The Entheogen Law Reporter

Issue No. 4 ISSN 1074-8040 Fall 1994

Entheogens & the Free Exercise Clause
Practical Legal Aspects for Individuals

"The government's *war on drugs* has become a wildfire that threatens to consume those fundamental rights of the individual deliberately enshrined in our Constitution. Ironically, as we celebrate the 200th anniversary of the Bill of Rights, the tattered Fourth Amendment right to be free from unreasonable searches and seizures and now the frail Fifth Amendment right against self-incrimination or deprivation of liberty without due process have fallen as casualties in this *war on drugs*. It was naive of this Court to hope that this erosion of constitutional protections would stop at the Fourth and Fifth Amendments. But today, the *war* targets one of the most deeply held fundamental rights -- the First Amendment right to freely exercise one's religion."

--Chief Judge Burciaga, *United States v. Boyll* (D. N.M. 1991) 774 F.Supp. 1333, 1334.

The free exercise clause of the First Amendment of the United States Constitution mandates "Congress shall make no law...prohibiting the free exercise" of religion. This article will survey the factors which have guided courts in determining whether or not anti-drug laws have violated a person's right to freely exercise his religious beliefs. By presenting the factors that courts have deemed important, it is hoped that persons seeking First Amendment protection for their religious use of entheogens will be better able to tailor their practices to increase the chances that protection will be granted by a court in the event that such person is ever arrested for unauthorized possession of a controlled substance.

Before beginning such a survey, it cannot go unnoted that free-exercise jurisprudence in general is a jumbled mess of changing standards, faulty reasoning, and, perhaps most frustrating as of late, a propensity to completely abandon the role of judge and entirely defer to the legislature. When entheogens are the subject of a case, jurisprudential dissonance amplifies to often excruciating levels. While there is much to criticize in the judicial decisions involving the religious use of entheogens, the leveling of such criticism will not be focus of this article. Instead, this article will present a distillation of the various factors that the courts have deemed relevant when deciding whether or not to grant First Amendment protection to a religious user of entheogens.

Just as a tax lawyer would review with clients the various factors relevant to a judicial determination of legal versus illegal tax deductions for the purpose of assisting his or her client in arranging business purchases and ultimately reducing or eliminating tax liability, this article will examine the factors relevant to a judicial determination of whether or not a particular entheogen based religious practice is or is

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not constitutionally protected free exercise.

This survey must begin with an overview of a recent bifurcation in free-exercise jurisprudence. Prior to April 17, 1990, when the United States Supreme Court decided *Employment Div., Dept. Of Human Resources v. Smith* (1990) 494 U.S. 872 [108 L.Ed.2d 876, 110 S.Ct. 1595] (*Smith*), free exercise issues were resolved by application of the legal standard known as "strict scrutiny," and specifically analyzed by employing the "compelling state interest" (CSI) test. In a nutshell, the CSI test is an *ends-oriented* balancing test weighing: (A) a law's burden on an individual's religious practices; against (B) the state's interest in enacting and enforcing the law without exception. A law which severely burdens a person's sincere religious practices, will be declared unconstitutional if the court determines that the burden on religion is not justified by a compelling state interest. In slightly more detail, the CSI analysis is divided into three component stages: (1) Does the challenged law substantially burden the person's free exercise of religion? (2) Is the law necessary to accomplish a compelling state interest? (3) Will accommodating the person's religious practice unduly interfere with accomplishing the compelling state interest? (*U.S. v Lee* (1982) 455 U.S. 252, 256-259.)

In the *Smith* decision the Court made a sudden and radical departure from the CSI test, holding that Oregon's across-the-board prohibition against possession of *peyote* did not violate the free exercise rights of two members of the Native American Church because the Oregon law proscribing the possession of *peyote* was not specifically aimed at burdening religious practice. In other words, the Court announced a new test entirely at odds with the historically employed ends-oriented strict scrutiny analysis; a neutral and generally applicable criminal law does not implicate the First Amendment's free exercise clause. (*Smith*, 101 S.Ct at 1603.) In other words, under *Smith*, *all* anti-drug laws pass free exercise muster because they are not specifically aimed at prohibiting or infringing on religious practices. Under the neutrality test enunciated in *Smith*, an anti-drug law's incidental burden on religious practice does not raise a viable free exercise issue.

The Supreme Court endorsed the neutrality test again in 1993, when Justice Kennedy, writing for the majority, reiterated : "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) ___U.S.___[113 S.Ct 2217, 2226, 124 L.Ed.2d 472, on remand 2 F.3d 369 (11th Cir. 1993.) [striking down Hialeah, Florida's ordinance prohibiting animal sacrifice after finding that the ordinance was not neutral but rather was enacted for the *specific purpose* of discouraging the Santeria religion from establishing itself in Hialeah, Florida.]

