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Article 10

Narcotics Statute Ruled Inapplicable to Religious Use of Peyote

Roth. While it does not resolve the problem of what is obscene, viz., hard core pornography, it does establish the test to be used in making such a determination. Thus, with the criteria to be employed by the various courts in determining whether a material is obscene being firmly formulated, the courts can now concentrate on determining that issue without first having to interpret the somewhat ambiguous *Roth* decision.

Recent Decision: Narcotics Statute Ruled Inapplicable to Religious Use of Peyote

Three Navajo Indians were arrested while practicing an ancient religious rite involving the use of hallucination-producing peyote.[1] Upon appeal of their conviction for the illegal possession of narcotics, the defendants argued that the statutory prohibition against the possession and use of peyote contained in Section 11500 of the California Health and Safety Code abridged their constitutionally guaranteed right to the free exercise of religion. The state contended that Peyotism shackles the Indians to primitive conditions and undermines enforcement of narcotics laws. Reversing the judgment of the superior court, the California Supreme Court *held* that the state's compelling interest in law enforcement was insufficient to outweigh the constitutional guarantees of religious freedom invoked by appellants as to their bona fide use of peyote as a sacramental symbol. People v. Woody, — Cal.—, 394 P.2d 813, 40 Cal. Rep. 69 (1964).

There is little consistency among the cases interpreting the alleged infringement of first amendment religious liberty by state and federal statutes. A review of these cases reveals not only disparity in the forms of the religious practices involved but also diversity in the approaches taken by the courts in reaching these decisions.[2]

One of the leading cases in this field is *Sherbert v. Verner,*[3] in which the United States Supreme Court held that a Seventh Day Adventist was unconstitutionally deprived of the right to the free exercise of

[1] Peyote is a product of the plant *lophophora williamsii,* growing in small buttons on the spineless cactus indigenous to Texas and northern Mexico. Mescaline, its principal constituent, releases its effects when the buttons are chewed or a derivative tea is consumed by the user. The types of hallucinations produced vary from bright-hued kaleidoscopic patterns to the symptomatic visions of schizophrenia. The visual effects are usually coupled with a heightened sense of comprehension and friendliness toward others. Technically peyote is not a narcotic, but a non-addicting hallucinogen whose users suffer no after effects when the hallucinatory stage has passed. For further discussion, see N.Y. Times, Nov. 1, 1964, § 6 (Magazine), p. 96.

[2] See Braunfeld v. Brown, 366 U.S. 599 (1961), in which the Court denied relief to Orthodox Jewish merchants who sought relief from Pennsylvania's Sunday Closing Laws, holding that the statute did not deprive appellants of their religion, but only made their religious observance more expensive. *Compare* Board of Educ. v. Barnette, 319 U.S. 624 (1943), in which the Court granted relief to Jehovah's Witness schoolchildren whose religious refusal to pledge allegiance to the flag violated a state regulation, *with* State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952), in which the court denied religious exemption to a Christian Scientist student who protested an X-ray examination prerequisite to registration at the University of Washington.

[3] 374 U.S. 398 (1963).

her religion when the state denied her claim for unemployment benefits, despite her inability to find employment that did not require her to labor on Saturday, her sabbath. Reasoning that the denial clearly burdened the free exercise of appellant's religion, the Court then considered whether some compelling state interest justified such abridgement of her constitutional guarantees. Although the state contended that fraudulent objections to Saturday work would dilute the state compensation fund and interfere with employers' scheduling of Saturday work, the Court held that no actual evidence of such abuse had been presented by the state to justify the infringement. Thus, the dual analysis employed in *Sherbert* called first for a determination if there was, in fact, a curtailment of a first amendment right, and then a weighing of the abridgement against the state interests involved.

A case which concerned a more serious peril to state interests was *Reynolds v. United States,*[4] which centered upon the Mormon practice of polygamy. The appellant was a Utah Mormon who protested that his right to free religious exercise was obstructed by a statute proscribing bigamy. Acknowledging that religious *beliefs* cannot be restrained by statute, the Court held, nonetheless, that the law may constitutionally proscribe deliberate *acts,* however piously motivated, which constitute a grave threat to marriage, family and society. Thus, the decision was founded on so weighty a concern for public policy that the consideration of first amendment rights was necessarily limited.

