The Entheogen Law Reporter

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Indiana Court Affirms Man's *Psilocybe* Mushroom Conviction

Since Issue No. 4, TELR has reported developments in the *Psilocybe* mushroom case involving Guy Bemis of Indiana. Following a jury trial in 1993, Mr. Bemis was convicted, based on mushrooms found in his home, of "dealing psilocybin" and "possession of psilocybin." He was sentenced to six years imprisonment on the dealing conviction and a concurrent eighteen months on the possession conviction. Mr. Bemis has been appealing his convictions.

On June 22, 1995, the Indiana Court of Appeals issued a decision affirming Mr. Bemis' conviction for dealing psilocybin.[1] The decision, which was certified for publication, is citable precedent in all future cases. Consequently, the court's holding is not only bad news for Mr. Bemis but also bad news for anyone (especially in Indiana) who seeks to argue that statutes prohibiting the possession of the *substances* psilocybin and psilocin are unconstitutionally vague when applied to *mushrooms* which endogenously produce those substances.

Previously, (6 TELR 51) TELR published the Attorney General's statement of facts which highlighted the fact that Mr. Bemis consented to a warrantless search of his apartment and that agents not only found *Psilocybe* mushrooms inside, but also found a number of books related to psychoactive plants and fungi, including guides for cultivation and preparation. Below is the "factual and procedural history" of the case as determined by the Indiana Court of Appeal.

On September 4, 1992, Bemis met Sharon Mosby at a local bar in Evansville. Mosby left the bar with Bemis to go to his apartment. After arriving at the apartment, Bemis gave Mosby a bowl containing dried mushrooms. Mosby ate one mushroom and part of a second one. Despite Bemis' warning not to drive, Mosby left in her car. During Mosby's drive home, she began hallucinating and vomiting. When Mosby arrived home, she was laughing and crying uncontrollably. Her son transported her to the Emergency room of St. Mary's Medical Center, where she explained the events of the evening to Evansville police officers.

Bemis consented to a search of his apartment on September 5, 1992. Police officers seized a Tupperware container which contained dried mushrooms. Police also seized other mushrooms that were growing throughout Bemis's apartment, massive amounts of paraphernalia associated with his mushroom growing operation, and various literature concerning mushroom growing and in-home drug cultivation. The mushrooms in the Tupperware container were later tested and found to contain Psilocin.

The record further reveals that in August of 1992, Bemis telephoned Purdue University's county extension educator, Larry Kaplan, and asked him how to grow mushrooms and whether psilocybin mushrooms were edible. Kaplan testified at trial that during this conversation he informed Bemis that psilocybin mushrooms were hallucinogenic and illegal.

... Prior to trial, Bemis moved to dismiss the information, arguing that the statutes under which he was charged were unconstitutionally vague. The trial court denied the motion, and the cause proceeded to trial [where Bemis was convicted].[2]

Before the Indiana Court of Appeals Mr. Bemis argued that the State statutes relating to the substances psilocybin and psilocin made no mention of *mushrooms* and hence failed to adequately inform him that some species of mushroom were themselves outlawed. Such vagueness in a criminal law, argued Bemis, violates the due process guarantees of the Federal Constitution and the Indiana Constitution.

The Indiana Court of Appeals rejected Bemis' arguments and affirmed

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his conviction. The court held:

> The Indiana Controlled Substance Act as it relates to Psilocybin and Psilocyn is not unconstitutionally vague. Indiana's statutory scheme gives persons of ordinary intelligence fair warning of the prohibited conduct and does not encourage arbitrary or discriminatory enforcement. Thus, the statutes are not unconstitutionally vague, either on their face or as applied to Bemis.[3]

Indiana's statutory definition of "hallucinogenic substances," which explicitly includes the substances psilocybin and psilocyn, is similar to that currently in effect in many states. The statute defines "hallucinogenic substances as:

> Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic, psychedelic or psychogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted by rule of the board or unless listed in another schedule, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation. (I.C. 35-48-2-4.)

In reaching its decision that the statute was not unconstitutionally vague, the Indiana Court of Appeals relied on language in an earlier case from Illinois[4] which held that a similar statutory provision was unambiguous. The Illinois court construed the word "material," as used in the statute, to include a mushroom, stating:

> [t]he term "material" is commonly used to refer to an item which is the source for something else rather than a finished product. A person of ordinary intelligence would be amply apprised that possession of or dealing in mushrooms containing Psilocyn is illegal.[5]

Without any further analysis, the Indiana Court of Appeals adopted the Illinois court's construction of the word "material," leading it to find that the Indiana statute was not vague — and that mushrooms containing psilocybin were themselves outlawed hallucinogenic *materials*.

Having held that a mushroom was a "material" within the statutory definition of a hallucinogenic substance, the court then examined whether there was sufficient evidence that Mr. Bemis knew that the mushroom contained psilocybin. The court wasted no time finding that the evidence was sufficient to support the conclusion that Bemis knew the mushrooms he possessed contained psilocybin. The facts surrounding Mr. Bemis' arrest, noted the court, were in stark contrast to the facts in a Florida case[6] which reversed the conviction of a man caught in possession of *wild* psilocybin-containing mushrooms:

> ...in [the Florida case], there was a complete absence of evidence that the defendant knew that he possessed illegal mushrooms. The defendant was arrested as he emerged from a field carrying a bag of wild mushrooms. This situation is more susceptible to an innocent explanation than the factual situation in the case before us. In the case at bar, police seized from Bemis's apartment several items of paraphernalia used in cultivating mushrooms, publications on the subject of cultivating mushrooms, including psilocybic mushrooms, as well as several mushrooms growing throughout the apartment. Larry Kaplan also testified that he informed Bemis that psilocybic mushrooms were illegal and hallucinogenic.[7]

Mr. Bemis' case is a good example of one in which the specific facts effectively eclipsed the legal arguments. The best argument, given the items seized from his apartment, was not that he didn't know that the mushrooms contained psilocybin, but rather, that mushrooms are not fairly considered to be "material" as that word is used in the Indiana anti-drug statute. This latter question, being one of statutory interpretation, was largely independent of the specific and difficult facts in Mr. Bemis' case. Perhaps recognizing that this latter question was more difficult to answer than the former, the court of appeals, dealt quickly and superficially with the statutory construction issue and then directed the majority of its attention to the far-easier issue of Mr. Bemis' knowledge.

