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PSYCHEDELICS AND RELIGIOUS FREEDOM*

By JOEL JAY FINER**

The initial segment of Professor Finer's contribution appeared as point one (of nine) in the brief for appellant filed by the author in November 1966 in the case of Timothy Leary v. United States, before the United States Court of Appeals for the Fifth Circuit. The Editors feel that publication of this work of advocacy is well justified by its thorough and informative scholarship on this question of contemporary constitutional significance. The author favored this format in order to make manifest his role as advocate-scholar, and thus avoid any suggestion of lack of full disclosure.†

In part I of the article which follows the brief, the author examines the claim that users of psychedelics do not deserve the status of religious claimants under the first amendment, explores the constitutional meaning of religious exercise, and describes the religious significance of psychedelic drugs in the lives of some users. In part II, he considers the standards for determining when legislative infringement is justified, analyzes the requirements of compelling state interest and lack of less-restrictive alternatives, formulates guidelines for judicial application of the relevant criteria, and briefly evaluates the Fifth Circuit's opinion in Leary v. United States.

The author and the Journal invite and encourage critical and disinterested response to the thesis presented herein.

I.

LEARY v. UNITED STATES: BRIEF FOR DR. TIMOTHY LEARY

Statement of the Case

General

On March 11, 1966, following a trial by jury in the United States District Court for the Southern District of Texas, Laredo Division, appellant was found guilty of violating 21 U.S.C. § 176(a) (unlawfully and knowingly transporting illegally imported marihuana, with intent to defraud, with knowledge of illegal importation (Count Two)) and 26 U.S.C. § 4744(a)(2) (unlawfully and knowingly transporting marihuana, as a transferee required to pay the transfer tax, without having paid such tax (Count Three)) (Tr).‡ Count One,
charging smuggling under 21 U.S.C. § 176(a), was not submitted to the jury, over objection of government counsel (Tr.)

Witnesses for the prosecution testified to the following:

(a) On December 22, 1965, appellant drove an automobile, with four passengers, up to the United States Customs Station at the International Bridge in Laredo, Texas, having crossed the bridge south to north, from Mexico into the United States (Tr.).

(b) Because the automobile contained considerable baggage and one of the passengers was bearded (Tr.), the occupants were ordered out of the car. A preliminary search revealed what appeared to be a marihuana seed (Tr.).

(c) The occupants did not declare anything from Mexico (Tr.).

(d) A personal search of the occupants revealed marihuana concealed on the person of Susan Leary, appellant’s 18-year-old daughter (Tr.). Additional marihuana sweepings were found in the glove compartment and the floor of the automobile (Tr.). The total quantity of marihuana was less than one-half ounce (Tr.).

(e) Prior to the search appellant told the customs inspector that he had not been into Mexico, but that after crossing the bridge from north to south had been advised by the Mexican officials to return to the Mexican Customs Station the next day (Tr.).

(f) Mr. Hatch, a customs agent, testified that appellant told him he had given the marihuana to his daughter on the way back across the bridge and told her to get rid of it (Tr.). He also testified that appellant said that at some point on the bridge, Susan “told her father that she still had it.” (Tr.)

Appellant’s principal defense was based on the first amendment’s guarantee of the free exercise of religion. The facts specifically bearing on this issue and the other points on this appeal will be presented in order of argument below.

Appellant introduced evidence to the effect that he began the trip from New York with marihuana in the automobile (Tr.); drove from New York through Laredo, Texas, across the International Bridge, to the Mexican Customs Station (Tr.). Upon being recognized by a Mexican official, and fearing a strict search, appellant told the members of his party to get rid of the marihuana; it appearing that they had carried out his suggestion, appellant honestly believed that there was no marihuana in his automobile (Tr.). Appellant was told by Mexican immigration officials that he would not be given entry papers at that time (the evening of December 22, 1965), but that he would

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1 Appellant’s daughter, Susan Leary, was tried by the court under the same indictment and convicted under count three, following the government’s motion, at the court’s behest, to dismiss the other counts against her.
have to come back early the next morning (Tr.).\footnote{This testimony was corroborated by that of a Mexican federal employee (Tr.).} Appellant concluded that he had to return to Laredo for the night (Tr.), and started back across the bridge, under the assumption that there was no marihuana in the automobile (Tr.). Just prior to reaching the United States Customs Station (about three-quarters of the distance between the international boundary and the American station), appellant realized that they would "have to go through customs on the American side" and asked, "Is all of the marihuana out of the car?" His daughter Susan replied "No," that the marihuana had just been found and that she had it." (Tr.) Appellant testified that he did not give marihuana to his daughter nor did he tell Mr. Hatch that he had (Tr.); nor did he tell his daughter to secrete the marihuana (Tr.).

Following the jury's verdict, appellant was sentenced to the maximum confinement and fine under each Count (total of 30 years and $30,000) and ordered committed for examination under 18 U.S.C. § 4208(B) in contemplation of subsequent reconsideration of the sentence (Tr.).

Questions Presented and Related Statement of Case

1. Where testimony indicates that marihuana plays an integral role in the religious life of a defendant belonging to a Hindu sect, facilitating a spiritual, transcendental experience at the core of religion, and that marihuana is relatively harmless, is defendant, on trial for offenses based on possession of marihuana, entitled to an instruction directing acquittal if the jury finds him honest and sincere in his religious beliefs?

Facts

The record suggests that appellant has had two consuming interests in his life—understanding and treating the mentally ill, and attaining and comprehending a profound religious experience through the use of psychedelic drugs, including marihuana.

Dr. Leary, who earned a Ph.D. in Clinical Psychology from the University of California (Tr.), devoted the years from 1944-1960 to treating the mentally ill and contributing substantially through scholarly publications, to our knowledge of the nature of mental illness (Tr.). In 1950 he helped found the Kaiser Psychiatric Clinic in Oakland, California (Tr.). During the next 8 years at the Kaiser Clinic he received close to one-half million dollars in federal grants for work on mental illness (Tr.). He published 13 scientific articles, two books and four diagnostic tests dealing with mental illness, prior
These tests are employed in diagnosing and treating the mentally ill in over 750 clinics and hospitals in the United States, and have been translated into several foreign languages (Tr.).

Dr. Leary served on the University of California medical faculty from 1953-1956 (Tr.) and, in 1959, accepted an invitation to join the Harvard University faculty (to teach and explore new methods of treating mental illness) (Tr.).

In 1960, while on a trip to Mexico, Dr. Leary had an experience that profoundly changed his life. He ingested a number of the “sacred mushrooms” of Mexico (Tr.) and had “the most intense religious experience I have ever had in my life.” (Tr.) Since then, appellant testified, “I have done practically nothing in my waking hours . . . except to try and understand the meaning of this experience, how it can be applied to help a man . . . find out who he is and what the religious nature of himself is.” (Tr.) The experience was one which men have “been having . . . for thousands of years and trying to write about . . . .” (Tr.)

Returning to Harvard, appellant read all he could about the mystical, transcendental experience, formed a religious research group, and, with the help of Aldous Huxley and the approval of Harvard, designed experiments to explore the religious, psychedelic experience as produced by certain drugs (Tr.).

In 1962 Dr. Leary became interested in Hinduism, and, after about a year of study, was initiated into a Hindu sect which operates an Ashram (religious center) 20 miles south of Boston (Tr.). Dr. Leary left Harvard in 1963 (Tr.), and after some experimental work in Mexico (Tr.), established a center for religious and scientific research in Millbrook, New York (Tr.).

Pursuing religious learning, appellant journeyed to Japan and India in the winter and spring of 1964-1965. While in India studying with Sri Asoke Fukir, a well known religious leader, appellant participated in religious rituals in which *ganja* (a specially cultivated hemp derivative more potent than marihuana) played an important role; and, becoming a member of Sri Asoke’s Hindu sect, Dr. Leary first began using marihuana for religious purposes (Tr.). Appellant then visited Banaras, a holy city, and New Delhi, but, having no religious teachers, did not smoke *ganja* (Tr.). Thereafter appellant studied for 3 months with Lama Anaganka Govinda, a leading authority on Tibetan Buddhism, and used *ganja* during this period (Tr.). Subsequently he stayed at monasteries in two other Indian cities for brief periods (Tr.). Appellant’s sole purpose during his trip was to study and practice religion (Tr.).

Among appellant’s religious and scientific publications on psychedelic drugs since 1960 (five books and 38 articles (Tr.) ) are included...
(a) a book of Psychedelic Prayers (involving prayers for each level of consciousness attained through each of the psychedelic drugs, including marihuana) (Tr.); (b) a modern translation of the holiest text in Tibetan religion—The Tibetan Book of the Dead, retitled The Psychedelic Experience, a guide for religious interpretation of each stage of the journey triggered by psychedelic drugs (Tr.); (c) an article (published, inter alia in the magazine of the Lutheran Church) called The Religious Experience, Its Production and Interpretation, dealing with the religious use and meaning of psychedelic drugs (Tr.); and (d) an article in the Journal of Religious Education, with Professor Walter Houston Clark of the Andover Newton Theological School, Religious Implications of Consciousness Expanding Drugs (Tr.). Dr. Leary has also given many lectures on the use of psychedelic drugs in religion (Tr.).

At his home in Millbrook, New York, where he pursues his religious and scientific studies, there is a meditation house which serves as a spiritual retreat; and many rooms in the main house contain “shrines devoted to different Hindu and Buddhist and Christian and other ways of finding God.” “Almost every room in the house has a religious picture or a religious statue.” Dr. Leary’s testimony regarding his religious studies at Harvard, his conversion to Hinduism, his religious activities in India, and his home in Millbrook, was substantially corroborated by the testimony of Sri Kalidas (Fred Swain), an American Hindu Monk, and Dr. Ralph Metzner, a psychopharmacologist (Tr.).

Regarding the significance of marihuana to appellant’s religion, Dr. Leary testified that it plays an integral part in his religious practices (Tr.); that it is a sacramental aid which substantially facilitates his religious beliefs (Tr.); that while other more potent drugs play a major role in his religion and bring him to different levels of consciousness, without marijuana he could not attain certain levels of religious experience (Tr.). Appellant pointed out that while his religious values would not be jeopardized were he deprived of marihuana (comparing this possibility to depriving a Catholic of Mass), the practice of his religion would be impeded and his religious beliefs violated (Tr.). The testimony of Sri Kalidas corroborated the fact that marihuana is used in the religious practices of certain Hindu sects (Tr.); that it plays a very important part in the sect to which appellant belongs (Tr.); and that appellant uses marihuana in this country in pursuit of his religious beliefs (Tr.).