Similarly, the courts have given heavy emphasis to public safety and welfare in the cases involving the handling of poisonous snakes as part of religious rituals. *Kirk v. Commonwealth*[5] set forth the elements typically contained in cases of this kind. The defendant was a licensed preacher of a religious sect which handled rattlesnakes as a test of faith, believing that no harm would come to handlers sufficiently devout. Appealing his conviction for the involuntary manslaughter of his wife who was fatally bitten by a snake during a religious ceremony, the preacher argued that the statute which proscribed the practice of snake-handling unconstitutionally abridged his first amendment rights. Here, as in *Reynolds,* the court conceded that the law may not interfere with the espousal of the faith itself, but in view of the public policy issue involved it held that conscientious religious belief was no excuse for illegal acts endangering the lives and health of citizens.

The unequivocal concern for public welfare in these cases might suggest a similar attitude toward the religious use of peyote, but the states are not united in their treatment of the drug. An interesting perspective of current policy regarding peyote is found reflected in the laws of several Western states where concentrations of Indian believers in Peyotism reside. In 1960 rec-

[4] 98 U.S. 145 (1878).

[5] 186 Va. 839, 44 S.E.2d 409 (1947); see Harden v. State, 216 S.W.2d 708 (Tenn. 1948); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1943).

But public policy has been tempered by concern for first amendment religious freedom even in the vital area of national security, as evidenced by the provisions of the Internal Security Act of 1950, which exempted conscientious objectors from combat service in the armed forces. See Dickinson v. United States, 346 U.S. 389 (1953); Taffs v. United States, 208 F.2d 329 (8th Cir. 1953); *In re* Hansen, 148 F. Supp. 187 (D. Minn. 1957).

ognition was extended to the sacramental use of peyote by judicial decree in the case of *Arizona v. Attakai.*[6] Similarly Montana in 1957[7] and New Mexico in 1959[8] amended their narcotics statutes in order to lift a pre-existing proscription of peyote and permit its use for religious and sacramental purposes.

In deciding the case at bar the Court focused on the question of whether there was a compelling state interest which counter-balanced appellants' right to the free exercise of their religion. Adopting the reasoning utilized in *Sherbert,* the Court employed a two-fold approach. First, it determined whether there was, in fact, an abridgement of constitutional rights, and second, it weighed any such infringement against the state's interest in continuing the proscription of peyote as it existed heretofore.

In order to determine whether the statute imposed any burden on the free exercise of appellants' religion, the Court inquired into the tenets of the Native American Church[9] to which appellants belong. The Court noted that the religion combined certain Christian teachings with the belief that "peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God."[10]

> Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a "teacher" because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian G.I. often wears around his neck a beautifully beaded pouch containing one large peyote button.[11]

After an examination of the record, the Court concluded that the effect of Section 11500 of the California Health and Safety Code was a virtual prohibition of appellants' religion. It stated that "to forbid the use of peyote is to remove the theological heart of peyotism."[12]

Having once concluded that an infringement did in fact exist, the Court passed to the second step in order to determine whether such abridgement was justified in the light of the state's compelling interest. This called for an analysis of the state's contentions that Peyotism substitutes the

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[6] Criminal No. 4098, Coconino County, July 26, 1960.

[7] MONT. REV. CODE ANN. § 94-35-123 (Supp. 1963). The amendment provided that the prohibition shall not apply to the use or possession of peyote "for religious sacramental purposes by any bona fide religious organization *incorporated* under the laws of the state of Montana." (Emphasis added.) It is interesting to note the requirement of corporate status as a qualification for the exemption of the religious organization.

[8] N.M. STAT. ANN. § 54-5-16 (1962). The amendment is almost identical to the Montana amendment *supra.*

[9] Since the organization forbids the use of alcohol and embraces many Christian precepts, a number of authorities believe that members of the church observe higher standards than nonmembers. Estimates of the organization's membership range from 30,000 to 250,000. It is incorporated under the laws of California.

[10] People v. Woody, — Cal. —, —, 394 P.2d 813, 817, 40 Cal. Rep. 69, 73 (1964).

[11] *Id.* at —, 394 P.2d at 817-18, 40 Cal. Rep. at 73. Elsewhere in its opinion the Court noted the significance of Title II, ch. 85, § 3 of the National Prohibition Act (1919) which exempted from prohibition the use of wine for sacramental purposes.

[12] *Id.* at —, 394 P.2d at 818, 40 Cal. Rep. at 74.

use of the drug for proper medical care, threatens to indoctrinate small children, engenders a possible propensity to the use of other more harmful drugs, and shackles the Indians to primitive conditions.