The crucial question, in other words, was whether the legislature intended the word "material" to include naturally occurring life-forms such as mushrooms, and whether (assuming the legislature did so intend) a reasonable person would know that the word "material" encompassed mushrooms.

In Indiana's definition of "hallucinogenic substances," the word "material" appears in the phrase "material, compound, mixture or preparation." Whether considered independently or together, those words in the context of an anti-drug provision would reasonably be understood as applying to the wide array of binding agents, cutting agents, liquid suspensions and the like which are commonly part-and-parcel of street drugs.

Many illicit drugs (like licit drugs) are manufactured in tablet form and, hence, contain only a percentage of the pure drug. The balance of the tablet is inert binding compounds and perhaps some adulterants or diluents. Additionally, some drug dealers, in an effort to stretch their profits, often sell, not 100 percent pure drugs, but rather diluted or "cut" drugs. Either way, only a portion of the material sold as the drug is the controlled substance itself. The phrase under scrutiny was intended to save government drug analysis laboratories the time and expense of having to tediously separate legal cutting agents, binders and diluents from the

pure illegal drug before determining how much of the substance the defendant possessed. In other words, the reasonable interpretation of the phrase "material, compound, mixture or preparation" is that the *entire* product is, as a whole, an outlawed "hallucinogenic substance."[8] The phrase was not intended to encompass whole unprocessed life-forms, nor would a reasonable person so interpret it.

Only in the most reductionistic and unnatural interpretation could a whole unprocessed mushroom be considered a "material, compound, mixture or preparation." In fact, if the Legislature intended the word "material" to be read so broadly as to include whole mushrooms, it would have used a word like "anything," not the series of more specific laboratory-oriented nouns which it chose.

Lastly, if the legislature had intended "material" to cover all whole plant sources of scheduled substances, it would have had no reason to specifically name certain plants as illegal having already made their psychoactive constituent's illegal. An interpretation of "material" like that in the Bemis case implicitly entails a finding by the court that the Legislature acted redundantly (at best) or irrationally (at worst) by explicitly scheduling the plants *Cannabis*, and *Papaver somniferum*, when THC and opium were also explicitly scheduled.

In summary, some good reasons existed for finding that when the Indiana Legislature drafted the definition of "hallucinogenic substances," it did not intend the term "material" to include whole plants or other life-forms which naturally embody controlled substances.

The Indiana Court of Appeal, however, avoided these arguments, instead opting for a superficial "dictionary" approach detached from both the context in which the word "material" is used in the statute as well as the obvious Legislative intent in selecting the word.

Notes

[1] *Bemis v. State* (Ind. App.1995) 652 N.E.2d 89. For double jeopardy reasons, the court of appeal remanded the case to the trial court ordering it to examine whether or not punishment on the possession conviction was improper double punishment for the same conduct. However, because Bemis was sentenced to concurrent prison terms, the actual time he will serve will be unaffected by any decision on remand.

[2] *Id.* at pp. 90-91.

[3] *Id.* at p. 93.

[4] *People v. Dunlap* (1982) 442 N.E.2d 1379.

[5] *Id.* at p. 91.

[6] *Fiske v. State* (Fla. 1978) 366 So.2d 423. See, 3 TELR 16-19 for a summary of *Fiske*.

[7] *Id.* at p. 93.

[8] This application of the "material, compound, mixture or preparation" phrase can be found in *U.S. v. Crowell* (Ariz. 1993) 9 F.3d 1452, where the defendants were convicted of conspiring to distribute dilaudid tablets. The defendants' sentences were calculated based on the *entire* weight of the dilaudid *tablets*, rather than just the weight of the controlled substance hydromorphine contained in the tablets. (See also, *U.S. v. Shabazz* (1991) 933 F.2d 1029.)

Federal Anti-Drug Laws May Violate Commerce Clause

The Comprehensive Drug Abuse Prevention and Control Act of 1970 is the law that established the federal scheduling system for "narcotic" or "dangerous drugs." As readers should know, most every well-known entheogen has been explicitly placed in Schedule I, the most tightly controlled category of drugs.

In enacting the federal law, Congress asserted that it was acting entirely within its power to regulate interstate commerce. (See 6 TELR 57 for a verbatim quote from the Act itself, explaining Congress' weak reasoning in this regard.) Previous legal attacks aimed at showing that the federal drug law was not authorized by the Commerce Clause have all been rejected under Supreme Court precedent which has historically permitted Congress broad powers in this area.[1]

However, as stressed in many previous TELR articles, "the law" is ever changing and presents few bright lines. A new case can entirely dismantle decades of line-drawing and statutory or constitutional interpretation. Just such a case was recently decided by the United States Supreme Court, calling into question the constitutionality of the federal anti-drug law.

In *United States v. Lopez*,[2] decided on April 26, 1995, the Supreme Court struck down the federal law which made it a crime to possess a gun within 1000 feet of a school.[3] This was the Supreme Court directly telling the Congress that it had overstepped it's powers. The gun law, said the Court, was only tangetially related to interstate commerce and, hence, could not be justified under the Commerce Clause. Interstate commerce, found the Court, was not "substantially affected" by someone possessing a gun near a school.

