary or irrational. *Id.* at 9. Therefore, in the instant case the court said that *Hamilton* established for the state that cannabis remains a dangerous drug. 377 So. 2d at 650. Dissenting in *Hamilton*, Justice Adkins disagreed as to the constitutionality of the statute. 366 So. 2d at 12. In the companion case of Bourassa v. State, 366 So. 2d 12 (Fla. 1978) Justice Adkins further discussed the unreasonableness of the statute. "In every relevant attribute marijuana has been shown to differ dramatically from the substances with which it is classified. . . . Therefore, the classification with opiates is irrational and denies equal protection." *Id.* at 18 (Atkins, J., dissenting). However, Justice Adkins did not say the use or possession of marijuana cannot be regulated, prohibited or punished in accordance with its propensity.

73. 377 So. 2d at 651. A police officer, observing petitioner's residence, testified he usually saw 15-20 cars parked on the premises. The court used this evidence coupled with evidence of cannabis use at all times of the day to lead to the "inescapable conclusion" that par-

members[74] convinced the court that to deny the injunction would, in effect, legalize cannabis for anyone going to the petitioner's residence.[75] Thus, by pointing to public policy considerations and existing law, the court determined that the state had a compelling interest which overrode the petitioner's free exercise claim.[76]

The instant court also considered the possible applicability of the *Woody* decision and found it non-controlling.[77] *Woody* was factually distinguished on three bases.[78] Initially, the court found the Native American Church's use of peyote was restricted to adults.[79] Second, peyote was used only during one particular ceremony.[80] Finally, peyote users did not pose a threat to the public while under the drug's influence.[81]

Although concurring with the majority's interpretation of *Woody*, Justice Boyd parted from the court's decision over the issue of placing an absolute restriction on cannabis use by the Coptics. In construing the court's duty to balance the competing interests, he expressed the view that the court does

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ticipants travelling to and from petitioner's residence posed a threat to public safety and welfare. *Id.*

74. The court was also concerned that children could readily receive the drug. *Id.* at 651; see note 68 *supra.* The courts have traditionally rejected arguments that would protect religious exercise but endanger children. *See* Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968) (state may intervene to give permission for blood transfusion to child); Prince v. Massachusetts, 321 U.S. 158 (1944) (nine-year-old child not allowed to sell religious pamphlet); *In re* Sampson, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (court has power to direct surgery on child).

75. 377 So. 2d at 651. It should be noted that the present action is a civil action. The court's reasoning here is questionable since criminal channels are also available.

76. *Id.* The court agreed to the injunction against use of cannabis on petitioner's property and also found petitioner in violation of the city's zoning ordinance by using her property as a church. *Id.* at 652. However, complicating the holding is the decision allowing the petitioner, her family and friends to continue worshipping in petitioner's home. *Id.* at 650.

77. *Id.*

78. *Id.* at 651. Unlike other jurisdictions which distinguished *Woody*, the Florida court did not overrate the particular and unique role peyote played in the Native American Church. Instead, *Woody* was cited by the instant court to contrast the two situations and to emphasize the deleterious effect uncontrolled drug use could have on the public. *Id.*

This exception is notable because most courts, in distinguishing *Woody*, pay particular attention to the centrality of peyote to the Native American Church. *See* Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); People v. Crawford, 69 Misc. 500, 328 N.Y.S.2d 747 (Supp. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (App. Div. 1973). This "centrality" approach has been criticized as an easy way for the court to distinguish cases which have essentially the same facts as *Woody*. *See* Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 115 (1973). *See also* Comment, *supra* note 54, at 276. ("Despite any 'centrality' talk, the majority in *Kennedy* was simply not prepared to extend religious freedom to the point that the First Amendment could provide a defense to an otherwise valid criminal statute prohibiting conduct rather than belief.")

79. In the instant case, cannabis was used by members and non-members of the Church, adult and child. 377 So. 2d at 651.

80. Cannabis was used throughout the day. *Id.*

81. See note 45 *supra.* The court concluded cannabis use did threaten the public since it was used throughout the day by people constantly coming and going to and from the petitioner's residence. *See* note 3 *supra.*

not have the power to abolish a religious practice.[82] Instead, Justice Boyd stated the court should allow reasonable time, place and manner restrictions in regulating cannabis.[83]

In analyzing the validity of the injunction, the court did not utilize the full *Sherbert* test.[84] Resurrecting the *Reynolds* dichotomy by holding that the state may regulate religious practices,[85] the instant court followed the current trend and reached its decision without full consideration of the free exercise interest.[86] The Florida supreme court, looking only at the effect of the compelling state interest in justifying restrictive acts, disregarded the strength of the religious interest involved. Thus, the court held that the danger to public safety was sufficiently compelling to permit infringement upon the right of free exercise.[87]

A proper application of the *Sherbert* test would have required the court to consider the petitioner's showing that cannabis was essential to the bona fide practice of her religion.[88] Additionally, the petitioner's claims should have been

82. 377 So. 2d at 652, (Boyd, J., concurring).