Testimony Relating to the Relative Harmlessness of Marihuana

Appellant called two experts to the stand: Dr. Ralph Metzner, a psychopharmacologist, and Editor of the Psychedelic Review, holding
degrees in pharmacy from Oxford University, a doctorate in Clinical Psychology from Harvard, and having had a year's post doctorate work at the Harvard Medical School (Tr.); and Dr. Joel Fort, a specialist in psychiatry and drug addiction, Director of the Center for Special Problems of the San Francisco Department of Public Health, Chairman of a California Medical Society's Committee on Alcoholism and Drug Addiction, who twice served as Consultant on Drug Abuse to the World Health Organization, once as Advisor to the United Nations Division on Narcotic Drugs, and has received federal and state authority to experiment with marihuana (Tr.). They agreed that (1) marihuana is not addicting, in the sense of producing either withdrawal symptoms or increasing tolerance (Tr.); (2) marihuana does not lead either to crimes or sexual misconduct, indeed it tends to produce quiescence and passivity (Tr.); (3) marihuana does not lead to heroin, or other hard-core narcotics (Tr.); and (4) it does not lead to physiological or psychological illness (Tr.). Dr. Metzner testified that alcohol was more harmful than marihuana (Tr.) and Dr. Fort testified that alcohol is more likely to lead to criminal behavior (Tr.).

The Court's Ruling

Appellant requested the court to instruct the jury that, with regard to the defense of religious exercise, "the only question for you to decide is whether the defendant honestly and sincerely believed that marihuana facilitated the practice of his religious beliefs. If you find that he was honest and sincere in these beliefs, you must acquit him on all counts of the indictment. On the other hand, if you believe beyond a reasonable doubt these representation of belief in religion is [sic] a mere pretense, without honest belief, made for the purpose of smoking or using marihuana with impunity, then you will find the defendant guilty." (Tr.)

Rejecting appellant's religious defense, the court made the following findings:

I do not consider the testimony that the defendant has given in any sense raises any question of religious freedom. There are a number of reasons for that. . . .

It appears that by his own statement this is not a necessary or essential part of his religious belief; it's simply, I think, as he put it, very accurately, an outward manifestation.

He has told us further that there are many other substances that might be used and that this is only one of a number.

Further, assuming his entire good faith, as I am for present purposes, the law does not permit a person's conduct to go completely unrestrained simply because it may be in a good-faith effort to practice one of the teachings or tenets of his religion. (Tr.)

The court found that People v. Woody3 was inapplicable because

3 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (upholding the constitutional right of members of an American Indian religion to use peyote in religious service).
(1) these American Indians "followed this same rite for perhaps hundreds of years"; (2) peyote was the very crux of their religious beliefs; (3) its use was always at a gathering attendant with the trappings of religious ceremony; and (4) peyote was a sacramental symbol, while

By Dr. Leary's testimony he uses marihuana and other drugs, as I understand it, to more effectively put him in a mood to contemplate and reflect, to aid or assist in contemplation and reflection.

Apparently he does it alone or with a few friends from time to time, [at] different hours of the day or night, which to me is a far different thing than the situation covered by the California case. (Tr.)

Argument

I(A).

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO ACQUIT APPELLANT IF IT FOUND HIS RELIGIOUS CLAIMS TO BE HONEST AND IN GOOD FAITH, IN LIGHT OF TESTIMONY TENDING TO ESTABLISH THAT (a) MARIHUANA PLAYS AN INTEGRAL ROLE IN APPELLANT'S EXERCISE OF HIS RELIGION, (b) THE APPLICATION OF THE TRANSPORTATION AND TAX STATUTES SUBSTANTIALLY INFRINGES APPELLANT'S RELIGIOUS FREEDOM, AND (c) THE INGESTION OF MARIHUANA DOES NOT PRESENT A GRAVE ABUSE ENDANGERING PARAMOUNT INTERESTS AND IS THUS FULLY PROTECTED BY THE "FREE EXERCISE" CLAUSE OF THE FIRST AMENDMENT.

A. Religious Exercise May Not Be Infringed by Generally Applicable Statutes Unless It Amounts to a Grave Abuse Endangering Paramount Interests or There Is a Compelling Governmental Interest in Denying a Religious Exemption.

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Universe . . . .4

1. The Measure of Constitutional Protection Afforded Religious Freedom

Within our constitutional system, religious exercise, like speech, receives special protection against legislative infringement. For these freedoms guaranteed by the first amendment, unlike the general "liberties" assured by the fifth amendment, may not be infringed by

legislation supported merely by "minimum rationality." The singular importance of religious exercise and speech in our constitutional jurisprudence imposes on the Government the burden of demonstrating a compelling, not merely a reasonable, interest in their abridgment.5

In its most recent articulation of this principle, the Supreme Court held that a state could not constitutionally deny unemployment compensation to one whose "unavailability" for Saturday employment was religiously motivated.6 The Court reasserted that where religious freedoms are jeopardized,

it is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."7

In a subsequent decision, In re Jenison,8 the Court, citing Sherbert v. Verner,sa remanded the criminal contempt conviction of a woman who based her refusal to render jury service on religious grounds.9

In Sherbert, the Court reaffirmed its understanding of the free exercise clause expressed 20 years earlier in West Virginia State Board of Education v. Barnette.10 Religious liberties, wrote Mr. Justice Jackson for the Court, "are susceptible to restriction only to prevent grave and immediate dangers to interests the state may lawfully protect."11 The numerous decisions affording this special constitutional

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7 Id. at 406 (emphasis added).


9 On remand, the Minnesota Supreme Court reversed the conviction, stating, "[u]ntil and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." In re Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

10 319 U.S. 624 (1943) (invalidating a compulsory flag salute as applied to Jehovah's Witnesses).

11 Id. at 640. Concurring in Barnette, Justices Black and Douglas observed that religious exercise could be constitutionally inhibited by laws "which are either imperatively necessary to protect society as a whole from grave and pressing imminent dangers or which, without any general prohibition, merely regulate the time, place or manner of religious activity." Id. at 643-44.

Earlier the Supreme Court, reversing a breach of peace conviction arising out of religious solicitation had held that religious freedom must prevail in the absence of a "clear and present danger to a substantial interest of the State." Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). This test was recently applied by the Illinois Supreme Court in upholding the right of an adult to refuse a blood transfusion, on religious grounds. In re Brook's Estate, 32 Ill. 2d 322, 205 N.E.2d 435 (1965).
protection to religious exercise have invalidated general, nondiscriminatory legislation which "neutrally" inhibited religious, as well as nonreligious practices.\textsuperscript{12}

In short, when religion and other constitutionally preferred values are at stake, there is small place for the considerable judicial deference ordinarily paid to legislative judgments.\textsuperscript{13} Upon the judiciary devolves the responsibility of preserving these cherished freedoms by closely scrutinizing the legislative rationale to determine whether the prohibited activity creates a grave danger, and, if so, whether the legislative objective could be substantially achieved without invading the protected area.\textsuperscript{14}

2. The Rationale of Religious Freedom

Religion, like speech, is afforded constitutional priority over all but compelling state interests because of its vital significance to the individual and to society. The Framers understood that the highest value is man himself and that religious experience was a profound means toward self-fulfillment. They knew that to forbid unorthodox modes of religious experience and worship "is to make . . . [religious] beliefs an empty shell and religious life a hollow mockery."\textsuperscript{15} In preserving religious freedom the Framers preserved man's opportunity to know and experience the deepest, the highest, the ultimate, the infinite, the good and the true by whatever means he believed could most profoundly reveal it.


\textsuperscript{14} In Sherbert, the Court concluded that speculative fear of fraudulent religious claims did not approach a compelling state interest, and that there was no evidence to support the assertion that allowance of religious exemptions would significantly impair statutory policies. 374 U.S. at 407-08.

The special protection of the "compelling interest" and "grave abuse" test has extended to a limited number of values in addition to religion and speech. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); McLaughlin v. Florida, 379 U.S. 184 (1964) (racial equality); Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1963) (dissenting opinion of Fahy, J. (Circuit Judge)), rev'd, 377 U.S. 163 (1964) (citizenship).

Religious experience, in providing man with important insights about the meaning and purpose of life and about man’s obligations to his fellow man,\textsuperscript{16} not only facilitates personal fulfillment, but provides society with a vital safety valve—a way or place for exploration of matters of ultimate societal concern,\textsuperscript{17} for a profound view from another dimension. Thus, like freedom of speech, religious freedom keeps open the channels of investigation and exploration through which the purposes and principles of man and society may be ever tested and reconsidered.\textsuperscript{18} As William James observed, “Religion . . . must necessarily play an eternal part in human history.”\textsuperscript{19}

Throughout our constitutional history, the Supreme Court has affirmed these values of religion.\textsuperscript{20} Appellant will demonstrate, by comparing the testimony below with the writings of religious scholars and opinions of the Supreme Court, that the experience he seeks and finds through marihuana—the spiritual communion with God—is the very essence of religious experience, and according to many authorities, may be the core of religion itself.

3. The Polygamy Cases

The decisions upholding restrictions on polygamy, as applied to Mormons whose church purportedly taught and required the practice, although decided before the Court had determined the meaning of any of the first amendment liberties, do not detract from the principle that only the gravest abuses justify infringement of religion, especially religious worship. Indeed, the 19th-century Court recognized that the first amendment “was intended to allow everyone under the jurisdiction of the United States . . . to exhibit his senti-

\begin{itemize}
  \item W. James, \textit{Varieties of Religious Experience} 378 (1901).
  \item “We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.” West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).
  \item “The essential characteristics of these liberties is that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our country . . . .” Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).
  \item “I am convinced that no liberty is more essential to the continued vitality of the free society which our constitution guarantees than is the religious liberty protected by the Free Exercise clause . . . .” Sherbert v. Verner, 374 U.S. 398, 413 (1963) (concurring opinion of Stewart, J.).
\end{itemize}
ment in such form of worship as he may think proper, not injurious to the equal rights of others." The Court, however, unequivocally manifested the deep abhorrence toward the practice of polygamy, finding that it undermined the principles of democratic government, "fetter[ed] the people in stationary despotism," and amounted to a "return to barbarism." Indeed the Court treated the Mormons' claims that they practiced polygamy in pursuit of their religious beliefs, as a "pretense" and "altogether a sophistical plea."