In contrast to the ends-oriented CSI test, the neutrality test, is *intent oriented*, and looks at the legislature's purpose in enacting the law, rather than the legislation's actual impact on religion. With the enunciation of the neutrality test in *Smith*, any hope that an entheogen based religious practice would find protection under the free exercise clause was completely squelched.

Fortunately, just as things seemed to reach their darkest moment, President Clinton, on November 16, 1993, signed into law the Religious Freedom Restoration Act of 1993 (RFRA). (42 U.S.C. 2000bb, PL 103-141, 107 Stat. 1488.) The express purpose of the RFRA was to restore the compelling state interest test, after "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." (42 U.S.C. 2000bb, subd. (a)(4).)

The RFRA explicitly states:

(a) In General

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(42 U.S.C. sec. 2000bb - 1)

The legal effect of the RFRA is unclear. Some scholars argue that the legislation does not supersede a Supreme Court decision, which can only be reversed or overruled by a constitutional amendment or a subsequent decision by the Supreme Court explicitly overruling its earlier decision.[1] If *Smith* remains good law, it is practically impossible for entheogen users to obtain relief from the anti-drug laws on free exercise grounds.[2] On the other hand, if the RFRA truly restores the viability of the compelling state interest test, at least some hope remains for religiously motivated entheogen users. Since this discussion is otherwise moot, this article will assume that the CSI test has been

restored as the standard for judging free exercise claims.

Because the CSI test was in force for over 30 years prior to the *Smith* decision, a considerable amount of information can be extracted from the previously published cases examining the free exercise claims of entheogen users. In fact, there are well over seventy published decisions in which courts have directly addressed the free exercise rights of religious users of controlled substances, employing the CSI test to reach their decisions.[3] In the overwhelming majority of these cases, the courts have upheld the constitutionality of the anti-drug law and/or refused to grant the religious user an exemption, after finding that the complete prohibition of drug use was necessary to further the government's compelling interest in preventing drug abuse and maintaining the social welfare. (See for example, *Leary v. United States*, 383 F.2d 851, 860-861 (5th Cir. 1967) rehearing denied, 392 F.2d 220, reversed on other grounds, 89 S.Ct. 1532, 392 U.S. 6, 23 L.Ed.2d 57 (1968) ["It would be difficult to imagine the harm which would result if the criminal statutes against marijuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marijuana laws would be meaningless, and enforcement impossible."]; *United States v. Kuch*, 288 F.Supp. 439, 455 (1968) ["If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting breakdown of society."]; *Randall v. Wyrick*, 441 F.Supp. 312, 316 (1977) ["Missouri's marijuana laws are still based on reason. [Footnote omitted.] They are directed against a continuing social and health problem and the purposes of the statute cannot be accomplished without continued full enforcement."]; *State v. Bullard*, 148 S.E.2d 565, 568-569 (1966) ["It is true that [the first] amendment permits a citizen complete freedom of religion. 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."].)

Cases such as those just cited make clear that courts have an overwhelming fear that granting a religious exemption to the anti-drug laws will effectively result in the complete undoing of the anti-drug laws. Therefore, the courts traditionally have viewed complete drug prohibition as the only effective way of supporting the compelling state interest of maintaining public health and welfare. Awareness of this fear, and taking all possible steps to alleviate it, is essential when formulating a plan for free exercise use of entheogens.

With a background now in place, we will turn to specifically examining the CSI test as it relates to persons seeking constitutional protection for the religiously motivated use of entheogens. The first two prongs of the CSI analysis are rather straight forward in both theory and application. Under the first prong, a court will examine whether or not the anti-drug law substantially burdens an entheogen user's right to freely exercise his or her religion. Obviously, to the extent that the state and federal anti-drug laws outlaw possession of entheogenic substances that are sincerely used as sacraments or to facilitate communion with the Divine Absolute, the anti-drug laws *directly* burden entheogen based religions. For all practical purposes, the anti-drug laws make all shamanic religions illegal, by declaring possession of the essential tools/sacraments a crime.

A survey of the case-law reveals that two sub-issues come into play when courts analyze the first prong of the CSI test. In addition to the fundamental question of whether or not the anti-drug law burdens the person's religion, courts have examined: (a) whether or not the person is *sincere* in claiming he or she uses entheogens for religious purposes; and (b) whether or not use of the entheogen is *indispensable or central* to the person's religion. The burden of proving both sub-issues falls on the person claiming the religious protection.

With respect to the sincerity sub-issue, the courts have expressed a concern with the prospect of large numbers of people attempting to side-step the anti-drug laws by bogus assertions that their use of an illegal substance was religiously motivated. In the "experimental law" category, sincere religious users of entheogens should consider drafting personal declarations articulating the religious motivation underlying their ingestion of controlled substances. (See example declaration on pages 31.) Such a document should be executed as soon as possible so that in the event the declarant is subsequently arrested some evidence will exist showing that his or her religious claim is sincere rather than a post hoc justification or legal maneuver later concocted to avoid conviction for illegal drug possession. This document should be kept with one's personal private papers and only disclosed to one's defense attorney in the event of arrest.