Commenting on the *Lopez* decision, constitutional law scholar, Erwin Chemerinsky, recently questioned whether many federal drug laws might be vulnerable to a renewed attack on the ground that they do not fall within the Commerce Clause and, hence, are outside of Congress' regulatory power. Discussing the potential wide-spread ramifications of *Lopez*, Professor Chemerinsky explained:

> The majority's narrow definition of Congress' powers gives the Court a basis for striking down countless federal laws. For example, many federal drug laws might be vulnerable because they regulate activities that are only tangetially

related to interstate commerce. Likewise *Lopez* can be used to challenge federal RICO prosecutions where there is not a strong relationship between the activity and interstate commerce.... The *Lopez* decision opens a door to constitutional challenges that appeared to have been closed almost 60 years ago.[4]

By reading *Lopez* it is impossible to predict whether or not such arguments will prevail. The *Lopez* decision leaves a number of crucial questions unanswered, providing very little guidance for trial courts faced with a Commerce Clause issue. In particular, the Court failed to shed any light on the meaning of "substantially affects" interstate commerce. Without a set of criteria showing how to test for substantial effect, courts and counsel in federal drug cases will have to proceed by arguments of analogy, with the facts in *Lopez* providing the referent.

In my opinion, striking down the federal law pertaining to drug-crimes other than interstate drug-trafficking would provide a major advancement in the country's drug policy. Assuming the demise of the federal law, we would be left with each state in control of its own drug laws and drug policy. Placing full responsibility in the hands of the states would result in fifty on-going drug-control experiments, a boon for drug policy experts.

Additionally, many states have already passed legislation which would permit the medical use of marijuana by seriously ill patients. These laws, however, are stymied by the federal government's continued wholesale prohibition. Knocking out the federal law as unsupported by the commerce power would automatically make medical marijuana available to countless people desperately in need of it. Likewise, groups like the Peyote Way Church of God, would be fully protected for their religious use of *peyote* in those states which do not have race-limited religious exemptions.

Notes

1 In a 1964 opinion, the Court stated, "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *(Heart of Atlanta Motel, Inc. v. U.S.* (1964) 379 U.S. 241, 256 [85 S.Ct. 348, 13 L.Ed.2d 258].)

2 *U.S. v. Lopez* (1995) 115 S.Ct. 1624, 131 L.Ed.2d 626.

3 Gun-Free School Zones Act of 1990; 18 U.S.C. sec 992(q)(1)(a) & 921(a)(25).

4 Chemerinsky, E. "Interpreting the Constitution: A Dramatic Conservative Turn" in August 9-16, 1995 *Res Ipsa* 11.

LSD-possession conviction upheld based on defendant's *past* possession of the drug

The Summer issue of TELR reported the May 8, 1995, decision by the California Supreme Court in *People v. Palaschak.*[1] The report promised further thoughts on the case.

To refresh the reader's memory, Douglas Palaschak's LSD-possession conviction was upheld by the California Supreme Court *although Mr. Palaschak had ingested all the LSD prior to his arrest and no longer possessed any more of the drug.*

The facts in Douglas Palaschak's case are both interesting and instructive. Douglas Palaschak was an attorney practicing in Southern California. He employed Jessica Jobin as his receptionist. In May 1991, Douglas told Jessica that he had been experimenting with hallucinogens and wanted to try LSD. Jessica said she'd try and obtain him some LSD.

A few days later, Douglas lent Jessica his car so she could go purchase some LSD from a contact of hers.[2] Without Douglas present, Jessica purchased 50 hits of LSD on blotter paper. She placed two hits in a birthday card and gave the card to Douglas the following morning as a birthday gift. Douglas opened the card and placed it in his desk drawer.

The following day, Douglas and Jessica took LSD in Douglas' law office. Douglas took one and one-half hits and Jessica took one-half hit. As the LSD came on, Douglas and Jessica began laughing and giggling. They were overheard by Melissa, a seventeen year-old temporary secretary who Douglas had employed for that day. Douglas told Melissa that he was "frying on acid" and gave her two hits with an invitation to join him and Jessica. Melissa discarded the LSD and, a while later, quietly slipped out of the office and notified the police.

When the police arrived at Douglas' office they reportedly found Douglas and Jessica hallucinating, dizzy and confused. Douglas volunteered that he had taken LSD and requested help from the officers.[3] When the officers asked if there were any other drugs on the premises, Jessica opened her purse and gave them the remaining 46 hits of LSD.

Approximately one month later, Douglas publicly told two newspaper reporters that he had ingested LSD on the day of his arrest, stating that the drug provided "a better social environment" in his office.

Mr. Palaschak was charged with conspiracy to possess LSD, possession of LSD, and furnishing or attempting to furnish LSD to a minor. The jury found him not guilty on all charges except simple possession of LSD. He was sentenced to 36 months of probation on the condition that he serve 90 days in the county jail.

Mr. Palaschak appealed his conviction arguing that the prosecutor failed to prove that he was in possession of LSD at the time of his arrest. He argued that the LSD was in his body at

the time of his arrest and that the law in California only outlaws the *possession* of LSD, not its *use*:

> ...every person who *possesses* any controlled substance...[including LSD] unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in the county jail for not more than one year or in the state prison. (Health & Saf. Code sec. 11377(a); emph. added.)

After considering Mr. Palaschak's argument and looking at the plain language of the statute, the court of appeal reversed his conviction. The court reasoned that Mr. Palaschak was indeed improperly convicted of possessing LSD because, at the time of his arrest, he had ingested the LSD and no longer had possession of it or any other LSD.

"Possession" explained the court of appeal, has been defined as "dominion and control" over the substance.[4] Once Mr. Palaschak had ingested the LSD, said the court, he no longer had dominion and control over it and therefore could not be convicted of possession. The court of appeal expressly noted that no California statute outlaws the "use" or "ingestion" of LSD and hence at the time of Mr. Palaschak's arrest he was committing no crime under California law.

