

# Comments

## LSD AND FREEDOM OF RELIGION

Effective October 6, 1966 the California legislature has penalized possession of the controversial drug called LSD.<sup>1</sup> Since in many instances use of this drug has resulted in religious experiences,<sup>2</sup> the question may soon be judicially raised whether this law will prevail against a defense based on freedom of religion under the First and Fourteenth Amendments.<sup>3</sup>

### I

#### PSYCHEDELICS AND THE LAW

LSD is medically classified as a "psychedelic" drug (meaning "mind-manifesting"), rather than a narcotic.<sup>4</sup> Other drugs in this group include mescaline, psilocybin and marijuana.<sup>5</sup> Mescaline, which is a purified substance of the "peyote cactus",<sup>6</sup> is prohibited under Section 11500 of the

<sup>1</sup> Lysergic acid diethylamide. The psychedelic properties of this drug were accidentally discovered in 1943 in Switzerland by A. Hofmann of the Sandoz Research Laboratories. MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* 49 (1966).

<sup>2</sup> See generally, MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* (1966); JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902); Leary, "*The Religious Experience: Its Production & Interpretation*", *THE PSYCHEDELIC READER* (1965).

<sup>3</sup> The First Amendment guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .", made applicable to the states through the liberties guaranteed in the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In California, religious freedom is granted in Art. 1 Sec. 4 of the state Constitution: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

<sup>4</sup> This dichotomy is significant since effects from the two types of drugs are physiologically opposite. A narcotic (such as morphine or opium) is a drug which produces sleep or alleviates pain by *depressing* the sensory system. A psychedelic drug expands sensory *awareness* and increases the general level of consciousness. Another cogent difference is that use of most narcotics leads to addiction whereas psychedelic drugs are not physiologically addictive. STANDARD CHEMICAL & TECHNICAL DICTIONARY, 1942; Burroughs, "*Points of Distinction Between Sedative & Conscious-Expanding Drugs*", LSD 170 (1965). Since most danger from use of narcotics emanates from crimes committed to obtain the drugs after addiction, non-addictive psychedelic drugs do not seem to present the same danger to public safety.

<sup>5</sup> A possible addition to this group was suggested by the discovery that seeds of morning-glory plants (specifically the "Heavenly Blue" and "Pearly Gates" varieties) also produced psychedelic effects. Reports that ingestion of 200 to 500 of these seeds resulted in effects similar to a large dose of LSD led to an unseasonal demand for them in Boston, New York and San Francisco, which presented the Federal Food and Drug Administration with the rather "seedy" problem of whether to ask Congress to amend the federal narcotic laws to bar morning-glories from domestic use. Apparently no action has been taken. Wakefield, "*The Hallucinogens: A Reporter's Objective View*", LSD 65 (1965).

<sup>6</sup> *Lophophora williamsii*.

California Health and Safety Code which refers to "possession of narcotic(s)<sup>7</sup> other than marijuana", even though it is medically classified as a psychedelic and not as a narcotic.<sup>8</sup> Marijuana, which has been referred to as the "safest" of the psychedelics,<sup>9</sup> is also classified under California law as a narcotic<sup>10</sup> and carries a felony penalty under Section 11530 for mere possession on the first offense. (By comparison, the most potent drug in this group—LSD—carries a misdemeanor penalty for first offenses.) Psilocybin was synthesized in 1958 from the "sacred mushroom" of Mexico<sup>11</sup> which had been used in that country as a mind-altering plant for more than 4 centuries.<sup>12</sup> Although this drug is more potent than marijuana or mescaline,<sup>13</sup> possession of psilocybin is not prohibited under California law.<sup>14</sup>

Another psychedelic frequently discussed is peyote, which is the crude "buttons" or growths from the "peyote cactus". Possession of this plant is also prohibited under Section 11500 of the Health & Safety Code referring to "narcotic(s) other than marijuana", even though it is not considered a narcotic under federal law and is not medically classified as a narcotic.<sup>15</sup>

The effects of these psychedelics—and particularly of LSD—is generally to expand the level of consciousness and to increase awareness of one's surroundings and bodily processes. Effects of the LSD drug include

<sup>7</sup> §11011 (1) defines as a narcotic "All parts of the plant of the genus *Lophophora* whether growing or otherwise; the buttons thereof, the alkaloids extracted from any such plant; and every compound, salt, derivative, mixture or preparation of such plant." This definition encompasses the synthetic psychedelic mescaline as well as the crude psychedelic substance known as peyote.

<sup>8</sup> PSYCHOPHARMACOLOGICAL AGENTS 562 (1964).

<sup>9</sup> Burroughs, "*Points of Distinction Between Sedative & Conscious-Expanding Drugs*", LSD 170, 174 (1965).

<sup>10</sup> West's Ann. Health & Safety Code §11001(d).

<sup>11</sup> *Psilocybe mexicana*.

<sup>12</sup> Wakefield, "*The Hallucinogens: A Reporter's Objective View*", LSD 50 (1965).

<sup>13</sup> The Medical Tribune, March 11, 1963.

<sup>14</sup> Nor is possession of this drug prohibited under federal law. Although psilocybin (along with DMT, LSD, mescaline and peyote) is subject to the federal Drug Abuse Control Amendments of 1965, this law does not prohibit possession for personal use. 21 Code of Federal Regulations §166.3 (1966); 21 U.S.C.A. §360a(C).