With respect to the centrality sub-issue, some courts distinguish integral use of an entheogen from "auxiliary" use. For example in one marijuana sacrament case, a California court refused to find First Amendment protection for a defendant's use of marijuana not as a sacrament, but rather as an auxiliary method for achieving religious insight. (*People v. Collins* (1969) 273 Cal.App.3d 486 ["Defendant testified that he used marijuana in order to ex-

tend and intensify his ability to engage in meditative communication with the Supreme Being, to attain spiritual peace through union with God the Father and to search out the ultimate meaning of life and nature.... [T]he law [proscribing possession of marijuana] does not bar him from practices indispensable to the pursuit of his faith."].)

The centrality factor has taken on less importance in recent years, but it is still tacitly examined by courts reviewing a law's burden on religious practice. Recalling that the CSI test is a balancing test, a person seeking free exercise protection for his or her entheogenic based religious practice would do well to concentrate on maximizing those factors that evidence the anti-drug law's burden on his or her religious practice. Therefore, a person seeking First Amendment protection for religious entheogen use, should consider making clear in their personal declaration that entheogen use is the "theological heart" of their religion; that entheogen use is a central and necessary component to his or her sincerely held religious beliefs. (See *People v. Mullins* (1975) 50 Cal.App.3d 61, 123 Cal.Rptr. 201.)

DECLARATION OF [*TYPED NAME*]

I [*typed name*] do hereby declare that I am a resident of the State of [*state*], [*county*] county, city of [*city*], and reside at [*street address*].

1. I have written this document on the date attested below for the purpose of documenting my sincerity and noncriminal intent with regard to my religious ingestion of *Psilocybe* mushrooms endogenously containing the controlled substances psilocybin and psilocyn. (Hereinafter, referred to as "mushrooms.")

2. The sacramental ingestion of mushrooms is a central and indispensable element of my religion. I sincerely believe that sacramental ingestion of mushrooms is to partake of communion with the Divine Absolute a.k.a., God.

3. I am aware that [*insert history of specific plant, fungi or substance's historical link to religious use.*]

4. As part of my religion, I partake of the sacramental ingestion of mushrooms on a [*period of ingestion*] basis. These religious services are held on private property, in a safe environment which presents no reasonable danger to myself or to others. [*Insert other details if relevant.*]

5. I ingest mushrooms solely for religious purposes and believe that the recreational ingestion of mushrooms is sacrilegious.

6. In order to supply myself with my sacrament, I, as necessary, cultivate a personal supply of mushrooms. These mushrooms are not distributed to others for any reason. They are solely for my religious use. [*Optional.*]

I declare under penalty of perjury under the laws of the State of [*state*] that the foregoing is true and correct.

Date: [*date*]

[*signature*]
[*typed name*]

NOTARY PUBLIC:
[*Have Notary sign and date.*]

Once a person has satisfied the first prong of the CSI analysis, the burden of proof shifts to the government to establish the second prong; namely, to show that the burden on religion is justified by a compelling state interest. As touched on earlier, the government will predictably argue that the anti-drug laws are necessary to maintain the health and well-being of individuals and of society in general. It is fruitless for a religiously motivated entheogen user to attack the government's general point. Rather, all attention should be focused on the third prong of the analysis – showing that accommodating the person's religious use of entheogens will not unduly interfere with the government's compelling interest in maintaining individual and social health and well being.

Simply put, entheogen users seeking religious protection should strive to position their religious practices such that the state's anti-drug laws are shown to be unnecessarily broad; that complete and absolute prohibition is not the least restrictive means of accomplishing the state's objective. Under the CSI test, a law that burdens religion must be carefully tailored to the interest which the state asserts motivates the law. In other words, the religious practitioner will want to show that his or her religious use of entheogens does not interfere with the government's interest in prohibiting drug use in general or with the government's ability to enforce the general laws.

Here the courts have examined several factors. Courts, will look at the particular substance claimed by the practitioner to be his sacrament or vehicle for the Divine Absolute. For example, in *Olsen v. Drug Enforcement Administration* (D.C. Cir. 1989) 878 F.2d 1458,[4] Carl Olsen, a priest in the Ethiopian Zion Coptic Church, petitioned the DEA for an exemption to the federal Controlled Substances Act to the extent that it prohibited possession of the Church's principal sacrament, marijuana. The DEA refused to grant the requested exemption, and the United States Court of Appeals for the District of Colombia Circuit upheld the DEA's refusal. The court distinguished the sacramental use of marijuana from sacramental use of *peyote* based on what it perceived as "the immensity of the marijuana control problem in the United States." In other words, the court justified the *peyote* exemption for the NAC,

by pointing to the vastly different quantities of illegal marijuana use versus illegal *peyote* use. The court was troubled by the fact that over fifteen million pounds of marijuana were seized by the DEA from 1980 - 1987, whereas only about 19 pounds of *peyote* were seized over that same time period. (*Olsen*, at p. 1467.) This distinction is clearly of use to religious users of relatively arcane entheogens such as *ayahuasca* or other DMT based entheogens, and even to psilocybin containing mushrooms, since very few governmental seizures of these substances occur each year.