The government appealed to the California Supreme Court, which reversed the court of appeal's decision. The Supreme Court reasoned that although no LSD was found in Mr. Palaschak's possession, there was plenty of evidence that he *had been* in possession of LSD shortly before he was arrested. The court announced:

> ..we can discern no good reason why substantial evidence of past *possession* of LSD (within the period of the applicable statute of limitations) should be deemed insufficient to sustain a conviction of that offense.[5]

In California, like most states, the essential elements of a drug possession offense are (1) dominion and control over a scheduled substance, (2) in a quantity usable for consumption, (3) with knowledge of the drug's presence and of its controlled nature. These elements can be proved with circumstantial evidence. The Supreme Court reasoned that the circumstantial evidence in Mr. Palaschak's case was sufficient to prove all three of the required elements and, hence, the conviction was valid. The Supreme Court explained:

> On being arrested, defendant readily admitted ingesting the drug. He confirmed this fact to news reporters. The arresting officers testified that defendant was under the influence of LSD, and lab technicians verified that the remaining doses of LSD in [Jessica's] possession were indeed LSD....
>
> If, as in the present case, direct or circumstantial evidence establishes that the defendant possessed an illegal drug during the period of the applicable statute of limitations, no compelling reason appears why that evidence should not be sufficient to sustain a possession conviction. Certainly the drug possession statutes contain no such requirement. The additional, fortuitous, fact that the defendant has consumed or ingested the drug likewise should not preclude a finding of his unlawful possession of it.[6]

The rule enunciated in the *Palaschak* case raises the specter of a much broader application of California's drug possession statute. It is particularly worrisome for its potential impact on First Amendment rights and the sharing of experiential information concerning outlawed entheogens.

For example, in *Palaschak*, the circumstantial evidence against the defendant was (1) his own statements (and those of Jessica), and; (2) the recovery of LSD *in another's possession*, but which was linked to the defendant via his statements.

But suppose that no LSD was recovered. Would Mr. Palaschak's statements and behavior alone been sufficient to support a possession conviction? According to some language in the *Palaschak* opinion, the answer to that question may depend on whether the evidence showed past *possession* versus past *ingestion*:

> ...there may be some justification for holding, as prior cases have held, that evidence of *ingestion* of drugs, standing alone, should not be deemed adequate to sustain a possession charge, although that issue is not presently before use. Ingestion, whether or not accompanied by useless traces or residue, at best raises only an inference of prior possession.
>
> ...if proof of ingestion of illegal drugs were sufficient to sustain a possession charge, then every person under the influence of an illegal drug could be charged with possessing it because, logically, one who ingests a drug must have possessed it at least temporarily. Yet it is arguable that not all occasions of drug use necessarily and inevitably involve criminal possession. For example, depending on the circumstances, mere ingestion of a drug owned or possessed by another might not involve sufficient control over the drug, or knowledge of its character, to sustain a drug possession charge.[7]

The court's comment hints that a defendant's statements of illicit drug *ingestion* within the statute of limitations (3 years in California) would be *insufficient* to sustain a possession conviction. The court, however, refused to state a bright-line rule in that regard, noting, "that issue is not presently before

us."

To my mind, the door to such a conviction should have been slammed shut by the court with an unequivocal statement that a defendant's statement of prior drug ingestion, within the statute of limitations, will *never*, standing alone, be sufficient for conviction. Given the potential wide-spread ramifications of a broad application of *Palaschak*, the court's ambiguous comment is less than comforting.

Suppose a person makes a statement that six months ago they *possessed* DMT but have since smoked it all. If some other evidence does exist (such as statements of witnesses, or a pipe containing DMT residue, for example), a prosecutor could use *Palaschak* to argue that the totality of such evidence was sufficient for a possession conviction, despite the fact that no DMT was ever recovered.

Another concern is whether *Palaschak* would authorize a possession conviction based on a positive drug test coupled with statements by the defendant that he has previously used the illicit drug found metabolized in his bodily fluids. Courts in Georgia have already upheld drug-possession convictions based on nothing but a positive drug test.[8] Other courts have upheld drug possession convictions based on a positive drug test coupled with the defendant's admission that he previously ingested the outlawed drug.[9] In California, however, a positive drug test has not been sufficient, with or without a defendant's statement, to sustain a drug-possession conviction. The *Palaschak* decision calls that precedent into question.

Notes

[1] *People v. Palaschak* (May 1995) 9 Cal.4th 1236.

[2] The court's opinion describes the house where the LSD was purchased as "a Dead Head House, occupied by ostensible fans of the Grateful Dead rock group." (*Id.* at p. 1238.)

[3] I wonder if such a statement could have been excluded from evidence under the doctor-patient privilege?

[4] In California, there is no statutory definition of "possession." The courts have, therefore, been left to interpret that word.

[5] *Id.* at p. 1240.

[6] *Id.* at pp. 1242-1243.

[7] *Id.* at pp. 1240-1241.

[8] See *Green v. State* (Ga.Sup. Ct. 1990) 390 S.E.2d 285 ["...the presence of [cocaine] metabolites, the residue of cocaine after the human body has processed it, constitutes evidence that the person ingested cocaine and therefore possessed the cocaine before ingesting it."] For a contrary holding see *State v. Lewis* (Ct.App.Minn. 1986) 394 N.W.2d 212, where the Minnesota Court of Appeals concluded that the mere presence of controlled substances in a defendant's urine does not constitute possession. ["After a controlled substance is within a person's system, the power to exercise dominion and control necessary to establish possession no longer exists.... We cannot interpret the term "possession" to encompass the mere presence of morphine within the body because the plain meaning of possession does not include that interpretation."].

[9] See *Franklin v. State* (Md. App. 1969) 258 A.2d 767 [heroin possession conviction upheld where defendant tested positive in a hospital and had made incriminating statements to treating physician. See also, *State v. Yanez* (Ct.App.N.M. 1976) 553 P.2d 252 [Possession conviction based in part on morphine found in defendant's urine.].