<sup>15</sup> A comment made by one researcher in the field seems germane at this point:

... use of the non-addictive and otherwise harmless peyote has been of very great value to the Indians. Spiritual sustenance apart, peyote has been conspicuously instrumental in effecting rehabilitation of countless Indian alcoholics . . . (y)et, so dangerous and wicked have the peyote rites seemed to a good many churchmen and politicians that . . . punitive legislation has been proposed and sometimes passed by various state law-making bodies. This sometimes has meant the classification of peyote as a dangerous narcotic, use of which is to be regarded as equivalent to the use of, say, morphine or heroin. These attempts to legally ban peyote . . . have been vigorously opposed by an array of distinguished anthropologists and other experts. . . . Sometimes these experts have carried the day, but on other occasions the courts and lawmakers have proved opaque to all authoritative evidence . . . and the new psychedelic drugs, especially LSD and other synthetics, have arisen to complicate the issue. That peyote, for many sound reasons, should not be considered along with the synthetic psychochemicals is evident to any careful student, but that this fact also will be evident to legislators and government agencies may be too much to hope for. MASTERS & HOUSTON, THE VARIETIES OF PSYCHEDELIC EXPERIENCE 45 (1966).

changes in visual and auditory perception, changes in the rate and content of thought, changes in experiencing time and space, and an increased capacity for concentration. Colors and sounds gain an intense meaning which may carry over even after the effects of the drug itself have worn off. Users have reported feeling they are outside of their body viewing it from afar and may have feelings of depersonalization and loss of ego. Sensations of death and rebirth have been experienced. Exactly what effects are experienced appears to vary with the personality of the user, the dosage taken and the setting in which the drug is administered.<sup>16</sup>

Various harmful effects from taking LSD have been reported. There can be a loss of awareness that the sensations are being caused by the drug which may result in delusions that others are trying to kill or harm the user or in self-loathing with impulses toward suicide. There is an apparent potential of the drug to produce bizarre behavior or undesirable personality changes in some persons. And in some instances the effects of the drug have recurred some time after the drug was used.<sup>17</sup>

Many of these harmful effects seem to occur when the drug is indiscriminately used or is administered without proper supervision. Of 70 LSD users admitted for emergency psychiatric treatment at the Neuropsychiatric Institute at U.C.L.A. during a 7 month period, none were experimental or therapeutic cases and all had obtained the drug from illegal sources.<sup>18</sup> Similarly, a survey of 5,000 persons who had received LSD or mescaline with medical supervision led to the conclusion that "with proper precautions (the drugs) are safe when given to a selected healthy group".<sup>19</sup>

When used therapeutically LSD has proven effective in several areas. It has been used as a means of giving solace to the dying, with the result that patients were greatly relieved of pain and were more receptive to the idea of losing ultimate control.<sup>20</sup> Used for the rehabilitation of chronic alcoholics, LSD has resulted in remission rates up to 70% (compared with an abstinence rate of 15%–20% claimed by Alcoholics Anonymous).<sup>21</sup> Administered to 100 persons with various neuroses who had been prepared over a 3 week period, a large single dose of LSD resulted in "marked improvement" in 80% of the cases.<sup>22</sup> When given to prisoners, one study

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<sup>16</sup> *Supra* note 15 at 5; Burroughs, "Points of Distinction Between Sedative & Conscious-Expanding Drugs", LSD 171 (1965).

<sup>17</sup> Cole & Katz, "The Psychotomimetic Drugs", J.A.M.A. March 7, 1964.

<sup>18</sup> Ungerleider, Fisher & Fuller, "The Dangers of LSD", J.A.M.A. August 8, 1966.

<sup>19</sup> Cohen, "Lysergic Acid Diethylamide: Side Effects & Complications", 130 J. Nerv. & Ment. Disease 30 (1960).

<sup>20</sup> Kast, "Pain and LSD-25: A Theory of Attenuation of Anticipation", LSD 239 (1965).

<sup>21</sup> Savage, "LSD, Alcoholism and Transcendence", LSD 183 (1965); MASTERS & HOUSTON, THE VARIETIES OF PSYCHEDELIC EXPERIENCE 53 (1966).

<sup>22</sup> Unger, "Mescaline, LSD, Psilocybin & Personality Change", LSD 200 (1965).

revealed a recidivism rate of 25% rather than the usual rate of 50%.<sup>23</sup> The drug has been successfully used in the treatment of sexual disorders and in working with psychopathic criminals and retarded and schizophrenic children, and has also proved effective as a preanesthetic in pre-operative situations.<sup>24</sup>

The drug is not legally available to the general public. LSD is presently a "new drug" under federal definition<sup>25</sup> and is supplied only to researchers who satisfy requirements set by the Federal Food and Drug Administration and by the National Institute of Mental Health.<sup>26</sup> However, in spite of this, it is estimated that approximately 40,000 persons now use LSD obtained from blackmarket sources or through illegal self-manufacturing of the drug.<sup>27</sup>

Possibly because of these strict controls on supply which exist (at least) in law, mere possession of LSD was not previously prohibited in California. Under federal regulations effective May 18, 1966<sup>28</sup> LSD and other psychedelic drugs became subject to the Drug Abuse Control Amendments of 1965,<sup>29</sup> but while these Amendments regulated manufacture, sale and possession, they specifically exempted possession for personal use or use by a member of one's household.<sup>30</sup>

The California law has considerably broadened these restrictions.<sup>31</sup> Unauthorized possession of the drug will now be a misdemeanor punishable by a sentence of up to 1 year in jail or a fine of \$1,000. Subsequent convictions will carry penalties of imprisonment for 1-5 years or a jail sentence not exceeding 1 year.<sup>32</sup> By placing this drug under the provision of the Health & Safety Code dealing with "restricted dangerous drugs" which provides for misdemeanor charges, the new law seems in part a legislative attempt to overcome enforcement difficulties inherent in charg-

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<sup>23</sup> MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* 53 (1966).

<sup>24</sup> *Ibid.*

<sup>25</sup> 21 U.S.C.A. §321(p).

<sup>26</sup> Letter from Patrick W. Fuller, Director of the Bureau of Drug Abuse Control, Los Angeles, on file at U.S.F. Law Review office. See 21 U.S.C.A. §355(b).

<sup>27</sup> Editorial, *The Psychedelic Review*, No. 7 1966.

<sup>28</sup> 21 Code of Federal Regulations §166.3; 31 F.R. 7175 (May 17, 1966).

<sup>29</sup> 21 U.S.C.A. §321(v)(3).