Appellant will establish below that no such damning condemnations can be applied to ingestion of marihuana, a substance less harmful than alcohol, and that no warrant exists for denying that his religious commitment to marijuana is deeply held and was sincerely claimed under oath at the trial.

4. The Sunday-Closing Law Cases

In Braunfeld v. Brown and Gallagher v. Crown Kosher Super Market, the Supreme Court found the free exercise clause not violated by the application of Sunday closing laws to businessmen whose religious principles required them to close on Saturdays. The Court emphasized that these laws were not a "direct" burden on religion; they did not prohibit any religious practice or principle; but made orthodox Judaism more expensive only for those "who believe it necessary to work on Sunday." The majority further noted that allowance of religious exemptions would directly undermine the legislative goal of uniformity.

In view of Sherbert v. Verner, it is likely that Braunfeld is now a "derelict on the waters of the law." As we have observed, Sher-

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22 Reynolds v. United States, 98 U.S. 145, 168 (1878).
23 Id.
24 Late Corp. of Latter-Day Saints v. United States, 136 U.S. 1 (1890). See also Cleveland v. United States, 329 U.S. 14, 16 (1946). AUTHOR'S NOTE: The reply brief argued that in these cases, "The Court independently found polygamy intolerable; it did not automatically defer to a branch of government not vested with final constitutional responsibility."
25 Late Corp. of Latter-Day Saints v. United States, 136 U.S. 1, 49-50 (1890). See also Davis v. Beason, 133 U.S. 333, 341-42 (1890).
29 Id. at 608. The majority was also impressed by the fact that the religious exemptions would economically disadvantage competitors, who would lose business to successful claimants. Neither competitive advantage, nor a special legislative concern for uniformity, are factors in the instant case.
30 In Sherbert, three Justices expressed the view that Braunfeld had been overruled, an opinion shared by many legal commentators. See, e.g., Note, 28 Albany L. Rev. 133 (1964); Note, 43 Ore. L. Rev. 177 (1964); Note, 38 Tulane L. Rev. 207 (1963); Note, 11 U.C.L.A. L. Rev. 423 (1964).
bert revitalized the "grave abuse" and "compelling state interest" tests (which Braunfeld had temporarily abandoned), emphasizing that even an incidental burden on religious freedom is invalid where the government cannot meet these tests and that fear of fraudulent religious claims cannot justify infringement.\(^{31}\) Appellant will demonstrate that ingestion of marihuana cannot rationally be characterized as a "grave abuse" such as would create a "compelling" government interest in its prohibition.\(^{32}\)

Whatever the status of Braunfeld, the burden imposed on appellant's exercise of his religion by the statutes here involved, is direct and substantial. Both 21 U.S.C. § 176(a) (Count Two) and 26 U.S.C. §4042 (Count Three) virtually render the possession of marihuana criminal per se.\(^{33}\) The former, prohibiting transportation of a substance appellant finds "integral" to his religion, obviously prevents him from practicing his religion anywhere but at the precise spot he acquires marihuana. Surely one cannot be constitutionally compelled to abandon a religious practice whenever (and because) he exercises...

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\(^{31}\) See note 14 supra. Moreover, were it relevant, the proof of appellant's religious dedication and commitment is so compelling and extraordinary that reversal here would have little, if any, tendency to encourage fraudulent religious claims.

\(^{32}\) Finally, Prince v. Massachusetts, 321 U.S. 158 (1943), may be worthy of mention. The Court there upheld the conviction of a Jehovah's Witness for violating child labor laws by allowing her 9-year-old child to sell religious magazines on a street corner at night. Although the majority emphasized the state's interest in the welfare of children and the harmful consequences of forcing a child to become a martyr, the Court did not expressly apply the grave and immediate danger test required by West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), as Justice Murphy pointed out in dissent. Justice Jackson, dissenting from the grounds of the holding, asserted that "religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

Of course, even if not undone by the Sherbert restoration of the Barnette tests, Prince has little if any bearing on the instant case, for appellant was not 'charged with violation of any laws relating to the welfare of children. In any event, appellant's children merely observe the religious rituals of their parent, they do not actually participate (Tr.). This is precisely the extent of involvement in Peyotism of the American Indian children whose parents follow the practices of the Native American Church, upheld by the California Supreme Court. People v. Woody, 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); see text following note 38 infra.

The United States Supreme Court has repeatedly held that the Constitution protects the sanctity and privacy of familial relationships, and parental rights to educate children, recognizing that these are among the most sacred and intimate institutions of a free society. Griswold v. Connecticut, 381 U.S. 479 (1965); Armstrong v. Manzo, 380 U.S. 545 (1965); May v. Anderson, 345 U.S. 528 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Thus, the existence of a family relationship, far from detracting from the force of appellant's position, may well place an added burden on the government to establish that appellant's religious practices constitute a grave threat to society.

\(^{33}\) Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).
his freedom of movement.34

The imposition of a $100 tax per ounce of marihuana35 was intended to be prohibitive—to prevent possession by nonauthorized users.36 Even nonprohibitive, nondiscriminatory taxes may not constitutionally be applied to religious activity: "freedom of religion . . . [is] available to all, not merely to those who can pay their own way."37

5. The Religious Use of Drugs Has Been Accorded the Full Constitutional Protection to Which It Is Entitled

By a six to one majority the Supreme Court of California has held that the religious use of peyote (a psychedelic mind-expanding, hallucinatory substance derived from the peyote cactus and considerably more potent than marihuana) is constitutionally immune from general prohibitory legislation.38 In Woody, the court held a state criminal statute unconstitutional as applied to possession of peyote by members of the Native American Church. It found that peyote was central to the religious beliefs and practices of this Church, whose theology "combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God," and "experience the Diety."39 Concluding that "the statutory prohibition of the use of peyote results in the virtual inhibition of the practice of defendant's religion," the court went on to consider whether "the state [had] demonstrated that 'compelling state interest' which necessitates an abridgement of defendants' first amendment right."

Contrary to the state's assertions, the court found that peyote was not used in place of medical care and that Indian children never, and Indian teenagers rarely, use peyote (although children did participate in the peyote ritual by their presence). Furthermore, the court observed, "peyote works no permanent deleterious injury to the Indian" and "there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics

34 It has been held that Congress may not condition the exercise of a first amendment freedom on the sacrifice of one's freedom of travel. Aptheker v. Secretary of State, 378 U.S. 500 (1964).
38 People v. Woody, 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); In re Grady, 61 Cal. 2d 387, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).
39 61 Cal. 2d at 720, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74.
than non-peyote using Indians."  

Following the teachings of *Sherbert v. Verner*, the California court rejected as unfounded the state's argument that spurious religious claims would undermine effective law enforcement, and concluded its opinion with these noteworthy remarks:

> "The right to free religious expression expresses a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California."  

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40 *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.  
42 61 Cal. 2d at 727-28, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78. In *In re Grady*, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964), the California Supreme Court unanimously held that a nonaffiliated self-styled "peyote preacher" was entitled to a reversal of his conviction for possession of peyote if his religious claims were made honestly and in good faith.  

The religious use of peyote has also received judicial protection against state legislation in Arizona. *State v. Attakai*, Superior Court of Cochise County, Arizona, July 26, 1960.  

Several states have made statutory exceptions. See, e.g., N.M. STAT. ANN. § 54-5-16 (1959); MONT. REV. CODES ANN. § 94-35-123 (1959).  


Although the courts of Montana and North Carolina have upheld peyote convictions of religious users, *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926); *State v. Bullard*, 269 N.C. 599, 148 S.E.2d 565 (1966), finding the legislation to be not unreasonable, and supported by the general police power, we have observed that the proper constitutional standard requires a showing of grave abuse or compelling state interest in denying the exemption. Although the North Carolina court thought it relevant that peyote produced hallucinations similar to the symptoms of schizophrenia, this has been true of many activities that produce religious experience, e.g., dancing, fasting. See W. SARGENT, *BATTLE FOR THE MIND* (1957).  

In *People v. Woodruff*, 272 N.Y.S.2d 786 (1966), it was held that one who refused to answer questions concerning the use and possession of drugs at Castalia Foundation, propounded in the course of a grand jury inquiry, was punishable for contempt notwithstanding the lower court's finding that she was in fact sincere in her religious belief which precluded her from giving testimony against a coreligionist. The court applied a constitutionally impermissible test, merely "balancing" the interest of the individual right of religious worship against the "interest of the state . . . ." *Id.* at 789. Of course, the constitutionally compelled test requires reversal even if the state interest "outweighs . . . the individual right," whenever the state interest is not a compelling one and the religious practice is not a grave abuse.
B. The Ingestion of Marihuana, a Relatively Harmless Substance, Cannot Reasonably Be Deemed a "Grave Abuse Endangering Paramount Governmental Interests"

As observed above, where legislation inhibits religious freedom, it becomes incumbent upon the courts to scrutinize the legislative rationale to determine whether the prohibited practice can rationally be deemed a "grave abuse" creating a compelling governmental interest in its outlawry. Appellant submits that the prohibition of marihuana barely meets a minimum rationality test, and under no stretch of the imagination can its use rationally be found to create the grave social evil necessary to justify suppression of religious experiences.43

Few myths have had such a tenacious hold on the uninformed public as the notion that marihuana is a significantly harmful substance. Among the charges levelled against marihuana have been the following: (1) it is addictive; (2) it leads to crime or sexual misbehavior; (3) it is the first step on the road to heroin; and (4) it produces physical or psychological harm to the user. When one turns to scientific evidence rather than rumor and hysteria it is found that not one of the above contentions is supported by substantial evidence; indeed, many reputable studies positively refute all of these charges.

Such were the conclusions of the most comprehensive study on the effects of marihuana undertaken in this country, carried out from 1939 to 1943 by a committee of distinguished scientists, doctors, and sociologists at the behest of Mayor La Guardia under the auspices of the New York Academy of Medicine.44

1. Marihuana Is Not an Addictive Drug

As a very recent report of the Medical Society of the County of New York observed, "Marihuana is not a narcotic nor is it addicting. It is a mild hallucinogen."45 The Mayor's committee found that "the practice of smoking marihuana does not lead to addiction in the medical sense of the word."46 These reports and numerous other studies,47 corroborate the testimony of Dr. Joel Fort, a world au-

43 Indeed, the leading British Medical Journal recently approved of the general availability of marihuana. THE LANCET, Nov. 9, 1962.
44 THE MAYOR'S COMMITTEE ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK (1944) [hereinafter cited as MAYOR'S COMMITTEE].
45 22 N.Y. MEDICINE No. 9, May 5, 1966.
46 MAYOR'S COMMITTEE 25. See also id. at 214.
thority on drug abuse, that marihuana is "not addicting in any sense"; a user does not develop tolerance or suffer withdrawal illness upon discontinuing its use (Tr.).