Reviews, Resources & Conferences

Reviews

Religion and Psychoactive Sacraments: A Bibliographic Guide. (1995)

By Thomas Roberts, Ph.D and Paula Jo Hruby, M.S.Ed. Published simultaneously as an electronic shareware document by the Council on Spiritual Practices and as a book by Psychedlia Books (POB 354, Dekalb, Il 60115).

In *Religion and Psychoactive Sacraments*, Tom Roberts, a professor at Northern Illinois University, and Paula Jo Hruby, M.S.Ed., have compiled a rich resource for anyone interested in the literature pertaining to psychoactive plants and chemicals used within a religious context. This book is a compilation and extraction of 223 books either about entheogens or with significant entries pertaining to entheogens. Information in *Religion and Psychoactive Sacraments* can be accessed either linearly — from front-cover to back-cover, alphabetically by author — or, my favorite way, via the book's outstanding index which runs for sixty-one pages.

Individual entries are organized by author's last name, and include a brief description of the book (number of pages, chapter headings, and whether or not indexed, etc.). The most important part of each entry, however, is the extensive excerpts which Roberts and Hruby painstakingly selected and which speak directly on the topic of psychoactive sacraments. These excerpts are verbatim quotes from each book, often from disparate passages tucked here and there. Each excerpt is complete which a pin-point page citation.

The verbatim excerpts and complete citations for each excerpt, make *Religion and Psychoactive Sacraments* an excellent one-stop-source for attorney's and other writers or speakers needing a

a wide array of quotable passages directly pertaining to psychoactive sacraments.

As Roberts points out in his introduction, it is surprising how many books have been written on the topic of psychedelic plants and chemicals in a religious context. Equally, or perhaps more surprising, however, are the many excerpts from books which don't ostensibly pertain to entheogens but which include passages concerning their religious import. Many of these books focus on religion or psychotherapy but, nestled in their nooks and crannies, Roberts and Hruby have located fascinating passages in which the authors comment on the role that entheogens can play in expanding religious awareness or accelerating self-transformation.

Religion and Psychoactive Sacraments is available from Psychedelia Books (see address above) as a spiral-bound paperback for $28.00, plus $3.00 s/h in the USA and Canada. In digital form it can be obtained via the CSP home page on the World Wide Web (http://csp.org/csp/).

Children of a future age,
Reading this indignant page,
Know that in a former time
A path to God was thought a crime
(Adapted from William Blake)
From the front-matter to
Religion and Psychoactive Sacraments,
by Roberts & Hruby.

Sacred Mushrooms and the Law (1995)

By Richard Glen Boire, Esq. Published by Spectral Mindustries -- "dossier series." 36 pages + paper cover, 4.25 x 7 inches.

"This is an interesting and useful book for anyone with an interest in mushrooms containing psilocybin/psilocin. After an introduction to the mushrooms and compounds, the main body of the book describes the federal and (all) state laws regarding them. The California law against spores is covered, as well as a number of state cases regarding the legal difference between the mushrooms themselves (not often mentioned in the statutes) and the active compounds. Finally, it mentions the possible use of the Religious Freedom Restoration Act as a defense against prosecution for the religious use of the mushrooms or compounds."

— ProMind Books

"Necessary and reliable information from a lawyer who *knows* mushrooms (or a mushroom who knows the law)."

—Diego Mara Mó

Sacred Mushrooms & the Law is published and distributed by Spectral Mindustries, Box 73401, Davis, CA 95617; $5.00 + $1.50 shipping/handling (+ 0.50 tax in California).

Resources

Psychedelic Abstracts On-line. An incredible searchable database packed with obscure references to esoteric topics constellated around entheogens and integral states of consciousness. (http://cyberverse.com/cgi-bin/LA?searchable)

Integration: journal for mind-moving plants and culture. A first-rate bi-lingual journal from Germany containing scientific papers on entheogens. Very expensive ($75 for 3 issues, includes postage), but each issue is like a book, artfully designed, and filled with the latest scientific papers on entheogens. Contributors have included: Jonathan Ott, Peter T. Furst, Alexander Shulgin, J.C. Callaway, and Giorgio Samorini. (Integration, bilwis-verlag, eschenau nr. 29, d-97478 knetzgau, germany.)

The Entheogen Review. A quarterly newsletter networking entheogen users around the world. Issues often run 20 pages and are filled with the latest entheogen discoveries, suppositions, and user reports. The very best way to keep up with the ongoing metamorphosis of practical experiential entheogen know-how. Edited by Jim DeKorne, author of *Psychedelic Shamanism*. (The Entheogen Review, POB 800, El Rito, NM 87530; twenty dollars per year w/i the USA; Thirty dollars elsewhere.)

HerbalGram. A glossy quarterly magazine published by the American Botanical Council and the Herb Resource Foundation. An excellent way to keep tabs on medicinal plants and the FDA's attempts to regulate them. (HerbalGram, POB 201660, Austin, TX, 78720; twenty-five dollars per year w/i the USA; Thirty-five dollars elsewhere.

Conferences

União do Vegetal -- conference on ayahuasca. November 2-4, 1995, in Rio de Janeiro, Brazil. Scientific conference devoted to the topic of ayahuasca. Participants include J.C. Callaway, Dennis McKenna, Charlie Grob, Kat Harrison, Ralph Metzner, Jonathan Ott and others. For more information contact Carman Tucker at 970-327-4948.

Ethnobotany and Chemistry of Psychoactive Plants. Two 7-day intensive field courses will be held at the Mayan temples of Palenque in the remote tropical rainforests of Southern Mexico. January 13 to 19 and January 22 to 28, 1996. Price $1,200 includes most everything except transportation to and from Palenque. Instructors include Alexander and Ann Shulgin, Terence McKenna, Jonathan Ott, Paul Stamets, Stacy Schaefer, and others. For more information call Ken Symington at 818-355-5571. Sponsored by the Botanical Preservation Corps.