<sup>30</sup> 21 U.S.C.A. §360a(c). Although LSD was regulated by the basic Federal Food, Drug and Cosmetic Act (21 U.S.C.A. §355), that Act prohibited only interstate transportation of the drug.

<sup>31</sup> Sec. 11901 of the Health & Safety Code enacted in 1965 has been amended to include as "restricted dangerous drugs" lysergic acid, LSD (lysergic acid diethylamide) and DMT (N-N-dimethyltryptamine), including their salts and derivatives or any compounds, mixtures or preparations chemically identical with such substances, and §11916 has been added to exempt investigational use of these substances for research purposes by qualified experts. Senate Bill No. 6, First Extraordinary Session, 1966.

<sup>32</sup> Cal. Health & Safety Code §11910.

ing college students and others similarly distinguishable from hardened drug addicts with felony penalties on first offenses.

It is to be noted briefly that various enforcement problems may attend the new law. LSD is odorless, colorless and tasteless—which may hamper prosecutions for mere possession of the drug since such possession must be “knowing” possession.<sup>33</sup> Because of its strong potency (1 ounce would provide experiences for 100,000 persons<sup>34</sup>), powerful doses of this drug could be hidden under a postage stamp or in other inconspicuous places. And since offenses of possession will be misdemeanors on first offenses, enforcement officers must have a search warrant or actually see the law broken before making an arrest.

Passage of the California law and similar laws in other states<sup>35</sup> has not met with unanimous approval. It has been suggested that while LSD and marijuana are considered “relatively harmless” as far as physiological health is concerned, the outlawing of a popular psychedelic will encourage individuals to experiment with agents that have toxic properties.<sup>36</sup> U.S. Food and Drug Commissioner Dr. James Goddard, testifying before a Senate subcommittee, stated that such laws might drive users underground, thus making it more difficult to find and treat those who suffer dangerous psychotic effects from indiscriminate or unsupervised use of the drug.<sup>37</sup> The fear has also been expressed that restrictive legislation may make supplies of LSD more scarce and so more expensive to obtain which may lead to the possibility of organized crime. Since the drug can be easily produced without expensive laboratory facilities and is now selling for \$4–\$12 per capsule when the legal retail price would be close to 2c per dose, there seems to be a lucrative market in commissioning small local producers to supply the drug for blackmarket purposes.<sup>38</sup>

One of the strongest criticisms against such laws has been voiced by psychiatrists who fear that investigational and therapeutic use of the drug will no longer be possible if possession is prohibited. This objection has been met, in part, by the California law which reiterates language of the Drug Abuse Control Amendments of 1965<sup>39</sup> exempting investigational use of the drug by qualified experts. Under this terminology psychiatrists

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<sup>33</sup> “LSD (Lysergic Acid Diethylamide)”, Research Material Prepared in Conjunction with Senate Bill No. 6, First Extraordinary Session, 1966, on file at U.S.F. Law Review office; *People v. Widener*, 220 Cal.App.2d 826; 34 Cal.Rptr. 130 (1963).

<sup>34</sup> “LSD (Lysergic Acid Diethylamide)”, *supra* note 33.

<sup>35</sup> Substantially similar laws have been enacted in 11 states including Nevada, Oregon, South Carolina, New York and New Jersey.

<sup>36</sup> “*Danger in LSD Ban*”, S.F. Chronicle June 15, 1966, quoting University of California Anthropologist Michael Horner at the Conference on Psychedelic Drugs, U.C. Extension Center, San Francisco, June, 1966.

<sup>37</sup> “*The Law & LSD*”, Time Magazine, June 10, 1966.

<sup>38</sup> MASTERS & HOUSTON, THE VARIETIES OF PSYCHEDELIC EXPERIENCE 65 (1966).

<sup>39</sup> 21 U.S.C.A. §355(i).

and researchers may use the drug as part of an investigational study upon receiving federal sanction from the Food and Drug Administration and upon receiving approval from the National Institute of Mental Health which regulates supply of the drug.<sup>40</sup>

## II

### A RELIGIOUS PHENOMENON

There seems to be little doubt that use of psychedelic drugs can result in authentic religious and mystical experiences. In depth of feeling, sense of revelation, and semantically, these experiences seem to show significant parallels with the more orthodox religious experiences.<sup>41</sup> In a study conducted by psychiatrists Ditman and Savage,<sup>42</sup> 43% in the Ditman group and 86% in the Savage group stated that they considered LSD to be a "religious experience" when questioned 6 months to 3½ years after receiving the drug. Fifty-four percent of the Ditman group and 93% of the Savage group felt they had gained a "greater awareness of God, or a Higher Power or an Ultimate Reality".<sup>43</sup> More than half of the persons in each group felt a greater regard for the welfare of other human beings and a greater tolerance of others after taking the drug. In a similar study where psilocybin was given to 69 full-time religious professionals (half of Christian or Jewish beliefs and half of Eastern religions), 75% said they had "intense mystico-religious experiences" and more than 50% stated that they had felt the deepest spiritual experience of their life.<sup>44</sup>

It has been estimated that were the general population given LSD under natural conditions 1/4 to 1/3 of those taking the drug would have religious experiences and if the persons had a strong religious inclination to begin with the estimate is placed at 3/4. Were the drug taken in a setting which was religiously suggestive, it has been estimated that 9 out of every 10 users would have religious experiences.<sup>45</sup>

While there is agreement that true religious or mystical experiences can result from the use of LSD, there is disagreement as to which ex-

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<sup>40</sup> Letter from Patrick W. Fuller, Director of the Bureau of Drug Abuse Control, Los Angeles, on file at U.S.F. Law Review office.

<sup>41</sup> MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* 247 (1966).

<sup>42</sup> Ditman, Mayman & Whittlesey, "Nature & Frequency of Claims Following LSD", 134 J. Nerv. & Ment. Disease 346 (1962); Savage, Harman, Fadiman Jr. & Savage, "A Follow-Up Note On The Psychedelic Experience", Paper delivered at meeting of the American Psychiatric Assn., St. Louis, Mo., May, 1963.