2. Marihuana Does Not Cause Crime

The major basis for the original federal antimarihuana legislation in 1937 was the allegation by enforcement officials that marihuana was responsible for the commission of crimes involving sex and violence. Virtually every scientific study undertaken since that enactment has refuted this premise.

The 1963 White House Conference states: "Although marihuana has long held the reputation of inciting individuals to commit sexual offenses and other anti-social acts, evidence is inadequate to substantiate this."

The Medical Society of the County of New York finds "no evidence that marihuana use is associated with crimes of violence in the United States." A number of major studies reach the same conclusion.

The most that can be said for the material presented to the 1937 Congress is that it revealed that a number of criminals smoked marihuana. This, of course, has no tendency to demonstrate that most marihuana smokers are criminals or, far more important, that marihuana smoking is a cause of crime. Indeed, many more criminals smoke tobacco, imbibe alcohol, attend movies, and drive automobiles than ingest marihuana, yet who would suggest that such a statistical

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48 See also 1963 White House Conference on Narcotics and Drug Abuse 286.


50 1963 White House Conference on Narcotics and Drug Abuse 286 (emphasis added).

51 22 N.Y. Medicine No. 9, May 5, 1966 (emphasis added).

52 Allentuck & Bowman, The Psychiatric Aspects of Marihuana Intoxication, 99 Am. J. Psychiatry 248, 250 (1942); Bromberg, Marihuana, A Psychiatric Study, 113 J.A.M.A. 4, 12 (1932); Bromberg & Rodgers, Marihuana and Aggressive Crime, 102 Am. J. Psychiatry 825-26 (1948); Mayor's Committee 25; The Marihuana Bugaboo, 93 Military Surgeon 95 (1943); Reichard, supra note 47, at 16.

Indeed, several researchers corroborate the expert testimony below in finding that marihuana produces quiescence and passivity and reduces aggression and sexual drives. See, e.g., Chopra & Chopra, Cannabis Sativa in Relation to Mental Disease and Crime in India, 30 Indian J. Medical Research 155, 168 (1942); Mayor's Committee 130; Murphy, The Cannabis Habit, A Review of Recent Psychiatric Literature, 15 Bull. Narcotics 19 (1963); Reichard, supra note 47, at 16.

53 Even if it could be shown that a significant proportion of people who use marihuana are criminals, this may mean only that, in the past, marihuana primarily attracted members of subcultural environments likely to produce criminal propensities, or, more likely, that marihuana users from respectable classes evaded statistical attention.
coincidence tends to establish a causal relationship between these activities and crime?\textsuperscript{54}

If indeed, marihuana, like alcohol, may tend to alleviate anxieties of those bent on crime,\textsuperscript{55} this is surely no justification for denying it to those whose purpose is religious experience.

3. Marihuana does Not Lead to Heroin Addiction

It is frequently asserted by enforcement officials that prolonged use of marihuana causes one to graduate to heroin. The medical and scientific evidence wholly belies this allegation,\textsuperscript{56} as does the testimony of the experts at trial (Tr.). Indeed, the leading proponent of the federal antimarihuana legislation, Harry Anslinger, Commissioner of the Bureau of Narcotics, while vigorously asserting that marihuana caused crime, informed the 1937 Congress in no uncertain terms that marihuana does not lead to heroin!

Congressman Dingle:

"I am just wondering whether the marihuana addict graduates into a heroin, an opium, or a cocaine user."

Mr. Anslinger:

"No, sir; I have not heard of a case of that kind. I think it is an entirely different class. The marihuana addict does not go in that direction."

The mere showing that many heroin addicts have smoked marihuana\textsuperscript{57} tells us nothing about the number of marihuana smokers

\textsuperscript{54} The erroneous belief that marihuana causes crime may be due in part to confusion with hashish, a hemp derivative associated in literary and historical writings with crime and eroticism. That marihuana does not lead to such behavior is explained by the fact that it is one-fifth to one-eighth the potency of hashish. See 22 N.Y. MEDICINE No. 9, May 5, 1966. See also Hearings Before Special Senate Comm. to Investigate Organized Crime in Interstate Commerce, 82d Cong., 1st Sess. 119 (1951); McGlothlin, Hallucinogenic Drugs, a Perspective With Special Reference to Peyote and Cannabis, Presented At The Second Conference on the use of LSD in Psychotherapy, Amityville, N.Y., reprinted in 6 PSYCHEDELIC REV. 36 (1965).

\textsuperscript{55} See Baren & Perelman, Personality Studies of Marihuana Addicts, 102 AM. J. PSYCHIATRY 676-77 (1946); Gaskill, Marihuana, An Intoxicant, 102 AM. J. PSYCHIATRY 203, 204 (1945).

\textsuperscript{56} See Allentuck & Bowman, The Psychiatric Aspects of Marihuana Intoxication, 99 AM. J. PSYCHIATRY 248, 250 (1942); MAYOR'S COMMITTEE 13. See also Winick, Narcotics Addiction and Its Treatment, 22 LAW & CONTEMP. PROB. 11 (1957).

\textsuperscript{57} Hearings on H.R. 6385 Before the House Comm. on Ways and Means, 75th Cong., 1st Sess. 24 (1937) (emphasis added). Perhaps worthy of note is Mr. Anslinger's change of tune in 1955, when he testified that "eventually if used over a long period it does lead to heroin addiction." Daniel Subcomm. Hearings, pt. 5, at 6 (1955).

\textsuperscript{58} It may well be that the existence of punitive legislation against the use of marihuana is substantially responsible for even this wholly inconclusive relationship between the use of marihuana and heroin. Once marihuana was
who never progress to heroin. In fact, among the hundreds of thousands of persons who have had marihuana experiences only a small number subsequently become heroin addicts. There is no evidence whatsoever to suggest that the use of marihuana inherently generates physiological or psychological processes which eventuate in a craving for heroin.

To prohibit marihuana by relying on a statistical fallacy which tends to prove that cigarette smoking or movie attendance causes heroin addiction (i.e. many or most heroin addicts have engaged in such activities) is arbitrary and irrational and surely no basis for inhibiting religious freedom.

4. Marihuana Does Not Produce Physiological or Psychological Harm

Medical research has established that prolonged use of marihuana does not produce disease or physical deterioration; nor, unlike the occasional consequence of hashish, does it create serious mental abnormalities.

5. Since Alcohol Is in No Respect Less Dangerous Than Marihuana and Since Society Does Not Find the Former Sufficiently Dangerous to Warrant Prohibition Even of Its Frivolous Social Uses, There Is No Basis for Finding That Marihuana Creates a Grave Abuse Justifying Infringement of Religious Exercise or That There Is a Compelling Governmental Interest in Prohibiting Its Religious Use

Alcohol is a more dangerous drug than marihuana. It is addictive—producing increasing tolerance and severe withdrawal symp-

outlawed, its distribution fell into the hands of those who took a great risk of long punishment, a risk which could only be compensated by the profits to be made by convincing marihuana smokers to switch to heroin. See A. LIndesmith, The Addict and the Law 233 (1965).

Moreover, the character traits that would inevitably lead some individuals to heroin could readily explain their initial association with marihuana. See Winick, Narcotics Addiction and Its Treatment, 22 Law & Contemp. Probs. 11 (1957).

60 22 N.Y. Medicine No. 9, May 5, 1966.

61 In recent years, marihuana has been increasingly used by members of the middle class and significant proportions of college students. See The Saturday Evening Post, May 28, June 4, 1966. Where is the evidence that such users move on to heroin?

It leads to crime, by substantially reducing inhibitions and releasing aggressive drives. It produces special psychoses and diseases (alcoholic cirrhosis of the liver is a major cause of death), vast industrial absenteeism and job loss, numerous accidents and broken homes. In short, "[f]rom the point of view of public health and safety, the effects of marihuana present a very minor problem compared with the abuse of alcohol."

When this country responded to the evils of alcohol by enacting national prohibition, religious exemptions were sensibly afforded. If today society finds such evils sufficiently tolerable to leave even social drinking unrestricted, there is surely no compelling interest in punishing the use of marihuana in the exercise of religious values protected by the first amendment.

Five to six million Americans are so addicted. See MacMillan's Standard Medical Text 295 (2d ed. Goodman & Gilman 1955); 1963 White House Conference on Narcotics and Drug Abuse 276, 284; Allentuck & Bowman, The Psychiatric Aspects of Marihuana Intoxication, 99 Am. J. Psychiatry 248 (1942); Fort, Social and Legal Response to Pleasure-Giving Drugs, in The Utopiates 209-10 (Blum & Blum ed. 1964) [hereinafter cited as Fort].

See R. De Ropp, Drugs and the Mind 126 (1957); A. Lindesmith, The Addict and the Law 228 (1965); Fort 209-10; Horton, The Functions of Alcohol in Primitive Societies, 3 Q.J. Alcoholic Studies 199 (1943).

See R. De Ropp, Drugs and the Mind 122-33 (1957); A. Lindesmith, The Addict and the Law 228 (1965); Fort 209-10.

See Fort 210.

D. Maurer & V. Vogel, Narcotics and Narcotics Addiction (1962). See also Aldous Huxley's fascinating advocacy of the use of mescaline (a derivative of peyote) as a far safer and a far more meaningful practice than the imbibing of alcohol. A. Huxley, Doors of Perception 62-71 (1956).


Author's Note: In the year since this brief was filed there has been increasing acknowledgment or corroboration of marihuana's relative harmlessness or the absence of proof of its harmlessness. See generally President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 224-25 (1967); Blum, Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs, in President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse (1967); Rosenthal, Proposals for Dangerous Drug Legislation, in President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse (1961); The Marihuana Papers (D. Solomon ed. 1966); Boyko & Rother, Constitutional Objections to California's Marihuana Possession Statute, 14 U.C.L.A. L. Rev. 775-81 (1967).