As a practical matter, a court will be more inclined to grant religious protection to a person utilizing of a *single* entheogen rather than a multitude of entheogens. In fact, every case finding in favor of religious use of entheogens has involved a person or church employing a single entheogenic sacrament -- namely, *peyote*.

Some courts have refused to grant religious protection for fear that the illegal substance might make its way outside the confines of the religious ceremony. To address this fear, entheogen users should strongly consider devising a method for strictly controlling the acquisition, storage and access to their entheogen. The aim is to prevent the entheogen's use by someone other than the practitioner outside the context of a religious ceremony. To complement the strict control program, the declaration should include a statement that the declarant considers it sacrilegious to use of the entheogen outside the confines of a religious ceremony. This documents the person's recognition of the state's interest in generally prohibiting such substances and reinforces the person's statement that use of the entheogen will occur only during a religious ceremony. (See generally, *Olsen*, at p. 1462.)

Finally, it goes without saying that preparation of such a personal declaration is only the first step in attempting to set the foundation for a religious defense in the event of a future criminal prosecution. Assuming the declaration is admitted into evidence,[5] rest assured that the court and jury will carefully scrutinize whether or not the person's actual conduct conformed to the statements contained in the declaration. Actions speak louder than words.

Notes

1. In remarks made on the South Lawn at the White House on November 16, 1993, when signing the RFRA, president Clinton stated:

"The power to reverse by legislation, a decision of the United States Supreme Court, is a power that is rightly hesitantly and infrequently exercised by the United States Congress. But this is an issue in which that extraordinary measure was clearly called for. As the Vice President said, this act reverses the Supreme Court's decision Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

More than 50 cases have been decided against individuals making religious claims against Government action since that decision was handed down. This act will help to reverse that trend by honoring the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties."

2. Though I am not aware of the argument ever having been made before, I believe that given the appropriate factual background it may be possible to argue that the anti-drug laws, to the extent that they prohibit possession of substances such as *peyote*, DMT, and psilocybin, are not neutral or general in their application, but rather were specifically designed to prohibit *peyote*, DMT, and psilocybin based *religious practices*. This argument would require the compilation of historical evidence that at the time *peyote*, DMT, and psilocybin were added to the Controlled Substances Act, they were not general drugs of abuse posing health or social dangers, but rather were used almost exclusively by people seeking religious insights.

3. The published opinion of every case directly addressing the free exercise issue in the context of entheogen use are on file in the TELR office. A copy of any case is available to subscribers for the cost of photocopying (15 cents per page) and postage. TELR is also considering publishing a low-cost compilation of the ten most important court opinions on this topic should subscriber demand warrant it.

4. It is informative to note that the majority opinion in *Olsen* was written by then Judge Ruth Bader Ginsburg of the D.C. Circuit court, now an associate justice on the United States Supreme Court.

5. For arguments in favor of the admissibility of such a document please contact TELR. TELR

Founder of Marijuana-Using Church Arrested

On March 14, 1994, articles of incorporation were filed with the Arkansas Secretary of State establishing "Our Church." A statement of purpose was attached to the articles of incorporation stating that Our Church was established for the purpose of providing: (1) an all denominational religious experience that will lead to a greater understanding of God; (2) the production of herbs and plants known to have value as medicine in the healing of the sick, and value as enhancers of the Spirit Quest; (3) the opportunity for research into the use of herbs and plants as medicine and to enhance the Spirit Quest; (4) a home for acts of civil disobedience in the tradition of Henry David Thoreau, Mahatma Ghandi, and Martin Luther King; and (5) Sanctuary whenever and by whomever requests it.

The first service was held on Easter Sunday, followed by a *Cannabis* planting ceremony publicly held on May 1, 1994, on land deeded to the church.

In early August, 1994, agents of the 4th Judicial District Drug Task Force, the federal Drug Enforcement Administration and the Washington County Sheriff's Department swept the Church property, confiscating over 400 *Cannabis* plants as well as a small amount of *peyote*. Church founder Tom Brown was subsequently arrested on a federal warrant and charged in U.S. District Court with the illegal manufacture of marijuana as well as possession with the intent to distribute marijuana.

Mr. Brown was released from custody after posting a $25,000 signature bond and promising not to grow additional *Cannabis* on his land or Our Church property. In his defense, it is expected that Mr. Brown will argue that his actions were protected under the Religious Freedom Restoration Act.

If convicted of the charges, Mr. Brown faces between five and 40 years in prison and a maximum fine of $2 million.