<sup>43</sup> The higher incidence of reported religious experiences in the Savage group resulted from supplying the subjects in that group with religious stimuli. *Ibid.*

<sup>44</sup> Leary, Litwin & Metzger, "Reactions to Psilocybin Administered in Supportive Environment", 137 J. Nerv. & Ment. Disease 561 (1963).

<sup>45</sup> Smith, "Do Drugs Have Religious Import?", LSD 158 (1965).

periences should be included within these classifications due to differences in criteria used to define the terms.<sup>46</sup> The problem is complicated by the commonplace practice of psychedelic subjects to describe various uncommon experiences in terms of religious metaphors.<sup>47</sup> However, the use of peyote by Indians in the Native American Church has reportedly produced theistic religious experiences during which the Indians have become aware of "the presence of God and of those personal shortcomings which must be corrected if they are to do His will".<sup>48</sup> As an example of an experience with LSD having mystical overtones, the following has been forwarded:

The boundaries of my being now had been dissolved . . . and all other boundaries also were dissolved. All, including what had been myself . . . became . . . a pure and seething energy that was the whole of Being. This energy . . . was experienced as a white and radiant fire. . . . At what I can only call the "core" of this flux was God, and I cannot explain how it was that I, who seemed to have no identity at all, yet experienced myself as *filled with God*, and then as . . . *passing through God* and into a Oneness wherein . . . God, Being and a mysterious One constituted together what I can only designate the ALL. What "I" experienced in this ALL so far transcends my powers of description that to speak . . . of an ineffably rapturous Sweetness is an approximation not less feeble than if I were to describe a candle and so hope to capture with my words all of the blazing glory of the sun.<sup>49</sup>

With such experiences being reported, and with the drug referred to in terms such as "When the day comes . . . that sacramental biochemicals like LSD will be as routinely and tamely used as organ music and incense to assist in the attainment of religious experiences . . .",<sup>50</sup> it seems probable that the courts may soon be faced with a prosecution under the new California law which is alleged to be in violation of the accused's constitutional right to freedom of religion.

### III

#### WHAT IS "RELIGION"?

Recent judicial definitions of what constitutes "religion" and "religious beliefs" would seem to leave ample room for such a defense. While the original definition of the word "religion" as used in the First Amendment

<sup>46</sup> MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* 258 (1966).

<sup>47</sup> *Id.* at 260.

<sup>48</sup> *Id.* at 257.

<sup>49</sup> *Id.* at 308.

<sup>50</sup> Lecture delivered by T. Leary at a meeting of Lutheran psychologists sponsored by the Board of Theological Education, Lutheran Church in America, in conjunction with the 71st Annual Convention of the American Psychological Assn., Philadelphia, Pa., August 30, 1963.

by the founding fathers was undoubtedly based on theistic principles,<sup>51</sup> this definition has been considerably expanded by the courts.<sup>52</sup>

In discussing what amount of religiosity was sufficient to acquire military service exemption under the Selective Service Act of 1940 which exempted any person "who, by reason of religious training and belief is conscientiously opposed to participation in war in any form", the Second Circuit Court of Appeals in *United States v. Kauten*<sup>53</sup> equated religious belief with personal conscience. The court stated, "a conscientious objection to any war under any circumstances (is) a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse".

Dissatisfied with this equation, the Ninth Circuit court held in *Berman v. United States*<sup>54</sup> that a belief not dependent upon faith in a Deity or superhuman power was in no sense "religion" as Congress used that term within the Selective Service Act. To clarify its intent, Congress revised the Selective Service Act two years after this decision to include the statement, "(r)eligious training and belief . . . means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."<sup>55</sup>

However, in 1961 the Supreme Court found such a requirement of theism unconstitutional. Invalidating a provision in the Maryland State Constitution authorizing oaths for public office which included a declaration of belief in the existence of God, Justice Black stated in *Torcaso v. Watkins*<sup>56</sup> that such a requirement was unconstitutional because "the power and authority of the State of Maryland is put on the side of one particular sort of believers—those who are willing to say they believe in the existence of God."<sup>57</sup>

<sup>51</sup> See Rice, "The Meaning of 'Religion' in the School Prayer Cases", 50 A.B.A.J. 1057 (1964); Baker, "The Supreme Court and the Freedom of Religion Melange", 49 A.B.A.J. 439 (1963); Kirven, "Freedom of Religion or Freedom From Religion?", 48 A.B.A.J. 816 (1962).

<sup>52</sup> For a comprehensive review of this area see Fernandez, "The Free Exercise of Religion", 36 SO. CAL. L. REV. 546; Donnici, "Governmental Encouragement of Religious Ideology," 13 J. PUB. L. 16 (1964).

<sup>53</sup> 133 F.2d 703 (2nd Cir.1943).

<sup>54</sup> 156 F.2d 377 (9th Cir.1946).

<sup>55</sup> Universal Military Training & Service Act, 50 U.S.C.A. App. §456(j).

<sup>56</sup> 367 U.S. 488 (1961). While the *Torcaso* decision was based on the First and Fourteenth Amendments, a similar rule applicable to federal employees exists under Art. VI of the U.S. Constitution which provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

<sup>57</sup> However, many examples of theism still exist on a national level; e.g., custom of opening legislative sessions with prayers; tax and postal exemptions for religious organizations; "So help me God" in courtroom oaths; reference to "Creator" in Declaration of Independence;



Two years after rendering this decision the Second Circuit court was again confronted with a conscientious objector case (*United States v. Jacobson*<sup>58</sup>) which was to be decided under the 1948 Selective Service Act as revised by Congress to require a belief in a Supreme Being. The objector felt that religion was "the sum and essence of one's basic attitude to the fundamental problems of human existence" and that "man can know nothing of God" and that "Godness can be approached only through psychic involvement in reality".<sup>59</sup> In holding that the objector qualified for exemption under the Act even though he did not, as the Act required, base his objections upon a belief in a Supreme Being, the court engaged in a notable example of judicial over-extension in direct contravention of legislative intent. The court found that "under present day thinking as to the First Amendment, a statute could scarcely be defended . . . if it protected the 'free exercise' of only a few favored religions or preferred some religions over others without reasonable basis for doing so", concluding that "The time-honored principle of construing a statute not only to escape unconstitutionality but to avoid 'grave and doubtful constitutional questions' (citations omitted) thus dictates reading the definition of 'religious training and belief' . . . as broadly as the words permit."<sup>60</sup>