A recent report prepared by the California Youth Authority and the Institute for the Study of Crime and Delinquency concludes that a majority of young people arrested for nonopiate drug offenses were never arrested again for subsequent narcotic violations, only 12% of the 936 juveniles studied were subsequently arrested for using opiates. California Youth Authority & Institute for the Study of Crime and Delinquency, A Follow-Up Study of the Juvenile Drug Offender 31 (1967).

Dr. James Goddard, Director of the Food and Drug Administration, has expressed the view that "whether marihuana is a more dangerous drug than alcohol is debatable—I don't happen to think it is." N.Y. Times, October 20, 1967, at 36, col. 3. See also Marihuana: Dangerous as Alcohol, The New Republic October 28, 1967, at 7.
C. Since the Testimony Below Tended to Establish That Marihuana Plays an Integral Role in Appellant's Religious Life, As a Sacramental Aid Facilitating the Spiritual Experience at the Core of Religion (As Understood by the Supreme Court and Religious Scholars), Appellant Was Entitled to a Jury Determination of the Honesty and Sincerity of His Religious Claims

1. The Religious Exercise Protected by the First Amendment Clearly Includes the Spiritual, Transcendental Experience Involving Communion With and Worship of God

Although the phenomenon of religion may be so complex as to defy comprehensive definition, opinions of the Supreme Court (as well as nonlegal scholarship) strongly suggest that religious experience (with the Western emphasis on the word "worship")—man's personal, transcendent spiritual communion with God, with the Infinite and the Eternal—deserves and is given the highest degree of constitutional protection:

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of the law.71

Man's relation to God was made no concern of the State.72

[F]reedom to adhere to such... form of worship as the individual may choose cannot be restricted by law.72

I have no loftier responsibility than to uphold spiritual freedom to its greatest reaches.74

Regarding the alleged relationship between marihuana and crime, appellee inevitably rehashed the old story about hashish and the Old Man of the Mountain. Virtually every popular magazine article on marihuana preceding passage of the 1937 federal legislation told of how the Old Man of the Mountain "drugged" the assassins with hashish before sending them out on their deadly missions. This ancient myth is exploded in Mandel, Hashish, Assassins, and the Love of God, 2 Issues of CRIMINOLOGY 149 (1966). This examination of the historical evidence suggests that these 11th century freedom fighters were not stimulated by ingestion of hashish but encouraged to carry out their assignments by the promise of the "exquisite paradisaical beauty" produced by hashish. If, as the author observes, "Eleventh Century folklore cannot be the basis for an important twentieth century prohibition" it certainly cannot provide a basis for violating contemporary religious freedom.

Obviously the literature on marihuana does not uniformly attest to its harmlessness; refutation is not spontaneously generated. Allegations of each of the evils denied in the brief have found their way, by one means or another, to the printed page. The Commentary, supra, will examine the role of the court as finder of "legislative fact," and explore more subtle forms of "harmfulness."

70 See, e.g., K. DUNLOP, RELIGION: ITS FUNCTIONS IN HUMAN LIFE (1946); Oman, The Sphere of Religion, in SCIENCE, RELIGION AND REALITY 261 (Needham ed. 1925).


Recognition by the Supreme Court that "freedom to believe" is "absolute" but freedom to act, "in the nature of things . . . cannot be" was not only an observation that religious activity, like speech, can be regulated where vital state interests are jeopardized, but also that internal, personal religious activity is entitled to special constitutional consideration:

[T]he believe-action distinction was an implicit affirmation that it was belief, prayer, and worship which comprised the central and essential core of religion . . . .

[T]he earlier judicial usage of religion envisioned a sacramental core surrounded by concentric circles of action, each more eternal and less purely religious than the last.

The Supreme Court recently cast considerable light on its understanding of the scope and meaning of "religion" protected by the first amendment. The 1940 Selective Training and Service Act exempted any conscientious objector "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." In 1948 Congress attempted to clarify the phrase "religious training and belief" by defining it as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation . . . ." Nevertheless the Court concluded that "religious training and belief" were not limited to belief in an anthropomorphic God, but included "all sincere religious beliefs which are based upon a power or being or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." Recognizing the "long established policy of not picking and choosing among religious beliefs," and that "in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss," the Court held that the exemption applied to "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." Quoting liberally from Dr. Paul Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1944).


380 U.S. at 176. Although the Seeger opinion purported to deal only with the meaning of legislation, constitutional issues of free exercise, establishment and religious discrimination, developed in the briefs and arguments, were implicitly resolved. See Brodie & Sutherland, Conscience, the Constitution and the Supreme Court, 1966 Wis. L. Rev. 306, 319-27. Had the Court construed the statutory definition of religious belief to be as narrow as it appeared on its face rather than to include all religious beliefs protected by the first amendment, the statute would have discriminated against particular religious beliefs and violated the establishment clause and the fifth amendment. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953).

380 U.S. at 174-75.

Id.
Tillich and other religious scholars, the Court clearly indicated that
the notion of parallelism or equivalence could not constitutionally be
confined to parochial or traditionally American concepts of religion. 82

The judicial task of defining religion or religious exercise has by
no means been limited to conscientious objector cases. 83 Where a
cherished constitutional right is at stake, the difficulty of defining
the outer limits is surely no basis for denying protection to the central
expression of that freedom. 84

2. The Testimony Below Indicated Appellant’s Deep Religious Com-
mitment and the Integral Role of Marihuana in Facilitating What
Authorities Have Recognized as the Central Religious Experience

The testimony tending to establish appellant’s deep religious com-
mitment has been discussed fully in the statement above. Briefly
summarizing: Following Dr. Leary’s profound religious experience
through ingestion of the sacred mushrooms of Mexico in 1960, he
dedicated his life to pursuit of the meaning of that experience, by
conducting religious seminars and experiments at Harvard and in
Mexico, joining a Hindu sect in Boston, journeying to Japan and
India to study under Buddhist and Hindu religious teachers, direct-
ing a center for religious and scientific research and publishing nu-
merous writings on the religious and scientific significance of psy-
chedelic drugs. While in India he became a member of a sect which
uses ganja (a hemp derivative more potent than marihuana) in reli-
gious worship, and participated in such services. 85

Appellant’s religious beliefs and practices unquestionably fall
within the ambit of protected religious activity as formulated in
Seeger, and involve the spiritual communion with God emphasized

82 E.g., “‘[A]nd if that word [God] has not much meaning for you,
translate it, and speak of the depth of your life, of the source of your being,
of your ultimate concern of what you take seriously without any reservation.’” Id. at 187, quoting P. Tillich, The Shaking of the Foundations 57
83 E.g., claims for religious tax exemption: Washington Ethical Soc’y v.
District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity
v. County of Alameda, 153 Cal. App. 2d 673, 315 F.2d 395 (1957); claims for
qualification as a religious trust: Stephan’s Estate, 129 Pa. Super. 396, 195 A.
653 (1937); claims for religious equality within a prison system: Wilford v.
California, 217 F. Supp. 245 (N.D. Cal. 1963); Fulwood v. Clemmer, 206 F.
84 The Supreme Court has recognized that the accommodation and pres-
ervation of religious values, required by the “free exercise” clause are wholly
compatible with the strictures of the “establishment” clause. Sherbert v.
Verner, 374 U.S. 398, 409 (1963); Selective Service Draft Law Cases, 245 U.S.
366, 388-90 (1918).
85 Appellant’s testimony on these matters was corroborated in all sig-
nificant aspects by the testimony of Dr. Ralph Metzner (Tr.) and Sri Kalidas
(Fred Swain), an American Hindu Monk (Tr.).
in other cited opinions; indeed the experience he sought and attained through marihuana and other psychedelic drugs is virtually indistinguishable from authoritative descriptions of the classical mystical religious experience.

(a) Appellant's Initial Experience With a Psychedelic Substance

Dr. Leary:

The experience that I had taking these mushrooms was the most intense religious experience that I have ever had in my life. It was an experience that I can only describe as revelatory, or as a conversion experience, and I have done practically nothing in my waking hours since taking these mushrooms in 1960 except to try and understand the meaning of this experience and how it can be applied to help a man, not only with his psychological problems, but find out who he is and what the religious nature of himself is. (Tr.)

It's very hard to explain these experiences. . . . (Tr.)

It's not at all like being intoxicated or it's not like being unconscious—far from it. It's as though every sense has a microscope—vision, hearing and many, many other senses that you never realize you had. It's a heightened state of awareness. You are aware of more, in one minute than you would be, perhaps, in a year, because your mind is speeded up so much and you are not thinking in the ordinary sense. You are experiencing at other levels. . . . (Tr.)

You are aware of the fact that you weren't born tonight, that I wasn't born in 1920. . . . that the process of which I am a part has been going on for millions and millions of years. It's as though God would open up the veils of his workshop, or let you take him by the hand and show you—say, "Listen, Timothy Leary. Don't be so self-centered." Because this process that exists in every cell and that exists in every plant and leaf, and it's all in the handiwork of a supreme intelligence and you begin to see how this is all hooked up together, and it's an extremely humbling and extremely shattering experience, because you realize in a sense all of your life has been a loss, that you have been so certain and so smug and actually you are just a grain of sand or a leaf on an incredibly long and lasting and large tree of life. (Tr.)

This is the sort of thing—I apologize for my incoherence—but men have been having these experiences for thousands of years and trying to write about them and trying to tell other people that they exist, and people in my profession have always had a hard job, because we just don't have the words to do it. (Tr.)

There is a feeling to go—the feeling to go along with this experience—and this again is typical of these experiences—this reverence and this tremendous gratitude for being able to see this, and also terror, because you feel that you are dying or that you feel that you are just a flash or that your ego—you are just really dissolved during that time, and that is why it can be very frightening during this. (Tr.)

There is also a feeling of almost laughter, of how seriously you took your little selfish ambition and how you failed to see the beauty and the wisdom and the God engineering and everything around. (Tr.)

There can be no question that Dr. Leary's understanding of his experience with psychedelic drugs falls well within the definition of religious belief formulated by the Supreme Court in Seeger. For
the psychedelic experience graphically demonstrated to appellant
that we are dependent on and subordinate to a Divine energy process
which he recognizes as God.86

(b) Mysticism and Religion

Many scholars have concluded that the type of experience attained
by Dr. Leary—the mystical, transcendental consciousness—is the es-
rence and source of all religion:

The very beginning, the intrinsic core, the essence, the universal
nucleus of every known religion . . . has been the private, lonely,
personal illumination, revelation, or ecstasy of some acutely sensitive
prophet or seer. . . .