[There are a number of other religious use marijuana cases currently in the litigation process. While The Entheogen Law Reporter will report on those cases which present or resolve novel issues, most of these cases will not be discussed in TELR due to lack of space and because information concerning those cases can be obtained from numerous other sources singularly focused on the legal issues concerning marijuana. One well done newsletter that is particularly good at covering the religious marijuana cases is published by Carl Olsen (yes, the same "Olsen," embroiled in the Olsen v. DEA case), P.O. Box 4091, Des Moines, Iowa 50333, carlolsen@dsmnet.com.] TELR

Peyote Exemptions Supplement

The following information supplements the listing of *peyote* exemptions earlier reported at pp. 10-13. Grateful thanks to Jerry D. Patchen, Attorney for the Native American Church in the State of Texas. [Excerpted from a letter from Mr. Patchen.]

"Oklahoma is the birthplace of the Native American Church. The Native American Church was incorporated in Oklahoma in 1918. Oklahoma has a *Peyote* exemption that is similar to the federal exemption, in that it is an administrative rule:

> Special Exempt Persons—Native American Church. The listing of mescaline as a controlled dangerous substances in Schedule I of the Uniform Controlled Dangerous Substances Act does not apply to the non-drug use of the peyote cactus in bona-fide religious ceremonies of the Native American Church, and members of the Native American Church so using the peyote cactus are exempt from registration with the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control. Any person who produces peyote cactus for, or distributes the peyote cactus to, the Native American Church of the State of Oklahoma, however, is required to obtain registration annually as a distributor and to comply with all other requirements of the Uniform Controlled Dangerous Substances Act and these Rules and Regulations. (Sec. 700.05, Rules and Regulations of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control (April, 1990).)

My understanding is that similar to Alaska, the states of Utah, Rhode Island, New Jersey, Washington, West Virginia, North Dakota, Tennessee, Montana, Mississippi, Virginia, and North Carolina also have exemptions tied to the federal exemption." TELR

Subscribers' Questions

Q: I know DMT is illegal, but is the MAO inhibitor side of *ayahuasca* also illegal?

A: The MAOI component of traditional *ayahuasca* is made from the plant *Banisteriopsis caapi*, which is relatively rich in harmine with some traces of harmaline. Many *ayahuasca* analogous substitute an extraction from the seeds of another harmine rich plant, Syrian rue (*Peganum harmala*). Neither harmine nor harmaline are controlled substances, nor are any of the plants which contain those substances.

Q: I understand California has a law against importing into California psilocybin mushroom spores. Can you tell me more about this law and exactly what it outlaws?

A: In 1985, the State of California enacted several statutes defining a multitude of crimes related to mushroom spores and mycelium that produce mushrooms containing the controlled substances psilocybin and psilocyn. A first conviction under section 11390 or section 11391 is punishable by a maximum of one year in county jail or state prison. The statutes are quoted below.

California Health & Safety Code section 11390: Cultivation of spores or mycelium capable of producing mushrooms or other material containing controlled substance; punishment

> Except as otherwise authorized by law, every person who, with intent to produce a controlled substance specified in paragraph (18) [psilocybin] or (19) [psilocyn] of subdivision (d) of Section 11054, cultivates any spores or mycelium capable of producing mushrooms or other material which contains such a controlled substance shall be punished by imprisonment in the county jail for a period of not more than one year or in the state prison.

California Health & Safety Code section 11391: Transporting, importing, selling, furnishing, giving away, etc., spores or mycelium capable of producing mushrooms containing controlled substance to violate sec. 11390; punishment

> Except as otherwise authorized by law, every person who transports, imports into this state, sells, furnishes, gives away, or offers to transport, import into this state, sell, furnish, or give away any spores or mycelium capable of producing mushrooms or other material which contain a controlled substance specified in paragraph (18) [psilocybin] or (19) [psilocyn] of subdivision (d) of Section 11054 for the purpose of facilitating a violation of Section 11390 shall be punished by imprisonment in the county jail for a period of not more than one year or in the state prison.

California Health & Safety Code section 11392: Spores or mycelium capable of producing mushrooms or other material containing psilocyn or psyocylin [sic]; use in research, instruction, or analysis

> Spores or mycelium capable or producing mushrooms or other material which contains psilocyn or psyoclyin [sic] may be lawfully obtained and used for bona fide research, instruction, or analysis, if not in violation of federal law, and if the research, instruction, or analysis is approved by the Research Advisory Panel established pursuant to Sections 11480 and 11481.

Q: Is ketamine illegal?

A: Under federal law, ketamine is not a scheduled substance. However, at least one state, namely, California, has scheduled ketamine. In 1991, California added ketamine to Schedule III of its Controlled Substances Act. (See Cal. Health & Saf. Code section 11056 (g); Stats. 1991, c.294 (A.B.444) sec.1.) Interestingly enough, my reading of section 11377, subdivision (a), reveals that *simple possession* of ketamine is expressly *excluded* from the statute imposing punishment for unauthorized possession of a Schedule III substance. In other words, my reading of section 11377, subdivision (a) indicates that simple possession of ketamine is *not* punishable. (Cal. Health & Saf. Code sec. 11377(a).) However, under section 11379.2, the unauthorized *selling* of ketamine or *possession of ketamine for sale is* punishable by a maximum of one year in county jail or state prison. (Cal. Health & Saf. Code sec. 11379.2.)