The Court found these arguments unsubstantiated by the record. It noted the absence of evidence to suggest that the Indians employed peyote in place of proper medical treatment, and observed from the record that Indian children never used peyote and that teenagers used it rarely. Further, the Court cited the admission of the attorney general that "there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics than non-peyote-using Indians,"[13] and "that peyote . . . works no permanent deleterious injury to the Indian."[14] As to the shackling of the Indians to primitive conditions, the Court admitted of no doctrine that "the state in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition'."[15]

The Court then proceeded to examine the state's contention that fraudulent assertions of religious immunity would impair enforcement of the narcotics laws. Turning again to *Sherbert,* wherein a similar argument predicted the filing of fraudulent unemployment compensation claims by persons feigning religious objections to Saturday labor, the Court pointed to the lack of evidence warranting fear of spurious claims. It dismissed the state's contention that the continued sacramental use of peyote would threaten the effective administration of the narcotics laws by noting unimpaired enforcement of such laws in Arizona, Montana, and New Mexico where Peyotism is permitted.[16]

The state's next argument suggested the difficulties that would necessarily attend any inquiry into the bona fides of each defendant's religious faith in future cases. The Court responded on this point, relying on *United States v. Ballard,*[17] in which the Supreme Court conceded that judicial examination of the truth or validity of religious beliefs is foreclosed by the first amendment, but nonetheless concluded that "the courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities."[18]

Finally, the *Reynolds* case, upon which the state principally relied, was examined by the Court and distinguished on the ground that it involved a lesser curtailment of religious freedom than the case at bar, and that it placed in issue a far greater peril to the interest of the state. The Court stated that

> the test of constitutionality calls for an examination of the degree of abridgement of religious freedom involved in each case. Polygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of the religion; peyote, on

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Id.* at —, 394 P.2d at 819, 40 Cal. Rep. at 75.

[17] 322 U.S. 78 (1944). The majority opinion in this mail fraud case upheld the constitutional propriety of probing the defendant's own belief in his alleged religious healing powers. However, the strong dissent of Mr. Justice Jackson should be noted.

[18] People v. Woody, *supra* note 10, at —, 394 P.2d at 821, 40 Cal. Rep. at 77.

> the other hand, is the *sine qua non* of defendants' faith. It is the sole means by which defendants are able to experience their religion; without peyote defendants cannot practice their faith. Second, the degree of danger to state interests in Reynolds far exceeded that in the instant case. The Court in Reynolds considered polygamy as a serious threat to democratic institutions and injurious to the morals and well-being of its practitioners. As we have heretofore indicated, no such compelling state interest supports the prohibition of the use of peyote.[19]

In order to resolve this case, which pitted vital interests of the state against religious acts safeguarded by the first amendment, the Court realized that it required a unique measuring device. It searched for an implement of breadth upon which such disparate values could be juxtaposed; and yet it sought a finely graduated instrument which could precisely gauge the outcome when the contest might be close. The Court found such a device in its two-fold analysis. This simply involved first, a determination whether the religious liberties concerned were actually infringed, and second, a conclusion whether such infringement might justifiably displace the warrantably heavy weight that freedom of religion places upon the scales of constitutionality. The logic and simplicity of this approach would seem to urge its greater use in future cases wherein state interest and religious practice clash. Furthermore, the courts should welcome eagerly this test which offers aid in settling the awesome issue of priority between the laws of man and God.

However, one problem may confront the courts attempting to apply this formula. An inquiry into the bona fides of a defendant's faith may be required, and this could prove to be a challenge. Cases will, no doubt, arise in which persons seeking religious immunity may feign their "faith" in order to escape conviction for their illegal acts. Other defendants who hold sincere but strange beliefs may be mistaken for impostors. Thus, the problem of determining the good faith of allegedly religious practices may impose a difficult but not an insurmountable task upon the courts.

Such a challenge can and should be met wherever the sanctity of first amendment freedom is placed in issue. The way is pointed by the case at bar. This decision properly upholds and reaffirms the principles of free religious exercise. Having thus stretched to new dimensions the demarcation line between state interest and religious freedom, particularly in the area of narcotics, this decision will doubtless usher in a host of cases, some seeking accommodation within the newly broadened boundary lines, others pressing even further to expand the gain.

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[19] *Id.* at —, 394 P.2d at 820, 40 Cal. Rep. at 76.