Making a full return to the idea of a personal conscience as equated with religious belief, the United States Court of Appeals in *United States v. Seeger*<sup>61</sup> in 1964 ruled that the concept of religion embraced faiths other than those which recognized a Supreme Being citing Buddhism, Taoism, Ethical Culture and Secular Humanism as examples. It stated that ". . . for many in today's 'skeptical generation', just as for Daniel Seeger, the stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God."<sup>62</sup>

The District Court of Appeals in California has reached a similarly broad interpretation of religious belief. The court in *Fellowship of Humanity v. County of Alameda*<sup>63</sup> consulted case precedent and dictionary sources, concluding that religion was (1) a belief, not necessarily referring to supernatural powers; (2) a cult openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the

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reference to Deity added to Allegiance to the Flag by Congress in 1954 (36 U.S.C.A. §172); chaplains in both houses of Congress, religious services at federal hospitals and prisons; appeals to the Almighty in Presidential messages; "In God We Trust" motto on coins (31 U.S.C.A. §324, 324(a)); the "Pray for Peace" postmark.

<sup>58</sup> 325 F.2d 409 (2nd Cir.1963).

<sup>59</sup> *Id.* at 415.

<sup>60</sup> *Ibid.*

<sup>61</sup> 326 F.2d 846 (1964).

<sup>62</sup> *Id.* at 853.

<sup>63</sup> 153 Cal.App.2d 673; 315 P.2d 394 (1957).

belief and (4) an organization within the cult which observed the tenets of the belief. The court stated that "the content of the belief is of no moment."<sup>64</sup>

Apparently the only qualification still remaining before "a belief" can be protected by the First Amendment's guarantee of religious freedom is that the belief be honestly held by the accused. Refusing to allow the jury to examine in any way the content of the defendant's religious beliefs, the court in *United States v. Ballard* has stated that "men may believe what they cannot prove"<sup>65</sup> and that they may not be put to the proof of their religious doctrines or beliefs. The court defined the sole inquiry which could be made—whether, on an objective basis, the defendant's belief occupied the same place in the life of its holder that orthodox beliefs occupied in the lives of the believing majority.

It would thus seem that the courts in broadening the concept of religion within the last two decades to include conscientious principles have provided ample room for the LSD advocate to declare that his religious beliefs will be violated by the new California law.

#### IV

##### PARALLEL PROBLEM: PEOPLE V. WOODY

Since LSD is a relatively new drug and since prior to the new laws passed by California and other state legislatures there were no restrictions on mere possession of the drug, there is little or no case law in this area. However, the California courts have been faced with a parallel problem in dealing with charges of possession of peyote which, like LSD, is classified as a psychedelic drug. If a defense to the California law is presented it will in all probability be analogized from the results of these peyote decisions. Two such cases are in point.

In *People v. Woody*,<sup>66</sup> decided by the California Supreme Court in 1964, it was found that restrictions on the use of peyote were a violation of the religious freedom of a group of Navajo Indians in Needles, California. In *Woody*, the defendants were convicted under Section 11500 of the Health & Safety Code for unauthorized possession of peyote. The conviction was reversed by the state Supreme Court which found that the drug was being used in a bona fide pursuit of a religious faith and that the practice did not frustrate a compelling interest of the state.

Defendants were members of the Native American Church which was incorporated by the State of California with a membership ranging from

<sup>64</sup> *Id.* at 693; 315 P.2d at 406.

<sup>65</sup> 322 U.S. 78, 86 (1944).

<sup>66</sup> 61 Cal.2d 716; 394 P.2d 813 (1964). Also see note, "Constitutional Law—Freedom of Religion—Unconstitutionality of State Narcotics Statute as Proscribing the Sacramental Use of Peyote by Indians", 6 ARIZ. L. REV. 305 (1964).

30,000 to 250,000. The church held certain Christian beliefs as well as teaching that peyote embodied the Holy Spirit so that those partaking of it could enter into direct contact with God. Meetings of this religion, which was practiced in 5 states and in Saskatchewan, lasted from sundown Saturday to sunrise Sunday. After a religious ritual, a member who was sponsoring the meeting would supply the peyote by passing a ceremonial bag containing peyote buttons and adult participants partook in quantities sufficient to produce a psychedelic effect. Members felt that peyote induced a feeling of brotherhood and was necessary in enabling them to experience the Deity. Some members wore peyote buttons around their neck in a pouch as a protective symbol. The court found that peyote was a sacramental symbol similar to bread and wine in certain Christian churches and that statutory prohibition of use of peyote would result in a virtual inhibition of the defendant's religion.

A reading of the *Woody* decision would seem to imply that a defense based on freedom of religion can prevail over statutory prohibition of a psychedelic where the religious practice of using drugs is part of a recognized, well-established religion; where the drug comprises a sacramental part of the religious ceremonies; and where the drug is in fact so basic to the religion that its prohibition would inhibit practice of the entire religion.

### *In Re Grady*

However, these requisites were substantially narrowed in a subsequent decision in *In Re Grady*,<sup>67</sup> the only California case to date which has relied on the *Woody* decision.<sup>68</sup> In this case petitioner sought habeas

<sup>67</sup> 61 Cal.2d 887; 394 P.2d 728 (1964).