Landmark Cases in Entheogen Law

Entheogen users interested in determinting their current navigational position on the modern legal landscape would do well to fix their position with reference to landmark cases from the past. When space permits, TELR will map the important cases which have revealed the contours of the religious defense to a drug charge. Much of the information in this column will come from the future-coming book by Richard Glen Boire, "Outlawing the Shaman: How the West has Dealt with Religiously-Motivated Users of Mind-Moving Substances."

In the preface to the second edition of *The Peyote Cult*, Westin La Barre, expressed his personal thoughts on the religious use of *peyote*, writing, "I remain convinced that there is no grave danger or evil in the Indian use of natural pan-*peyotl* in religious ceremonies, and so long as I have a voice in the matter I propose that Indians continue to practice their faith unhindered."[1] He went on to contrast the Native American Church (NAC) to The Neo-American Church, a California church which claimed to use a number of entheogens in their religious practice.

In strong language La Barre questioned the sincerity of non-Indians seeking legal protection similar to that granted the NAC.

> ...I deplore the "Neo-American Church" among Caucasoid Americans who pretend to follow their "religion" through the use of mescaline as a "sacrament." Ethnographically the latter is a wholly synthetic, disingenuous and bogus cult, whose hypocrisy (one would suppose) honest young people would discern and despise; indeed, to it could properly be applied the old missionary cliché against peyotism as the "use of drugs under religious guise.[2]

To La Barre, the NAC was a unique organization which should *alone* receive legal protection for religiously motivated entheogen use.

The facts surrounding the Neo-American Church and its legal troubles in the mid-1960's flourecsently highlight what is more commonly seen in less relief in other decisions concerning the religiously motivated use of entheogens: the fear that a non-Indian-limited religious exemption would prompt many "drug users" to falsely claim that their drug use was protected as part of their religion.

The Neo-American Church was incorporated in California as a nonprofit corporation. By 1968, it claimed a membership of approximately 20,000, all of whom had sworn to subscribe to the following principles:

> (1) Everyone has the right to expand his consciousness and stimulate visionary experience by whatever means he considers desirable and proper without interference from anyone;
>
> (2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the Self, and therefore belong to everyone;
>
> (3) We do not encourage the ingestion of psychedelics by those who are unprepared.

The Church outwardly declared, "it is the Religious *duty* of all members to partake of the sacraments on regular occasions."

In 1967, Judith Kuch, an ordained minister of the Neo-American Church was arrested and charged with violating the Marihuana Tax Act and with possessing LSD in violation of federal law.[3] In the United States District Court for the District of Columbia, she filed a motion to dismiss the charges, arguing that the laws under which she was charged were unlawful infringements on her constitutional right to freely exercise her religion. At the hearing on her motion to dismiss, she produced evidence showing that she was an officer in the Neo-American Church and also introduced some of the church documents.

The District Court was unimpressed, finding that the Neo-American Church was a "church" in name only. It consequently held that Ms. Kuch was not entitled to any of the protections that might guard "legitimate churches" or true religions.

In ruling that the church was not a "religion," the court pointed to evidence of the Church's organizational structure and printed literature, both of which often mocked orthodox religion. The court, for example, drew attention to the appellations of the church's leaders, pointing out that the leader of the church was known as "Chief Boo Hoo," and Ms. Kuch was known as "the primate of the Potomac." Although Ms. Kuch testified that she was an "ordained," officer of the church, the court emphasized that the Church required no formal training in order to become ordained.

The Church's official literature also provided the court with a great deal of fodder for declaring it a non-religion. Ridiculing the Church's "Catechism and Handbook" as "full of goofy nonsense, contradictions, and irreverent expressions," the court particularly noted that the handbook asserted "we have the *right* to practice our religion, even if we are a bunch of filthy, drunken

bums." The handbook, noted the court, also instructed members that anyone seeking to join the Church should be taken as a member "no matter what you suspect his motives to be."

Although the court acknowledged that it was not easy, in theory, to define "religion," it found that, in application, any definition would lead to the exclusion of the Neo-American Church.

Examining the Church's publications, the court gained "the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term." Church members carried a "martyrdom record" documenting their drug arrests. The Church key was a bottle opener, and its official songs were "Puff, the Magic Dragon," and "Row, Row, Row Your Boat." Last, but not least, the court drew attention to the Church's motto: "Victory over Horseshit!" All considered, it was the court's conclusion that "the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant" of the Church and the true reason for its existence.

On the way to concluding that the Church was not a "religion," the court did made some remarkably honest findings with respect to the religious import of entheogens:

> Just as sacred mushrooms have for 2,000 years or more triggered religious experiences among members of Mexican faiths that use this vegetable, so there is reliable evidence that some but not all persons using LSD or marijuana under controlled conditions may have what some users report to be religious or mystical experiences. Experiments at Harvard and at a mental institution appear to support this view and there are specific case histories available, including the accounts of the professors who testified as to their personal experience under the influence of psychedelic drugs. Researchers have found that religious reactions are present in varying degrees in the case of from 25 percent to 90 percent of those partaking. A religious reaction appears most frequently among users already religiously oriented by training and faith. While experiences under the influence have no single pattern, a religious reaction includes the following effects. Sometimes senses are sharpened and apparently a mixed feeling of awe and fear results. There may be mystery, peace, and a sharpening of impressions as to all natural objects, perhaps even something akin to the vision Moses had of a burning bush as described in Exodus. That there may be wholly different effects upon given individuals is equally clear. Psychotic episodes may be initiated, leading to panic, delusions, hospitalization, self-destruction and various forms of anti-social and criminal behavior, as will be later indicated in more detail.