Subscribers are cautioned that California may not be unique in scheduling ketamine. TELR

RECENT LSD CARRIER-WEIGHT CASES

In federal LSD cases punishment is largely dependent upon the weight of the LSD sold. Under the Federal Sentencing Guidelines as they existed prior to November, 1993, the weight of a controlled substance was calculated based on the entire weight of any mixture containing a detectable amount of the controlled substance. (U.S.S.G. sec. 2D1.1.) The Guidelines made clear that "mixture" includes carrier mediums. Since LSD is active in extremely small amounts, the weight of the carrier medium always far exceeds the weight of the actual LSD, and hence, hugely disparate sentences resulted from sales of the exact same amount of LSD depending on whether it was sold on blotter paper or much heavier sugarcubes.

In November, 1993, the United States Sentencing Commission amended the Federal Sentencing Guidelines by ordaining a standard carrier weight of 0.4 milligram per dose regardless of the weight of the actual carrier medium used. (U.S.S.G. sec. 2D1.1, Amendment 488.) The new 0.4 milligram per dose formula was expressly retroactive, and hence defendants sentenced before the amendment took effect were authorized to seek reductions of their sentences based on the new formula. (See U.S.S.G. sec. 1B1.10(a) and (d) (1993); *United States v. Holmes* (8th Cir. 1994) 13 F.3d 1217, 1222 [district courts have discretion to apply Amendment 488 retroactively in appropriate circumstances].)

On June 7, 1994, the United States Court of Appeals for the First Circuit held that the new 0.4 milligram carrier weight does not apply in cases triggering a mandatory minimum sentence. (See *U.S. v. Boot* (1st Cir. 1994) 25 F.3d 52, 55.) Under 21 U.S.C. section 841(b)(1)(B)(v), distributing "1 gram or more of a mixture or substance containing a detectable amount of" LSD is punishable by a mandatory minimum sentence of five years.

In *Boot*, Mr. Boot pled guilty to distributing 599 doses of LSD within 1000 feet of a school. The gross weight of the LSD plus its carrier weight totaled 11.6 grams. Under the pre-amended Guidelines, Mr. Boot was sentenced to 121 months in prison. Amendment 488 would have dramatically reduced Mr. Boot's prison sentence from 121 months to 27-33 months, and he petitioned the court for a reduction in his sentence. The First Circuit upheld the District Court's refusal to reduce Mr. Boot's sentence below the mandatory minimum five-year sentence for distribution of 1 gram or more, holding that the 0.4 milligram carrier weight does not apply if the mandatory minimum sentence was triggered by actual weight of the LSD and its carrier medium. (*Boot*, 25 F.3d at p. 55.)[1] The First Circuit's decision was based on the United States Supreme Court's decision in *Chapman v. United States* (1991) 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524, which held that a sentencing court must include the entire *actual* weight of the LSD and its carrier medium when determining whether the mandatory minimum sentence was triggered. (See *Chapman*, 500 U.S. at p. 461 ["Congress adopted a "market-oriented" approach to punishing drug trafficking," intending courts to sentence defendants "according to the weight of the drugs in whatever form they were found -- cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level."].)[2]

This is clearly the trend of other recent cases interpreting Amendment 488. (See e.g. *U.S. v. Kinder* (D. Vermont 1994) 853 F.Supp 122; *U.S. v. Neal* (C.D. Illinois 1994) 846 F.Supp. 1362.)

In short, despite Amendment 488's establishment of a standard 0.4 milligram carrier weight for calculating the applicable Guideline sentencing range, the current federal cases on the subject make clear that distributors of LSD would still be wise to use the lightest possible carrier medium in order to avoid the five year mandatory minimum triggered by distributing 1 gram or more of LSD by *actual* weight of the LSD and carrier.

Notes

1. Why the 11.6 gram actual weight did not trigger the ten year mandatory minimum rather then the five year term is not clear from the opinion. (See 21 U.S.C. sec. 841 (b)(1)(A)(v) ["In the event of a violation...involving 10 grams or more of a mixture or substance containing a detectable amount of [LSD] ...such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life...."]

2. A good article discussing the interpretation of "mixture or substance" and criticizing the *Chapman* approach is "A proposal to Resolve the Interpretation of "Mixture or Substance" under the Federal Sentencing Guidelines," by Thomas J. Meier. (84(2) Jrnl. of Crim. Law & Criminology 377 (Summer 1993).) Note, however, that the article was written prior to Amendment 488. TELR

Indiana Case Will Challenge Equating Possession of *Psilocybe* Mushroom with Possession of Psilocybin

On September 5, 1992, officers of the Evansville, Indiana, Police Department seized from the residence of Guy Bemis what were later identified as *Psilocybe* mushrooms. Evidently, although criminal charges were originally filed, they were quickly dropped.