<sup>68</sup> However, the *Woody* decision was recently relied upon (unsuccessfully) in *North Carolina v. Bullard* (148 S.E.2d 565 (1966)). Charged with possession of peyote and marijuana, the defendant stated he was a member of the Neo-American Church which believed that these plants, being growths from the earth, were a reincarnation of the spirit of God and were necessary in the practice of his religion. Setting a striking parallel to *Woody*, Bullard said that peyote was being used in a sacramental way and constituted the cornerstone of his religion and was itself an object of worship. However, the court (scarcely veiling its personal feelings) stated that a jury might well have found that this defense was invented by the defendant after his arrest and "Even if he is sincere, the First Amendment does not protect him. . . . He may belong to any church or to no church and may believe whatever he will, however fantastic, illogical or unreasonable, but nowhere does it authorize him in the exercise of his religion to commit acts which constitute threats to the public safety, morals, peace and order." It concluded, "His position cannot be sustained here—in law nor in morals."

While the North Carolina court relied upon the line of cases exemplified by *Reynolds v. U.S.* (98 U.S. 145 (1878)—refusing to allow polygamy) which have held that religious activities which threaten public interests may be prohibited, the *Woody* court (at 725-726) found that this rule had been restated by the Supreme Court in *Sherbert v. Verner* (374 U.S. 398 (1963)—unemployment compensation granted Seventh-Day Adventist refusing to work on Saturdays) necessitating a balancing of interests: ". . . no showing merely of a rational relationship to some colorable state interest will suffice; in this highly sensitive constitutional

corpus for release from the California Men's Colony at Los Padres in Riverside County after conviction of unlawful possession of peyote. After receiving information that peyote was being used at the home of petitioner police officers searched the premises and found gelatin capsules of peyote as well as a substantial quantity of peyote buttons buried in a sack 70 feet from the house. Petitioner, his wife and three other men were arrested. As evidence of religious support for use of the drug petitioner stated he was the spiritual leader of the codefendants (who lived in his home), that he selected their food, taught them deep-breathing exercises, how to pray and "how to love the Christian Life." He stated that peyote was a very spiritual plant because it gave direct contact with God and "when used for prayer the best thing that can happen to you." The case was remanded for rehearing on the factual question of whether defendant was actually engaged in good faith when practicing this religion.<sup>69</sup> However, in remanding, the court inferred that this quantum of evidence of religiosity, if in good faith, was sufficient to establish a valid defense. Referring to the previous *Woody* decision, the court stated that "the state may not prohibit the use of peyote in connection with bona fide practice of a religious belief. In light of petitioner's assertion of religious use, our decision in *Woody* requires us in the instant case to grant the writ of habeas corpus."<sup>70</sup>

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area, only the gravest abuses, endangering paramount interests, give occasion for permissive limitation." Applying such a test, the *Woody* court found Peyotism did not present a grave abuse to state interests.

Of tangential interest in the *Bullard* case is the fact that the defendant also unsuccessfully objected that peyote and marijuana were not narcotics under a state narcotic statute which listed "cannabis" and defined cannabis as including peyote or marijuana. While marijuana is the equivalent in the Americas of the *cannabis sativa* plant, peyote is an entirely different plant called *Lophophora williamsii*. Both plants have been medically termed psychedelics. PSYCHOPHARMACOLOGICAL AGENTS 574, 585 (1964).

<sup>69</sup> Upon receiving the case from the Supreme Court the Riverside Superior Court conducted a trial limited to determining whether the defendant's claim of religious use of peyote was valid. Finding it was not, the Riverside Court then returned the case to the Supreme Court. The Supreme Court without formality returned the case with instructions that it was a complete reversal and that a trial de novo was required. Since the evidence used at the original trial had by then been destroyed the case was dismissed. Letter from Rufus W. Johnson, attorney for defendant Grady, on file at U.S.F. Law Review office.

<sup>70</sup> In *Re Grady*, 61 Cal.2d 887, 888; 394 P.2d 728, 729 (1964). By broadly directing themselves to "bona fide practice of a religious belief" in both the *Woody* and *Grady* decisions, the California courts expanded the peyote exemption found in other states. At the time of the *Woody* decision Peyotism had already been exempted from drug laws in New Mexico and Montana by statute and in Arizona by judicial decision. However, these states addressed their exemption to religious organizations incorporated under state laws or specifically to the Native American Church. N.M.Stat. (1959) 54-5-16; Mont.Stat. (1959) 94-35-123; *Arizona v. Attakai*, Crim. No. 4098, Coconino Cty. July 26, 1960. Similarly, federal regulations effective in May, 1966 which made DMT, LSD, mescaline, psilocybin and peyote subject to the restrictions of the

## V

## STATE INTERESTS

In both of these cases the religious use of a psychedelic was found permissible when balanced against the state's interest in protecting the health and safety of its citizens. This may well be the crucial question if religious freedom is presented as a defense to the use of LSD.

As was pointed out in the *Woody* appeal, freedom of religion is susceptible of restriction only where there is a compelling state interest—where the exercise of the freedom would result in a “grave and immediate danger”<sup>71</sup> to interests which the state may lawfully protect. The state in *Woody* contended that such a compelling interest was present in possible harmful effects upon the Indian community, in a propensity to use more harmful drugs as a correlation of using peyote, and especially in the infringement upon enforcement of narcotic laws due to fraudulent claims asserted under a religious mantle. However, Justice Tobriner pointed out that there was no evidence to suggest Indians who used peyote were more liable to become addicted to narcotics than were non-peyote-using Indians and that the moral standards of members of the Native American Church were regarded by experts to be higher than those of Indians outside the church. As to the possibility of spurious claims of religious belief, the court pointed out that the state had produced no evidence that such claims would in fact preclude effective administration of the law or that other forms of regulation would not accomplish the state's objectives. The court concluded that “the use of peyote presents only slight danger to the state and to the enforcement of its laws . . . the scale tips in favor of the constitutional protection.”<sup>72</sup>

Since both peyote and LSD are psychedelics, it would seem that permissive religious use of one of these drugs might necessitate granting a similar privilege for use of the other. In support of this position it is to be noted that the *Woody* court felt that effective administration of the law would not be endangered by religious use of peyote at a time when the drug was being used by 30,000 to 250,000 persons—whereas LSD is

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Drug Abuse Control Amendments of 1965 specifically noted that “The listing of peyote in this subparagraph does not apply to non-drug use in bona fide religious ceremonies of the Native American Church . . .”. 21 Code of Federal Regulations §166.3. Since federal restrictions do not prohibit personal possession, the California courts have effectively created religious exemption for use of peyote for *all* individuals who have a bona fide religious motivation, without regard to requirement of affiliation with an organized religion or with the Native American Church.