The transcendent experience is what is common to all religions.

W. T. Stace, Professor Emeritus at Princeton, holds that the "es-
sonce of religion is mysticism."88 Philosophers such as Henri Berg-
son, William James and Aldous Huxley have found the mystical
experience to be a central phenomenon in religion.89 Indeed, this
experience has played a significant role in all religions,90 being re-

86 See United States v. Seeger, 380 U.S. 163, 176 (1965). See also United
States v. Macintosh, 283 U.S. 605, 633-34 (1931) (dissenting opinion of Hughes,
J.): "The essence of religion is belief in a relation to God involving duties
superior to those arising from any human relation."


89 See, e.g., H. Bergson, TWO SOURCES OF MORALITY AND RELIGION (1935)
[hereinafter cited as BERGSON]; A. Huxley, THE PERENNIAL PHILOSOPHY (1944);
W. James, VARIETIES OF RELIGIOUS EXPERIENCE (1901) [hereinafter cited as
JAMES]. See also Scholem, Religious Authority and Mysticism, COMMENTARY,
November 1964, at 31.

Several well-known definitions of religion imply the transcendental,
mystical experience. For example, James defines religion as "the feelings,
acts and experiences of individual men in their solitude so far as they appre-
hend themselves to stand in relation to whatever they consider Divine."
JAMES 69. Stratton concludes that religion "is the appreciation of an unseen
world or of unseen company." G. Stratton, THE PSYCHOLOGY OF THE RELI-
gious Life (1911). McTaggard holds that religion is "best described as an
emotion resting on a conviction of harmony between ourselves and the uni-
verse at large." McTaggard, SOME DOGMAS OF RELIGION (1906).

Even one who denies that mysticism is the "essence" of religion agrees
that it is a central phenomenon. W. Kaufmann, RELIGION AND PHILOSOPHY
331 (1961).

90 In Western religious traditions the significance of the transcendental
experience is expressed in the writings of St. John of the Cross, Ignatius of
Loyola, St. Teresa, Meister Eckhart, Rudolph Otto, Israel Baal-Shem and
John Wesley, and in the tenets of such sects as the Sufis, the Kabbalists, the
Gnostics, the Quakers, the Brethren of the Free Spirit and the Spanish Alum-
brados. See generally A. Huxley, THE PERENNIAL PHILOSOPHY (1944); R.
Otto, MYSTICISM EAST AND WEST (1932); E. Underhill, MYSTICISM 105 (1955);
Scholem, Religious Authority and Mysticism, COMMENTARY, November 1964,
at 31 (the author is Professor of Jewish Mysticism, Hebrew University, Jeru-
usalem).

In Eastern religions, which are far more private and subjective and less
markably similar throughout history in all parts of the world.\(^9\)

Without unduly burdening this text, let it simply be noted that the religious authenticity of the experience related by appellant is amply demonstrated by comparison with the following principal characteristics of the classical, mystical, religious experience: (a) comprehension of the Divine process, existing in and unifying all things;\(^{92}\) (b) ineffability, insight and heightened sensory awareness;\(^{93}\) (c) transcendence of ego and spiritual rebirth;\(^{94}\) and (d) intense emo-

organized and institutional than those in the West, the ultimate and primary objective is the attainment of a state of transcendental consciousness, e.g., Nirvana or Dhanyi in Buddhism, Satori in Zen Buddhism, Samadhi or Moshki in Hinduism. See generally A. BHARATI, THE TANTIC TRADITION (1965); VEDANTA FOR THE WESTERN WORLD (C. Isherwood ed. 1948); R. OTTO, MYSTICISM EAST AND WEST (1932); H. SMITH, THE RELIGIONS OF MAN 14-216 (1958); H. ZIMMER, PHIELOSOPHIES OF INDIA (1951).

\(^{91}\) See BERGSON 246; A. HUXLEY, THE PERNIAL PHILOSOPHY (1944).

\(^{92}\) Evelyn Underhill, probably the leading Western authority on mysticism, defines it as "the art of establishing [man's] conscious relation with the Absolute." E. UNDERHILL, MYSTICISM 81 (1955). The French philosopher Henry Bergson recognizes that: "The mystics do not posit an arbitrary conception of God. They obviously mean by experience of the Divine, an energy to which no limit can be assigned, and a power of loving and creating which surpasses all imagination" and that "the ultimate end of mysticism is the establishment of a contact, consequently of a partial coincidence with the creative effort which life itself manifests." BERGSON, supra note 89, at 262. See also id. at 230. Many other writers have stressed the communion with God. See, e.g., J. WACH, SOCIOLOGY OF RELIGION 376 (1944). And James describes the religious life as including the following beliefs: "1. That the visible world is part of a more spiritual universe from which it draws its chief significance; 2. That union or harmonious relation with that higher universe is our true end; 3. That prayer or inner communion with the spirit thereof is a process wherein work is really done, and spiritual energy flows in and produces effects, psychological or material, within the phenomenal world." JAMES 367.

\(^{93}\) Julian Huxley observes that through mystical, religious consciousness "vital experiences [are organized] on a new level, above that of the ordinary self, above that of all merely discursive activity, in which new intensity is gained through so much more than usual being seen and felt together in a single organized moment of spiritual perception." J. HUXLEY, RELIGION WITHOUT REVELATION 186 (1957).

James describes the two principal characteristics of mystical experience as: "Ineffaibility. . . . [N]o adequate report of its contents can be given in words. It follows from this that its quality must be directly experienced; it cannot be imparted or transferred to others. . . . Noetic quality. . . .[A]lthough so similar to states of feeling, mystical states seem to those who experience them to be also states of knowledge. They are states of insight into depths of truth unplumbed by the discursive intellect. They are illuminations, revelations, full of significance and importance, all inarticulate though they remain and as a rule they carry with them a curious sense of authority for aftertime." JAMES 292–93. See also A. HUXLEY, DOORS OF PERCEPTION (1954); A. HUXLEY, HEAVEN AND HELL (1954). On ineffability, see also F. ALLPORT, INSTITUTIONAL BEHAVIOR: ESSAYS TOWARD A REINTERPRETING OF CONTEMPORARY SOCIAL ORGANIZATIONS 423, 427-28 (1933).

\(^{94}\) Appellant's experience of a loss (death) and transcendence of self and ego, his awareness for the first time of the profound beauty and wisdom of
tional qualities.95

(c) The Role of Marihuana in Appellant’s Religious Life

Appellant testified that marihuana played an “integral” role in his religious life (Tr.), as a sacramental . . . aid (Tr.), that its use was essential to attain a unique level of spiritual consciousness (Tr.); and that since his religious sojourn to India, where he was initiated into a sect which uses a hemp derivative as a religious aid he has used marihuana exclusively for religious practice. He compared the effect of depriving him of marihuana with that of forbidding a Catholic to celebrate the Mass: while his beliefs might be strengthened, the exercise of his religion would be impeded (Tr.).

Sri Kalidas (Fred Swain), an American Hindu Monk, testified that a number of Hindu religious leaders use marihuana in their religion (Tr.), that it plays an important part in the Indian sect in which Dr. Leary was initiated (Tr.); that he, Sri Kalidas, has been unable to practice his full religion in this country because of the prohibition against marihuana (Tr.) and that were marihuana available it would play a significant role in his religious life (Tr.).

(d) Drugs and Religion

Throughout history, in all parts of the world, drugs have played a significant role in religious practices. In an extensively documented commentary on the immemorial relation between drugs and religion, Phillipe de Felice has concluded:

The employment for religious purposes of toxic substances is extraordinarily widespread. . . . [It occurs] in every region of the earth, among primitives no less than among those who have reached a high pitch of civilization. We are therefore dealing not with exceptional facts . . . but with a general and, in the widest sense of the word, a human phenomenon, the kind of phenomenon which cannot be disregarded by anyone who is trying to discover what religion is, and what are the deep needs which it must satisfy.96

God’s work, and his consuming desire to help man understand his religious nature, is the process of death and rebirth through revelation that is central to the religious mystical experience. See generally A. HUXLEY, THE PERENNIAL PHILOSOPHY (1944). Professor Stace finds that common to all religions is the assertion of an experience in which one transcends differences and all things are seen as elements of one, uniform process. W. STACE, RELIGION AND THE MODERN MIND 257-58 (1952).

95 Several religious scholars have emphasized the intense emotional aspects of the religious experience—awe, reverence, humility, terror, gratitude, glory and mystery. See J. HUXLEY, RELIGION WITHOUT REVELATION 104 (1957); JAMES 376; and the German Protestant theologian, R. OTTO, THE IDEA OF THE HOLY (2d ed. 1952).

96 POISON SACRES, IVRESSES DIVINES, translated and quoted by A. HUXLEY, DOORS OF PERCEPTION 67, 68 (1954) (emphasis added).

For discussion of the drugs used by religious groups around the world,
In recent years, many recognized authorities in the field of religion have discovered that psychedelic drugs, of which marihuana is the mildest, can produce profound religious experiences. One scholar has found that the psychedelic experience "corresponds almost exactly to the theological concept of a sacrament or means of grace." Indeed, it has been suggested in the Journal of Phi Beta Kappa that the source of all religion and theology may well have been an intense mystical experience generated by the accidental ingestion of hallucinogenic substances.

(e) Hemp and Hinduism

The highest objective of Hinduism is samadhi, a state of transcendental consciousness that is direct experience of "the divine life force that pervades the universe and inhabits every creature." The source of all religion and theology may well have been an intense mystical experience generated by the accidental ingestion of hallucinogenic substances.


Professor Stace has concluded that the psychedelic drug experience is not merely akin to mystical experience, "it is mystical experience." Quoted in H. Smith, *Do Drugs Have Religious Import?*, in LSD, THE CONSCIOUSNESS-EXPANDING DRUG 152, 159 (D. Solomon ed. 1964).

William James found that nitrous oxide "stimulat[ed] the mystical consciousness in an extraordinary degree," a consciousness which he believed could not be disregarded in seeking understanding of the reality of the universe. *JAMES* 298.


For further recognition that psychedelic drugs can produce religious experience, see A. BHARATI, *The Tantric Tradition* 28-87 (1965); A. MASLOW, *Religions, Values, and Peak-Experiences* (1964); Downing & Wygant, *Psychedelic Experience and Religious Belief*, in *The Utopiates* (Blum & Blum ed. 1964).