Granting that the evidence showed that psychedelic drugs *could* elicit religious cognition in some people, and granting that some members of the Neo-American Church may have had religious experiences through the use of psychedelic substances, the court concluded that such experiences really aren't the issue. "The fact that the use of drugs is found in some ancient and some modern recognized religions," cautioned the court, "is an obvious point that misses the mark." Putting its finger on the fundamental barrier to defining the Neo-American Church as a bona fide religion, the court explained that there was no solid evidence that the Church recognized "a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence." Reflecting the then prevailing judicial view that an essential element of a "religion" was the theistic belief in a Supreme Being, the court believed the evidence proved that the Neo-American Church was "agnostic, showing no regard for a supreme being, law or civic responsibility." It was not, therefore, a "religion."

Although the District Court could have ended its opinion at that point, it went on to say that even if one were to assume for the purposes of argument that the Neo-American Church was a legitimate religion and that Ms. Kuch's religious beliefs required her to ingest psychedelic drugs, her motion to dismiss would still have been denied because the laws against marijuana and LSD promoted the compelling state interest of preserving "public safety, health and order."

Invoking the belief/conduct distinction, enunciated by the United States Supreme Court nearly 100 years earlier, the court explained:

> ...Congress may inhibit or prevent acts as opposed to beliefs even where those acts are in accord with religious convictions or beliefs. 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.[4]

Making obvious reference to the "hippie movement" in full bloom in the summer of 1968, when the court rendered its decision, it chastised:

> There is abroad among some in the land today a view that the individual is free to do anything he wishes. A nihilistic, agnostic and anti-establishment attitude exists. These beliefs may be held. They may be expressed but where they are antithetical to the interests of others who are not of the same persuasion and contravene criminal statutes legitimately designed to protect society as a whole, such conduct should not find any constitutional

sanctuary in the name of religion or otherwise.

Here, the court, like many before it and after, was uncritically allowing itself to fantasize about amorphous dangers not presented by the facts in evidence before it.[5] This is a classic error in reasoning that would not be tolerated in the usual (i.e. non-drug involving) free exercise case. A fundamental premise of our legal system is that cases are to be decided on the facts in evidence, not on speculation. Yet, in many free exercise cases involving relatively popular entheogens, courts have aimed their analysis not at the specific facts of the case before it, but rather with an eye to what *might* happen if large numbers of people began to claim that their use of a psychedelic was religiously motivated.

It's also worth noting that the *Kuch* court sloppily mixed its analysis of the member's *sincerity* with its analysis of whether the Church was a *religious* organization. Those issues should remain conceptually distinct. Clearly, a given organization could be religious but have insincere members. It could also be a non-religious organization, but have sincere members. In *Kuch*, the court's analysis used member insincerity to prove non-religiousness. While this is primarily an academic issue with respect to *Kuch*, such errors by a court should be guarded against by defense counsel who want to present the strongest case possible showing that their client's use of an entheogen is indeed "religious" as that word is used in the First Amendment. Whether or not some particular members might be insincere members of the religion is a secondary question which should not be permitted to affect the threshold determination.

Notes

[1] La Barre, W. *The Peyote Cult* (5th ed. 1989 Univ. Oklahoma Press.) xiii

[2] *Ibid.*

[3] *U.S. v. Kuch* (1968) 288 F.Supp 439.

[4] See *Reynolds v. United States* (1878) 98 U.S. 145, 166.

[5] In case after case, judges have diverted their eyes from examining what, if any, *specific harm* was done to the defendant or society by *the defendant's* sacramental use of an entheogen. Instead, judges routinely shift their focus from the real person before them, to a generalized and speculative concern of what might happen if everyone was allowed to use illegal drugs for religious purposes.

DEA Rejects Church's Request for Equal Access to Sacramental *Peyote*

The Peyote Way Church of God is a unique church located in a remote valley in Southeastern Arizona. The Church was founded almost twenty years ago by Reverend Immanual Trujillo, a former Roadman in the Native American Church. Reverend Trujillo left the NAC in order to establish a *peyote*-based church without race requirements or limits. The Church is protected under the State of Arizona's legislative exemption for religious use of *peyote*.

Unfortunately, however, the *federal government* has continually denied Peyote Way a religious exemption similar to that granted the NAC. Consequently, despite the fact that Peyote Way is clearly a bona fide religious organization that considers the ingestion of *peyote* a necessary part of its religious beliefs and practices, members of the church who ingest *peyote* during religious spirit walks are under constant threat of federal criminal prosecution. Additionally, because the federal government does not recognize Peyote Way, the Church has been unable to purchase *peyote* from licensed *peyote* sellers in Texas. As a result, Peyote Way's sacrament has been effectively denied them and their right to freely exercise their religion quashed by the federal government.

By letter dated June 6, 1995, Peyote Way, in its ongoing attempts to gain access to its sacrament, requested that the DEA grant the Church the right to purchase 10,000 *peyote* cacti over the next five years. These cacti would be replanted on Church property and tended exclusively for their sacramental use on Church property. The DEA rejected Peyote Way's request, stating, "...your church has no authority to unilaterally disassociate itself from the laws of the United States."

The DEA's letter failed to acknowledge The Religious Freedom Restoration Act of 1993, which bars the government from "substantially burden[ing] a person's exercise of religion" unless the government can demonstrate that the law not only furthers a "compelling governmental interest," but also, "is the least restrictive means of furthering that" interest. With respect to Peyote Way, it is exceedingly unlikely that the government could meet its burden under RFRA. In other words, in denying Peyote Way's request, it is the DEA, not Peyote Way, which has "unilaterally disassociate[d] itself from the laws of the United States."

The exchange of communication between Peyote Way and the DEA is reproduced on page 80.