83. *Id.* Justice Boyd's suggestions included allowing bona fide adult members to use cannabis in worship services in a properly zoned church location, on the condition that they do not drive while under the drug's influence. Moreover, the court should designate the people who are to distribute and receive the drug. Also, a strict accounting of the narcotics would prevent misuse. *Id.*

84. See text accompanying note 35 *supra*. The *Sherbert* test requires consideration and balancing of the individual's religious interest, the state's interest and any alternatives available. Alternatives did not weigh in the court's analysis in the instant case.

85. 377 So. 2d at 651. In its decision, the court cited *Sherbert* for the proposition that laws may never restrict religious beliefs but may regulate religious practices. *Id.* at 650. In actuality, this premise was first propounded in *Reynolds*. See notes 12-21 and accompanying text, *supra*.

86. *See* State v. Soto, 21 Or. App. 794, 537 P.2d 142, *cert. denied*, 424 U.S. 955 (1976). The defendant, convicted of unlawful possession of peyote, was not allowed to present evidence of his religious beliefs and practices and their relationship to his possession of peyote. The appeals court said that a religious freedom defense was "in disregard of a positive legislative declaration" which makes criminal the possession of a dangerous drug. Because the state had established a compelling interest, the defendant was not allowed to raise his free exercise defense for consideration. *Id.* at 798, 537 P.2d at 144. See note 87 *infra*. *See also* Leary v. United States, 383 F.2d 881 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

87. 377 So. 2d at 651. Problems can be found with the court's application of the state interest step of the *Sherbert* balancing test. First, the state should have been required to show its compelling interest with more particularity. See note 41 *supra*. While some testimony indicated indiscriminate use, see note 69 *supra*, the state should be required to show a strong threat or particular danger to the public. Second, there was no discussion in the opinion of the effect the injunction would have on the church. The court failed to weigh the danger to the public against the effect of an injunction on the church. Commentators have noted the lack of actual balancing in court decisions. As one suggested, once the state shows a compelling interest, "the Court stops and the state automatically wins, even if the individual's interest is exceptionally compelling." Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1245. *See* Lewellyn v. State, 489 P.2d 511 (Okla. Crim. App. 1971) (because the danger was so great, the court did not inquire into the truth of the defendant's beliefs).

88. "When a conflict is between the law and fundamental principles of religion and conscience, courts are more inclined to grant an exemption than when the religious principle involved is not a central tenet of the religion." Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 416 (1974).

given some weight even if they conflicted with a positive legislative declaration.[89] To decide otherwise would mean that when the legislature ascertains the use of anything is harmful to the public welfare, consideration of the first amendment right to religious freedom would be circumvented.[90] Such action would, in effect, void the religious freedom guarantees of the Constitution.[91]

By distinguishing the facts of the instant case from those of *Woody*, the majority used particulars to cloud fundamental similarities. In both, bona fide religious groups considered the use of an unlawful drug to be central to their religion's tenets.[92] However, because the Native American Church restricted peyote use to a particular ceremony, the Florida court treated that use as acceptable while rejecting the Coptic practice.[93] In reaching this conclusion, the instant court neglected the second step of the *Sherbert* test. If the court had considered the viable alternatives to an injunction then the adverse effects of the Coptic's practice could conceivably be rectified.[94] As suggested by Justice Boyd, reasonable restrictions could be placed on the church, thereby allowing devotees to traditionally practice their religion while protecting the public.[95]

The United States Supreme Court test for analyzing free exercise claims specifically requires a balancing test in which each interest is weighed in turn. For the instant court to prohibit a religious exercise without giving each interest this due consideration violates that mandate. Unless guidance and direction are given to this ad hoc balancing system by either the United States Supreme Court[96] or the legislature, continued deprivation of religious freedoms could occur as state interests compel.

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89. *See* State v. Soto, 21 Or. App. 794, 795, 537 P.2d 142, 144 (1975) (Fort, J., dissenting).

90. *Cf.* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965) (some moral standards are beyond toleration; therefore the legislature may declare acts harmful or immoral).

91. State v. Soto, 21 Or. App. 794, 799, 537 P.2d 142, 147.

92. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69.

93. See note 56 *supra*.

94. 377 So. 2d at 652. See Justice Boyd's suggested alternatives, note 83 supra. The court apparently feared that if the Coptics were allowed to smoke marijuana, other individuals would allege church membership in defense of narcotics charges. As seen in *Sherbert* and *Woody*, fear of fraudulent claims has not been a successful argument. *See, e.g.*, United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (to allow members of the Neo-American Church a drug exemption would be to "permit anyone to violate the law by the church membership fee.") *Id.* at 447.

See generally Giannella, *supra* note 35, at 1408 (courts stress the possibility of fraudulent claims more in the cases of unknown, non-orthodox or unpopular sects). *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 332-34 (1969) (although a religious privilege to smoke marijuana may be workable if only a few people could establish the requisite religious interest, acts such as polygamy or sacramental use of LSD may not be tolerated regardless of numbers).

95. The California Supreme Court put restrictions on the Native American Church by requiring a strict accounting of the peyote. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

96. The instant case, as of this writing, is being appealed to the United States Supreme Court. Telephone interview with Milton M. Ferrell, Jr., counsel for petitioner (Jan. 24, 1980). See note 9 *supra*.