Stated more fully, the objective is (a) awareness and liberation of Atman, man's hidden Divine Self, his infinite soul, the transcental knowledge that lies within, and (b) communion and ultimate Oneness with Brahman, i.e., God, "that which lies beyond the sphere and reach of intellectual consciousness." This objective is singular, not twofold, for the aim is to experience the identity of Brahman, the God which pervades the universe and Atman, the God within all of us. See H. SMITH, *The Religions of Man* 27 (1958); H. ZIMMER, *Philosophies of India* 79 (1951). See also R. OTTO, *MYSTICISM EAST AND WEST* ch. VII (1932).
Atman, or immanent eternal Self, is one with Brahman, the Absolute Principle of all existence; and the last end of every human being is to discover the fact for himself, to find out Who he really is.\footnote{A. Huxley, DOORS OF PERCEPTION 2 (1954).} Intellectual comprehension of Brahman, Atman and their identity is wholly inadequate; this must be experienced through transcendental, mystical, nonverbal, ineffable, revelatory consciousness.\footnote{W. Stace, RELIGION AND THE MODERN MIND 265, 267 (1952).} To achieve this experience is to realize that the perspective of our worldly lives is distorted by illusion (maya); that the sole reality is God and His Divine processes.\footnote{See, e.g., id. at 274.}

It is no wonder that Dr. Leary's quest for understanding the meaning of his "sacred mushroom" experience ultimately led him to join Hindu sects in this country and India, for by his testimony his psychedelic drug experiences, his samadhi, revealed to him the illusions of his worldly existence, impelled him to find out who he really is, and provided an intense consciousness of the handiwork of a Supreme Intelligence pervading the Universe.

The hemp plant, \textit{cannabis sativa}, is the source of a number of psychedelic substances of which marihuana (called \textit{bhang} in India) is the mildest, and \textit{ganja} (widely cultivated in India and sold under a licensing system) and hashish are progressively more potent.\footnote{See generally R. De Ropp, DRUGS AND THE MIND 62-65 (1957); TAYLOR, NARCOTICS: NATURE'S DANGEROUS GIFTS 7-28 (1963) [hereinafter cited as TAYLOR]. Hashish (also called \textit{charas}) is the subject of vivid and dangerous accounts in the romantic writings of Baudelaire, Gautier and Ludlow. Bhang is considered by middle class Indians to be a low quality substitute for ganja. TAYLOR 7-28.}

\textit{To the Hindu the hemp plant is holy.}

A guardian lives in the bhang leaf. . . . To see in a dream the leaves, plant or water of bhang is lucky. . . . In the ecstasy of bhang the spark of the Eternal in man turns into light the murkiness of matter. . . . No god or man is as good as the religious drinker of bhang. At Benares, Ujjain and other holy places, yogis, bairagis and sanyasis take deep draughts of bhang that they may center their thoughts on the Eternal. . . . To forbid or even seriously to restrain the use of so holy and gracious an herb as the hemp would cause widespread suffering and annoyance and to large bands of worshipped aestetics deep-seated anger.\footnote{TAYLOR 22-23. See also 3 REPORT OF THE INDIAN HEMP COMMISSION 250 (1894); Daru and Bhang, Cultural Factors in the Choice of Intoxicant, 15 Q.J. ALCOHOLIC STUDIES 220-37 (1954).}

Hindus consider the state produced by \textit{bhang} and \textit{ganja} as "fixing the mind on God."\footnote{TAYLOR 23. A Hindu painting in the Musee Guimet in Paris shows a tortoise as a reincarnation of the Hindu God Vishnu. According to legend, the hairs of the tortoise represent hemp. Robinson, in 3 CIBA SYMPOSIUM 381 (1946).}
The religious significance of hemp has deep roots in Hindu mythology, which holds that one of the two paths to the sacred mystical experience is through soma. Many authorities have concluded that the properties of the hemp plant closely approximate the legendary powers of soma, and indeed, that "soma may well have been hemp."

D. The District Court Applied Unconstitutional Standards in Refusing to Submit the Issue of Appellant's Sincerity to the Jury.

Where testimony raises the defense of religious exercise, and the practice does not amount to a grave abuse engendering a compelling state interest in its prohibition, the proper procedure requires submission to the jury of the question whether the religious claim is made sincerely and in good faith. The Supreme Court's articulation in Seeger of the role of draft boards and courts is instructive; they are to determine "whether the beliefs professed by the registrant are sincerely held and whether they are, in his own scheme of things, religious." Appellant has not suggested, however, that an activity is religious merely because it is sincere, but has demonstrated that his claims objectively involve the very essence of religion as understood by the courts and religious scholars, and thus entitle him to no less than a jury determination of his sincerity.

The district court refused to submit to the jury the issue of the sincerity and good faith of defendant's religious professions, finding that, unlike the use of peyote in the Native American Church, (a) the use of marihuana was not an essential part of defendant's belief, but "as he put it . . . an outward manifestation," and "there are many other substances that might be used"; (b) defendant's religion had not followed the same rite for perhaps hundreds of years; (c) defendant's ingestion of marihuana was not attendant with the trap-
pings of a religious ceremony but was taken at "different hours of
the day or night . . . alone or with a few friends . . . to more effec-
tively put him in a mood to contemplate and reflect"; and (d) mari-
huana did not serve as a sacramental symbol (Tr.).

In the first place, the very words of the first amendment reveal
that religious freedom is far more than the right to believe. It is the
exercis e of religion which is guaranteed freedom, i.e., the "manner in
which an expression shall be made of . . . belief." As we have
seen, the Supreme Court has held this to include the carrying out of
one's belief, inter alia, by solicitation, and by refusals to work on
Saturdays, salute the flag, and serve on juries. Moreover, appellant's
religious practice, like the Mass, is not merely a religiously motivated
activity or forbearance for him but a means of worship, of Divine
communion, of attaining the spiritual experience, recognized by the
Supreme Court as central to religion and its constitutional protection.

The district court compounded its constitutional error by im-
licitly holding that a practice is not protected if not essential to a
man's religion. In protecting religiously motivated activities and for-
bearances, the Supreme Court has never suggested that religious
freedom is limited to essentials; such an approach would undermine
all our religions. For the Bible, the altar, the ark, and bread and
wine all give religion a vital richness and depth; even though none of
these qualify as a sine qua non, without them our religious life would
be emotionally and spiritually shallow.

Moreover, appellant did testify that marihuana was integral to
his religious beliefs and enabled him to attain a unique level of
spiritual consciousness. Such testimony was ignored in the court's
statement that "he has told us . . . that there are many other sub-
stances that might be used and that this is only one of a number."
To deprive appellant of any one sacramental aid is to deprive him
of every one, if "essentiality" is the test; indeed, psychedelic sub-
stances considerably more potent than marihuana might not survive
a "grave abuse" test; in either event appellant's religion would be
wholly stripped and destroyed.

The district court's suggestion that private religious experi-
ences, absent the "trapping of religious ceremoni[es]," are not pro-
tected by the first amendment, ignored judicial precedent as well as
authoritative understandings of religion. The Supreme Court has
repeatedly recognized that the blessings of religious liberty are not
limited to any particular form of worship, and that bona fide personal

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115 Thus, appellant's testimony indicated that marihuana played a far
more important role than merely putting him "in a mood to contemplate or
reflect."
worship enjoys no less protection than organized church practices. In *United States v. Ballard* the Court emphasized the principle that the constitutional guarantee extends to the most unorthodox, even incredible, religious claims. In *Seeger*, the Court read the congressional religious exemption from the draft to include highly personal religious claims, independent of the theology of recognized institutional religions. In *Jenison*, the claimant's refusal to serve on a jury was upheld even though it was based on a personal interpretation of a religious passage. In *In re Grady*, the California Supreme Court held that a self-styled peyote-preacher, claiming to see God through peyote, was entitled to a jury determination of his sincerity and good faith even though he was "not formally connected with an organized church." As Mr. Justice Stewart observed in *Sherbert v. Verner*, "Our constitution commands the positive protection of religious freedom—not only for a minority, however small... but for each of us.”

Throughout history and around the world, religious men have worshipped "alone or with a few friends," at "different hours of the day or night," as well as in formal ceremonies. As observed above, this personal relationship with God is at or close to the heart of religion as understood by the Supreme Court and religious scholars. The "trappings of religious ceremony" thought significant by the district court are hardly what religion or religious freedom are all about:

[T]he essential, the intrinsic, the basic, the most fundamental religious or transcendent experience is a totally private and personal one which can hardly be shared... As a consequence, all the paraphernalia of organized religion—buildings and specialized personnel, rituals, dogmas, ceremonials, and the like—are to [one who has mystical religious experiences] secondary, peripheral and of doubtful value in relation to the intrinsic and essential religious or transcendent experience.

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116 322 U.S. 78 (1944).
117 In holding that a jury may not consider the truth or falsity of religious claims, but only their sincerity, the Court said, "[H]eresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law." Id. at 86 (emphasis added).
123 A. Maslow, RELIGIONS, VALUES AND PEAK-EXPERIENCES 27-28 (1964). The New Testament is also instructive in this regard:

"And when you pray, you must not be like the hypocrites; for they love
In any event, appellant's religious beliefs and practices are far from a matter of personal idiosyncrasy. They are rooted in the philosophy and practice of Hinduism, probably the oldest religion in the world (in existence at least 3000 years).\textsuperscript{124}

In conclusion, the district court not only disregarded the Supreme Court's admonition to consider whether the defendant's religious claims "are, in his own scheme of things, religious";\textsuperscript{125} it demonstrated the validity of James Madison's warning that "religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate."\textsuperscript{126}

E. The Limited Ramifications of Reversal on First Amendment Grounds

While a sincere religious defense may not be denied merely for fear of fraudulent claims in other cases,\textsuperscript{127} appellant is not unaware of the likelihood of judicial concern regarding possible undesirable consequences of reversal on first amendment grounds. Appellant submits that such concern, although understandable, is unwarranted. To protect appellant's right to seek Communion with God in the way of his religion is not to create exemptions for all who assert a religious motive; the requirement of sincerity and good faith will preclude any significant detraction from the general enforcement of the marihuana laws. For the mere assertion of a religious defense is a far cry from the proof of it. Such a defense can succeed only if a jury of 12 ordinary citizens (with their typical cynicism toward the bona fides of "exotic" religious claims) can be persuaded (at least to the point of reasonable doubt) that the defendant is honest and sincere in asserting that marihuana plays a significant role in his religious life.