Six months later, however, Mr. Bemis filed a tort claim against the city for damages done to his apartment as well as for the destruction and/or confiscation of some of his equipment. In response to his claim, the State of Indiana immediately reinstated criminal charges against Mr. Bemis, alleging : (1) that he unlawfully possessed Psilocybin, a Schedule I Substance, and (2) that he possessed Psilocybin with the intent to deliver it. Mr. Bemis's motion to dismiss the charges on the grounds that possession of *Psilocybe* mushrooms was not proscribed under Indiana law was denied and he was subsequently convicted as charged.

Mr. Bemis is currently appealing his conviction, arguing, among other points, that possession of *Psilocybe* mushrooms is not unlawful under Indiana law. As discussed in TELR (pages 16-19, 24), Indiana is among the majority of states in which this issue is one of first impression. TELR is continuing to monitor this appeal and hopes to present excerpts from the appellate brief once filed. (*State v. Bemis*, Vanderburgh Superior Court Case No. 82C019303CF00146.) TELR

Power Product Proprietor Sentenced

It was previously reported (pp. 16, 24-25),that the proprietor of Power Product, a company selling *Psilocybe* growing kits, pled no contest to Misconduct Involving a Controlled Substance in the Fourth Degree in violation of Alaska law AS.11.71.040(a)(3).

On August 16, 1994, Superior Court Judge Walter L. Carpeneti ordered imposition of sentence suspended for a period of four years on the conditions that the proprietor serve six months in jail, waive his Fourth Amendment right to be free from unreasonable searches and seizures, pay a fine of $3,600, and perform 240 hours of community service work. (*State v. Paramore*, Case No. 1JU-S94-150CR.)

On September 12, 1994, the State of Alaska filed a notice of appeal asserting that the sentence handed down by Judge Carpeneti is "too lenient." TELR will continue to follow the case as it proceeds through the Alaska Court of Appeals. TELR

Mail Search Update

As reported previously (pp. 23-24), the Ninth Circuit Court of Appeals held in *United States v. Taghizadeh* (9th Cir. March 28, 1994) No. 92-50518, 94 DAR 3973) that customs officials need not have probable cause before opening mail coming from a "drug source country" and addressed to a post office box.

In a rare ruling on September 9, 1994, a majority of the Ninth Circuit's 26 active judges voted to refer the case to an 11-judge panel for a new hearing. Mr. Taghizadeh's lawyer, Alan Rubin, will be attacking the concept of designated "drug source countries." As Mr. Rubin points out, the designation unjustly "makes every person from that country a second-class citizen. They have relatives in that country. Their mail is going to be searched, while others' won't, because of their nationality."

In addition to the designation of drug source countries, TELR strongly questions the Ninth Circuit's additional reliance on the fact that the package was sent to a post office box. (Judge Kozinski wrote, "Post office boxes are commonly used in drug operations; they are, after all, relatively anonymous and secure.... When we pair this fact with the package's origin in a source country, things start looking mighty suspicious".) Obviously, just as millions of law-abiding people live in countries that are believed to export drugs, millions of law-abiding people use post office boxes. It is ridiculous to attach individualized suspicion of criminal activity based on either factor or on a combination of the two.

TELR will continue monitoring this case. TELR

RECOMMENDED

COUNCIL ON SPIRITUAL PRACTICES

Prospectus

Throughout recorded history, those inclined towards the sacred have employed a variety of techniques in their spiritual practices, including prayer, meditation, silence, yoga, martial arts, fasting, plant sacraments, chanting, drumming, and dancing. Practitioners value these methods in their own right and for the benefits they cultivate in everyday life. An occasional effect of such disciplines is the direct perception of unity and immediate encounter with the sacred—what William James called *primary religious experience*.

There is a yearning for community, spirituality, and primary religious experience in contemporary Western society. Among organized religions, charismatic movements are flourishing; so are the "movement towards the Divine Feminine" and the "men's movement," both emphasizing community and spirituality. The popularity of these themes is also evident in films and in the burgeoning spirituality sections of bookstores. And "raves," communal celebrations featuring hypnotic music and ecstatic dancing, now take place worldwide.

For many people, spiritual practices are among the most valuable activities in their lives, and in the United States, the free exercise of religion is given the highest legal protection. Furthermore, a growing body of literature provides evidence that primary religious experience benefits everyday life, teaching deeper understanding and respect for ourselves, for others, and for the balance of nature. Collectively, attention to spirituality may lead to wider recognition and evolution of shared purpose, and in turn, to a reduction in the conflicts of interest that give rise to violence, environmental damage, and other ills. It is through spiritual awareness that we enter the process of conscious evolution. Thus spiritual practices are worthy of study independent of their doctrinal backdrop.