For more information about Peyote Way's history, tenets, and legal controversies, see a very recent article by Bernadette Rigal-Cellard "The Peyote Way Church of God: Native Americans v. New Religions v. the Law." (9:1:1995 *European Review of Native American Studies* 35-44.) People interested in supporting the Church can subscribe to its newsletter "The Sacred Record," ($20 per year) or purchase *Mana* Black Rim Earthenware handmade by the Church clergy. (Peyote Way Church of God, Star Rt. 1, Box 7x, Willcox, AZ 85643.)

Recent Correspondence Between Peyote Way Church of God and the DEA (as referred to in the article on page 79.)

Peyote Way Church of God
Star Rt 1 Box 7X
Willcox, AZ 85643

June 6, 1995

Drug Enforcement Administration
Office of Compliance
Attention: Gene R.Haislip
600 Army Navy Dr
Washington, D.C. 20002

Gentlemen:

The Peyote Way Church of God is an all race religion that uses Peyote in it's religious ceremonies. We are aware of the opinions and statements that there are no other groups, other than the Native American Church of North America that has a history of the use of Peyote. We have been involved in numerous legal proceedings regarding our use of Peyote outside of the Native American Church and by non-Indians. The Church was organized in 1977 with it's current name. There were predecessor organizations. Even before 1977 the use of Peyote in this all-race religion was central to it's beliefs and practices. We have documented the use, beliefs and doctrines of the church since 1977. Enclosed for your information and consideration are copies of various documents we believe establishes that we are a bona fide religion and that the use of Peyote is central to our religious beliefs and practices and that this has continued for a significant period of time to be considered exempted from the statute against using Peyote, so long as we use it in our religion.

We believe Peyote is an endangered species and do not wish to continually diminish the supply in Texas, therefore we would request a total of ten thousand plants over a period of five years which would be replanted and tended for sacramental use on Church land in Arizona. We request that the Church President and two counselors be granted authorization to procure the holy sacrament in Texas from Government authorized Peyote distributors.

We pray that in light of the Religious Freedom Restoration Act, the discriminatory Native American Religious Freedom Act, and the recent Boyll decision in favor of a non-Indian member of the Native American Church importing Peyote from Mexico, and after examining the enclosed documents closely, that in the future opinions, enforcement activities and the statutory interpretations of legislative requests, make it known that the Peyote Way Church of God is a bona fide religion and that Peyote is central to it's religious beliefs and practices and that it has historically existed with this belief and practice.

Sincerely,

Rabbi Matthew S. Kent, President

The foregoing instrument was subscribed and sworn to before me this 6 day of June, 19[illegible]

U.S. Department of Justice
Drug Enforcement Administration

Washington, D.C. 20537

JUL 12 1995

Rabbi Matthew S. Kent, President
Peyote Way Church of God
Star Rt. 1 Box 7X
Willcox, AZ 85643

Dear Reverend Kent:

This is in response to your letter and accompanying documents, dated June 6, 1995, requesting that the Drug Enforcement Administration (DEA) authorize you to obtain 10,000 Peyote plants for cultivation and use in Arizona. You further request that DEA acknowledge the Peyote Way Church of God as a bona fide religion, and by inference, that DEA should not require its members to conform to the controlled substances laws and regulations as enacted by the United States Congress and upheld by United States Courts.

As is clear from the record which you have provided, the Peyote Way Church of God and its members are not exempt from the Controlled Substances Act. While it is not within DEA's purview to determine whether a particular sect is or is not a bona fide religion, such a determination is not necessary to declare that your church has no authority to unilaterally disassociate itself from the laws of the United States.

As you mention in your cover letter, there has been much litigation brought by your church to have it exempted from the laws of the United States and various states with respect to the use of peyote. The net result of this litigation is that the courts have ruled that the Peyote Way Church of God and its members are not exempt from the Controlled Substances Act; that it was the intent of Congress that only the religious use of peyote by the Native American Church and its members should be exempt. The Courts have further ruled that Congress' exemption of the Native American Church was intended to be the only one granted based on that Church's unique status (Peyote Way Church of God, Inc., v. Richard Thornburgh, Attorney General of the United States, affirmed by the United States Court of Appeals, Fifth Circuit).

Rabbi Matthew S. Kent, President — Page Two

In light of the Court's findings in these matters, it is not within the jurisdiction of this office to reinterpret Congress' intent or to disregard the Court's judgement. Therefore, I cannot grant your request to obtain 10,000 peyote plants.

Sincerely,

Gene R. Haislip
Deputy Assistant Administrator
Office of Diversion Control

U.S. DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
WASHINGTON, D.C. 20537

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Peyote Way Church of God
Star Rte. 1 Box 7X
Willcox, AZ 85643

Peyote Way Church of God
Rabbi Matthew S. Kent, President
star Rt 1 Box 7X, Willcox Az 85643

Gene R. Haislip
Deputy Assistant Administrator
Office of Diversion Control
U.S. Department of Justice
Drug Enforcement Administration
Washington D.C. 20537

August 6,1995

Dear Mr. Haislip:

We have received your letter of July 12 and are disappointed by your response. The material we sent was our response to your letter of March 2, 1962, in which you set forth the standards set by the Office of Legal Counsel to determine which groups are covered by the exemption found in Title 21, Code of Federal Regulations, Section 1307.31. Having read these regulations in their entirety, we felt that you were, in fact, qualified to determine whether we could be included in the exemption.

As the beliefs and practices of this church are protected by the laws of Arizona, whose Constitutional Peyote Statute protects the bona fide religious use of Peyote regardless of race, we do not believe that Peyote Way Church of God has unilaterally disassociated itself from the laws of the United States.

Please accept this piece of Mana™ pottery for your office, as a token of our good will. We will now approach our Legislators. May the Lord bless you and guide you.

In Its Service.

Rabbi Matthew S. Kent, President

— INSCRIPTION AROUND THE INSIDE OF THE JEFFERSON MEMORIAL —

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