<sup>71</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>72</sup> *People v. Woody*, 61 Cal.2d 716, 727; 394 P.2d 813, 821 (1964).

currently being used by some 40,000 persons. And the fact that the state legislature has made possession of LSD a misdemeanor while less powerful psychedelics, including peyote, carry felony penalties might be said to reflect on the "gravity" of the danger to state interests which the legislature feels is present.

Nor should reports of harmful effects following indiscriminate use of this drug necessarily prove a cogent factor. It was noted in the first *Woody* appeal<sup>73</sup> that while members of the Navajo tribe usually consumed between 4 and 8 buttons of peyote at their meetings, other tribes were known to consume from 30 to 40 buttons thus greatly increasing chances of harmful effects; and since the amount of usage at the Navajo meetings was not regulated there was no evidence that injurious effects might not result in the future from the religious practices of this tribe. However, the Supreme Court did not mention this speculation in reversing, and in finding the drug not subservient to state interests may thereby have implied that while danger was possible, it was not "immediate." The decision would seem to imply that even though injurious effects from the use of a psychedelic may be possible through indiscriminate use, the danger in each case is to be measured by the usual practices of the particular defendant.

There are also surface similarities between the drugs themselves. Both produce expanded consciousness of sounds and colors, feelings of dissociation and distortion of bodily image. Both are non-addictive physically, although they may become addictive psychologically. Both have been used therapeutically with good results. And in the case of both drugs, the results from use depend upon the personality of the user (and of the therapist), the setting and the dosage taken.<sup>74</sup>

However, several dissimilarities in the properties of the two drugs are to be noted, and it is these dissimilarities which may provide sufficient delineation between the psychedelics to permit religious use of one but not the other.

a. One such difference lies in the potency of the drugs. While peyote and LSD are both stronger than marijuana, in turn, LSD has a far greater potency than peyote. Comparative reports of this potency vary greatly—from reports that LSD is 100 times more potent than mescaline (a peyote derivative) to its being 7,000 times more potent.<sup>75</sup> However, there is at

<sup>73</sup> 35 Cal.Rptr. 708, 714 (Vacated).

<sup>74</sup> Unger, "*Mescaline, LSD, Psilocybin & Personality Change*", LSD 200 (1965).

<sup>75</sup> The Medical Tribune on March 11, 1963 reported, "LSD is by far the most powerful of the (psychedelics), having a potency approximately 10 times that of psilocybin and 100 times that of mescaline." Time Magazine on June 17, 1966 stated that LSD ". . . has 100 times the potency of psilocybin and 7,000 times that of mescaline, which is itself considerably more powerful than marijuana". Since mescaline is an alkaloid extracted from the crude peyote plant, these figures would be even higher when LSD is compared directly with peyote.

least agreement that LSD is by far the more potent drug. Because of this potency, use of LSD—even in religious ceremonial surroundings—is a potentially more dangerous undertaking than is similar use of peyote. And since LSD is colorless, tasteless and odorless, the chance of *inadvertently* receiving a larger dose than intended or desired is apparent.

b. Even though public use of LSD has been noted only during the past 4 or 5 years<sup>76</sup> it has already gathered a following of some 40,000 socially-divergent citizens.<sup>77</sup> However, peyote, which was used as early as 300 B.C. and which has been used in the United States during the past 70 years,<sup>78</sup> has centralized among constituents of the Native American Church. The reason for this would seem to lie in the fact that ingestion of peyote often produces unpleasant sensations of nausea (followed by vomiting in some cases) and in sensations of being too hot or too cold and of dizziness—side effects which may be tolerable for ceremonial use but not for recreational use. With LSD, these reactions are comparatively mild and may go unnoticed.<sup>79</sup> It might be speculated, then, that while some religious use of LSD will be seen, the major appeal of the drug will lie in recreational use by the masses, not always with proper supervision. This unsupervised use by the general population has resulted in some instances in users harming themselves or being forced to seek medical help after taking the drug, and is to be contrasted with use of peyote by members of the American Native Church who even without formal supervision have not inflicted appreciable harm upon themselves or their surroundings.<sup>80</sup> Whether this difference is caused by the potencies of the drugs or whether an “informal” supervision has been supplied by ceremonial surroundings in the Native American Church, it would seem that estimable future use of the drugs presents different problems in terms of state interests.

c. While the major psychedelics have the same spectrum of effects, there is a difference in response to individual drugs based on the personality of the user.<sup>81</sup> Thus, with mescaline (a peyote derivative) there tends to be an impairment of performance for all users. The introverted-aesthetic

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<sup>76</sup> One of the earliest public warnings about the drug appeared in the July 14, 1962 issue of *Journal of the American Medical Association*. *Medical Tribune*, March 11, 1963.

<sup>77</sup> Persons admitted in Los Angeles for emergency treatment after taking LSD without medical supervision were noted to be “predominantly single, white, male and with an average age of 21”. Of 70 persons so admitted, 24 were unemployed, 16 were students, 10 were businessmen, 3 were artists and 1 was a housewife. Ungerleider, Fisher & Fuller, “*The Dangers of LSD*”, *J.A.M.A.* August 8, 1966.

<sup>78</sup> MASTERS & HOUSTON, *THE VARIETIES OF PSYCHEDELIC EXPERIENCE* 40 (1966).

<sup>79</sup> *Id.* at 67.

<sup>80</sup> See text *supra* note 15.