The Council on Spiritual Practices is an ecumenical, scientific, and educational organization. Our mission is to assist churches and other groups in cultivating spiritual practices and discussing their safety, efficacy, and long-term consequences. We bring together scholars, scientists, and practitioners so they can share knowledge, develop and refine methods, identify and overcome barriers, and learn from their progress.

Among its first areas of inquiry, the Council is studying the spiritual applications of entheogenic substances. Historically, psychoactive plants have played a major and likely formative role in many of the world's religions. Currently, the Native American Church and other spiritual groups around the world incorporate entheogens in their practices. Their experience suggests that the careful use of entheogens can bring rich returns with minimal risks. We will explore how others may benefit similarly.

In addition, the Council will monitor developments in psychology, pharmacology, holistic studies, biomedical engineering, the neurosciences, computer arts and sciences, and telecommunications. We will encourage the investigation and application of those that offer potential for increasing the effectiveness of spiritual practices in the service of personal transformation and social evolution.

May 1994
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COUNCIL ON SPIRITUAL PRACTICES

entheogen@csp.org

en•theo•gen [*en* within, *theos* god or experience of god, *gen* producer]
a psychedelic plant or chemical substance when used spiritually

The Council on Spiritual Practices sponsors an electronic mail forum to facilitate entheogen-related discourse among its members. This service is provided as part of an initiative, the Entheogen Project, to enable churches and spiritual groups to use selected entheogens safely and legally in their practices and to gather knowledge about the immediate and long-term effects of such use.

The entheogen "email list" works like this: A message sent by a subscriber to the Internet address entheogen@csp.org is automatically forwarded to each of the subscribers on the list. Recipients of these messages may reply privately to the sender or may "converse" publicly by sending replies back to entheogen@csp.org.

INVITED TOPICS Customs of entheogen use within various cultures or groups, including the roles and preparation of the participants, the substances and quantities consumed, and details of the setting and practices • Psychology of mystical and contemplative states, including their induction, phenomenology, and effects on everyday life and productivity • Social phenomena surrounding entheogen-assisted religious practices • Health and safety: measures to protect the bodies, minds, and spirits of entheogen-using congregants • Pharmacological and subjective effects of various entheogens • Public policies and laws that affect entheogen use, including the implications of free speech, free exercise of religion, and personal liberty • Information and news about groups that use entheogens • Notices, references, and reviews of relevant books, articles, meetings, etc.

PRIVACY Mail forwarded through entheogen@csp.org does not show the names or addresses of the individual list subscribers, and the email list management software is configured not to divulge this information. These email mechanisms are not, however, generally regarded as highly secure. Of course, messages you send to entheogen@csp.org will be received by many people, each of whom will be able to forward or distribute it according to his or her own judgement.

INAPPROPRIATE USE This email list is not provided to encourage or facilitate illegal production of or trafficking in controlled substances.

TO JOIN CSP and THE ENTHEOGEN LIST The list is open only to members of CSP. To join, contact us by letter, fax, or email to request a membership form. You will receive a private email note welcoming you to the list when your completed form is processed.

QUESTIONS/COMMENTS Administrative correspondence regarding entheogen@csp.org may be sent to the list maintainer, entheogen-owner@csp.org. Inquiries regarding the Council on Spiritual Practices, CSP membership, or the Entheogen Project may be sent to csp@csp.org.

31 Aug 1994 ER

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Donate TELR To Your Local Law School Library

A substantial amount of policy debate takes place in law school. Entire classes are often devoted to discussions of hypothetical case scenarios designed to point out the limits of various legal rationales and the paradoxes that can arise when criminal laws come in contact with individual rights and liberties. Law school is also the place were future lawyers, judges and politicians obtain their philosophical grounding.

The primary channels of thought and information are well represented in law libraries, but a huge void exists with respect to information which has not yet received the political or academic stamp of approval. In the area of drug policy in particular, the current legal journals and periodicals are not only decidedly conservative, but, as you might suspect, fail to speak to the unique legal issues addressed within the pages of The Entheogen Law Reporter.

In an effort to spread the memes cultured within these pages, TELR is beginning a program by which interested subscribers can donate a one-year subscription to their local law school library for $20. Depending on the donor's stated preference, gifts can be made anonymously, or the donor can elect to have his or her name mentioned in the opening letter to the law library which will accompany the first issue of the gift subscription.

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STAY INFORMED !

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Statement of Purpose

Since time immemorial, humankind has made use of entheogenic substances as powerful tools for achieving spiritual insight and understanding. In the twentieth century, however, these most powerful of religious and epistemological tools were declared illegal and their users decreed criminals. The Shaman has been outlawed. It is the purpose of this newsletter to provide the latest information and commentary on the intersection of entheogenic substances and the law.

How To Contact The Entheogen Law Reporter

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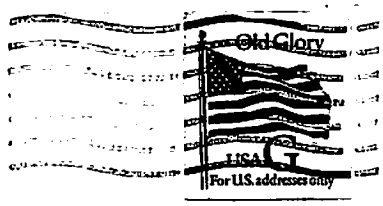

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