<sup>81</sup> Rinkel, *SPECIFIC & NON-SPECIFIC FACTORS IN PSYCHOPHARMACOLOGY* 130 (1961); Wolbach, Miner & Isbell, “*Comparison of Psilocin With Psilocybin, Mescaline & LSD-25*”, 3 *Psychopharmacologia* 221 (1962).

type of person also experiences confusion with this drug and may remain immobile contemplating this confusion; however, the extroverted-athletic personality (who might be expected to have a greater tendency to inflict his emotions upon his surroundings) becomes more elated and euphoric under mescaline and due to this generally euphoric state may lack destructive motivation. With LSD, however, the extroverted-athletic type of person tends to become depressed, anxious and tense and since there is little impairment of mobility with LSD he is better able to inflict these emotions upon his surroundings.<sup>82</sup> It would thus appear that LSD has a more emotionally disturbing effect than does mescaline or peyote in dosages which are otherwise comparably active, and because of this, evidence concerning the safety of peyote as used in the Native American Church cannot justifiably be analogized to similar religious use of LSD.<sup>83</sup>

## VI

### CONCLUSIONS

1. It is felt that in view of the increasing use of LSD by young persons without proper supervision the new California law is a commendable use of state power to protect its citizens from possible harm by unsupervised or indiscriminate use of the drug. Whether prohibition of possession of this drug will in fact act as a deterrent is not certain,<sup>84</sup> but if law itself possess deterrent qualities it is to be expected that the California law will prevent some persons from using the drug in unsupervised situations such as "LSD parties."

2. The present laws in California regarding psychedelic drugs contain several inconsistencies which suggest remedial legislation. The first of these is that the most potent of these drugs, LSD, carries misdemeanor penalties while the *least* potent, marijuana, carries a felony penalty. It is not suggested that possession of LSD be made a felony charge; since many users of this drug are of college age and are not akin to habitual drug users, the misdemeanor penalty for first offenses is felt to be proper. However, due to this respective potency, probable harm which could

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<sup>82</sup> *Ibid.*

<sup>83</sup> Letter from Sterling Bunnell, M.D. on file at U.S.F. Law Review office.

<sup>84</sup> It was reported in the Journal of the American Medical Association and in the press that federal restrictions on LSD have proven futile since the number of persons hospitalized after illegal use of the drug actually increased rather than decreased after the Federal Drug Abuse Control Amendments of 1965 became effective. "The Futile Federal Law on LSD", S. F. Chronicle, August 8, 1966; Ungerleider, Fisher and Fuller, "The Dangers of LSD," J.A.M.A. August 8, 1966. However, this conclusion does not seem supported by the data provided by these sources. While the Amendments become effective February 1, 1966 and the largest number of hospitalizations occurred during March, LSD did not become subject to the Amendments until May 18, 1966. 21 Code of Federal Regulations 166.3; 31 F.R. 7175 (May 17, 1966).



result from use of marijuana is slight compared to the harm which can be foreseen from use of LSD. It is therefore felt that marijuana should be removed from Section 11530 of the Health & Safety Code and included under Section 11901 of that code (which now regulates LSD) which refers to "restricted dangerous drugs." Under this section first offenses would be misdemeanors and subsequent offenses either a misdemeanor or felony. This would seem to correctly reflect the danger to the state which is presented by the use of this drug.

Secondly, California has tenaciously classified psychedelic drugs as narcotics in the face of medical evidence concerning divergent effects which follow the use of these drugs and in spite of the divergent dangers to state interests which they represent.<sup>85</sup> This difficulty could be resolved by also including mescaline and peyote under Section 11901 of the Health & Safety Code with specific provisions for exemption for medical purposes. This section which relates to "restricted dangerous drugs" was added to the code in 1965 and now presents a suitable solution which was not heretofore available to the problem of legally classifying drugs which are dangerous but are not narcotics. Such a step would unite all of the major psychedelic drugs under one code section and would provide misdemeanor penalties for all on first offenses for possession with either misdemeanor or felony penalties for subsequent convictions. Since the California legislature has already seen fit to include LSD—which is admittedly the most potent and injurious drug in its group—under this section, there does not seem to be a valid objection to including the other psychedelic drugs under its provisions as well.

Thirdly, it is felt that California should provide against the use of psilocybin, the only commonly-used psychedelic which is not prohibited under present state laws. To close the doors on possession of DMT, LSD, mescaline, peyote and marijuana yet ignore psilocybin is to invite the present LSD users to "switch rather than fight" after the California law banning LSD is effective.

3. It is felt that inevitably the defense of freedom of religion will be presented against the new California law—if not by an individual, then by a group which has united as a religion that uses LSD in a sacramental capacity. The more structuralized the group, the stronger will be the analogy to the *Woody* case, and much of such an analogy would be valid. However, it is felt that if expert testimony is obtained on the properties and effects of these two drugs the dissimilarities between peyote and LSD will cause state interests to outweigh the constitutional considerations and the defense will prove invalid.

In this regard it is felt that caution should be exercised. In determining the validity of the defense there will be a subtle but strong influence

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<sup>85</sup> See text *supra* note 4.

presented by recent adverse publicity concerning the drug which may cause hasty and emotional reactions. To the majority of citizens use of a drug to attain religious experiences is at least an unusual method of religious expression. But in this regard there seems to be a common thread of intent running through the query made by one psychologist on behalf of an LSD user, "Must his experiential contact with the Divine Process come in watered-down symbols, sermons, hymns, robot rituals, religious calendar art and moral-behavior sanctions eventually secular in their aim?"<sup>86</sup>—and the comment of the *Woody* court that ". . . in a mass society which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes even more important"<sup>87</sup>—and the conclusion of the *Ballard* court that "Religious experiences 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."<sup>88</sup>

The restriction of an individual's religious activities is a weighty responsibility. If a defense under freedom of religion is to be denied to users of LSD, this decision should be based on medical facts presented by expert testimony—not on public reaction resulting from mass-media publicity.

*Lorraine A. Smith*

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<sup>86</sup> Leary, "The Religious Experience: Its Production & Interpretation", THE PSYCHEDELIC READER (1965).

<sup>87</sup> *People v. Woody*, 61 Cal.2d 716, 727; 394 P.2d 813, 821 (1964).

<sup>88</sup> *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).