It seems unlikely that a religious defense could succeed even as often as the rarely successful assertion of conscientious objector status (given congressional immunity from the compulsory draft laws). For religious sincerity as commonly understood is not something that can be acquired overnight or that can be principally motivated by a desire to smoke marihuana. Religion is commitment. It is

to stand and pray in the synagogues and at the street corners, that they may be seen by men. . . . But when you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you." Matthew 6:5-9 (Revised Standard Version 1952).

\textsuperscript{124} Thus, there is no justification either in law or fact for distinguishing Woody because the Native American Church practiced the same rite "for perhaps hundreds of years."


dedication. It is a profound search for ultimate answers through awareness of the Divine. Wary of being defrauded, a jury is likely to pay close attention to everything in a claimant's life that has any bearing on his sincerity. It would seem that little less than the commitment and dedication to religious values demonstrated by appellant through his revelatory experience, his writing, his speeches, his home, and his entire way of life\textsuperscript{128} could satisfy a jury of the sincerity of a religious defense.\textsuperscript{129}

\textsuperscript{128} Indeed, testimony such as that given by the witness Cutler, if believed by the jury, might tend to undermine the religious defense. This witness testified that he had observed Leary smoking marihuana under frivolous circumstances on an unspecified date between January and March 1964, at an unspecified address in Greenwich Village, New York, contradicting Leary's testimony that the first time he used marihuana was in August or September of 1964 and then only for scientific purposes until his visit to India in January 1965. \textit{See, however, Point V infra.} [\textit{Author's Note: One of the points on the appeal is that the prosecution committed error in failing to disclose that Cutler was under two federal indictments at the time he testified, and in arguing to the jury that "there is no reason to disbelieve this man—no motivation for him to falsify." The author urged that such error was reversible and not harmless, in light of (a) the jury's resolution of several relevant issues depended on its assessment of Dr. Leary's credibility and (b) the government argued to the jury that in light of Cutler's testimony it should disbelieve everything Leary "testified to from the witness stand."}]

In \textit{People v. Mitchell}, a California district court of appeal rejected a religious defense to a marihuana prosecution, finding that the "defendant has offered no evidence that his use of marihuana is a religious practice in any sense of that term. In defendant's discourse to the jury he did refer to the Bible and to the practices of some Hindus, but in essence he was expressing only his own personal philosophy and way of life." \textit{People v. Mitchell}, 244 Cal. App. 2d 176, 182, 52 Cal. Rptr. 884, 888 (1966).

The court purported to distinguish \textit{People v. Woody} by virtue of the stipulation that "the use of peyote by the Indians was a central part of their religious ceremony" and the showing that "such use of peyote, under the safeguards prescribed by the church, had no antisocial consequence, and that the danger of misuse of the substance, under improper claim of religious immunity, was minimal." \textit{Id.}

As appellant has indicated above, the first amendment does not permit courts or legislatures to limit religious freedom to central religious exercises or to organized church religion. This has been recognized by the California Supreme Court. \textit{In re Grady}, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 914 (1964). Moreover, appellant has demonstrated the minimal danger of marihuana as far from constituting a grave abuse.

The defendant's testimony in \textit{Mitchell} would seem to corroborate your appellant's contention that the required jury determination of sincerity is a more than adequate safeguard against fraudulent claims of religious immunity.

\textsuperscript{129} Of course, the procedures and jury instructions should be designed to prevent, to the extent possible, the exercise of religious prejudice or the jurors' application of personal notions of religion and religious freedom. \textit{Cf. United States v. Ballard}, 322 U.S. 72, 92 (1944) (dissenting opinion of Jackson, J.). \textit{Author's Note: In its brief the Government asserted: "This is not a question of religious freedom but rather an after-the-fact attempt to justify otherwise illicit acts by imposing a question of freedom of religion." Appellant replied: "The suggestion that Leary 'got religion' in order to
Finally, judicial recognition that marihuana does not present a grave abuse justifying infringement of religious freedom will provide little, if any, precedent for constitutionally exempting the religious use of other more potent drugs. Whatever the danger of other substances, the religious use of something as relatively harmless as marihuana must be constitutionally protected if the promise of the first amendment is not to be broken.

**Conclusion**

Throughout the ages men have been punished for pursuing God in ways contrary to established orthodoxy. In search of an end to religious oppression the men who adopted and ratified the first amendment came to these shores "with the hope that they could find a place in which they could pray when they please to the God of their faith in the language they chose." The majority can protect its own religious practices simply by not legislating. Minorities must ultimately rely on the first amendment as enforced by the courts.

Appellant seeks no privileges. He seeks only the spiritual freedom constitutionally guaranteed to every man. Appellant's way to God is harmful to no one, not even himself. It does not coerce; it does not exploit; it does not injure. By no stretch of the imagination can it be deemed a grave abuse.

To know the meaning of constitutional freedom is to know that "the spirit of liberty is [that] . . . spirit which is not too sure that it is right," and which can rarely hope to see, but through a glass darkly. To affirm these convictions is to permit incarceration, for no less than 5 years, of a man whose religious sincerity has never been denied by judge or jury. Surely the first amendment deserves the benefit of any doubt.

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II.

FREE EXERCISE, COMPELLING GOVERNMENTAL INTERESTS AND PSYCHEDELIC DRUGS:
THE MEANING AND SCOPE OF RELIGIOUS FREEDOM

Author's Note: Notwithstanding my affiliation with Dr. Leary, the article which follows expresses my considered and unsponsored views. It is intended to stand or fall as an effort of scholarship, not advocacy. I adopt as directly in point Alan Watts' preface to his work, "The Supreme Identity" (1957): "It is surely a kind of spiritual pride to refrain from 'thinking out loud,' and to be unwilling to let a thesis appear in print until you are prepared to champion it to the death. Philosophy [and law], like science, is a social function, for a man cannot think rightly alone, and the philosopher must publish his thought as much to learn from criticism as to contribute to the sum of wisdom. If, then, I sometimes make statements in an authoritative and dogmatic manner, it is for the sake of clarity rather than from the desire to pose as an oracle."

I. Psychedelic Experience as Religious Exercise

In a recent issue of the Harvard Law Review Professor Donald Giannella, writing about the meaning and scope of the free exercise clause, confidently asserts that the use of psychedelic drugs is not deserving of status as a free exercise claim under the first amendment, at least where the claimants practice what he terms "modern

1 In denying Dr. Leary's first amendment contention in Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), the Fifth Circuit relied principally on the presumed evils of marihuana and the "harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes." We will discuss at length the constitutionally required justification for infringing religious freedom.

On the status of Dr. Leary's contention as a religious claimant under the first amendment, the court had this to say: "There is no evidence in this case that the use of marihuana is a formal requisite of the practices of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid to attaining consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally." Id. at 860.

The court dealt with People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), and In re Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), as follows: "With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between Woody and the instant matter in that peyote in the Woody case played 'a central role in the ceremony and practice of the Native American Church, a religious organization of Indians,' and that the 'ceremony' marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. Grady was apparently the spiritual leader of a group of individuals and provided peyote for the group which he said was for religious purposes." 383 F.2d at 861.

nontheistic religion[s]." In the course of his discussion, four arguments are more or less explicitly advanced in support of the conclusion that mystical psychedelic practices should be denied the status of religious claims. A major contention is that denial of exemption for these practices does not create problems for the individual's conscience similar to those created by traditionally religious claims to freedom of worship. Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened. Although the seeker of new psychological worlds may feel equally frustrated when deprived of his gropings for a higher reality, there is not the same sense of acute loss—the loss of the Be-all and End-all of life.

With due respect, it is submitted that this contention is untenable; it ignores those individuals who find in psychedelics the only accessible path to genuine religious experience, and the only meaningful answer to what Dr. Tillich regarded as perhaps the question of the century—whether man could know again that sense of awe he had once known through direct, personal awareness and experience of his Ground of Being. How gratuitously insensitive is the assertion that outlawing of the mystical psychedelic experience will not produce "the same sense of acute loss" as interference with the "traditional" right to worship! It is perhaps a contestable but hardly a radical thought that revelation, intuition, mystical consciousness or some such bridge must be crossed in order to ascend from empty ritualistic tradition to authentic religion, and that this ultimate experience is the foundation of institutional religion and the source of any validity it may have. Traditionally such an experience has been attained by only a few, whose accounts have inspired and attracted followers. To many there can be no authentic religion without this experience, and to some no such experience has been possible without psychedelics. Giannella would deny such persons psychedelics and comfort them with the assertion, "You have not been exercising religion, but you are free to do so by seeking God through 'traditional

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3 Id. at 1426–27. "[N]ontheistic practices seeking to advance individual psychological and spiritual development are to be denied equal status with sacramental acts of worship." Id. at 1431.

4 Id. at 1427.

5 Contemporary criticism of LSD cults is to some extent paralleled by Dr. Tillich's reservations about Eastern mysticism: "Mysticism . . . does not take seriously the concrete and the doubt concerning the concrete. It plunges directly into the ground of being and meaning, and leaves the concrete, the world of finite values and meanings, behind." Quoted in W. Braden, The Private Sea: LSD and the Search for God 194 (1967). On the social and pragmatic value of psychedelic philosophy, see, however, Dr. Harvey Cox (Harvard Divinity Faculty), God and the Hippies, PLAYBOY, Jan. 1968, at 93, and Dr. Michael Novak (Stanford Religion Faculty), Commencement Address, Stanford University, June 1967, reprinted in Stanford Daily, Sept. 26, 1967, at 3, col. 1.
worship'—through liturgy, prayer, sacrament, ritual, doctrine, dogma and church, through all the avenues which have failed you; surely you will suffer no 'acute loss.' " This is small solace indeed to those stifled in their search for direct and experiential answers to fundamental, universal, metaphysical questions, deprived of their one effective vehicle to God or Ultimate Ground, and prevented from knowing Divinity as experience rather than shadow, symbol or concept.

Additional arguments advanced by Professor Giannella are (1) that the psychedelic experience is "nontheistic,"6 has "no transcendental referent,"7 and therefore would be outside religion unless the Supreme Court expands8 its understanding in United States v. Seege;9 and (2) that such claims, involving neither "cultic bond"10 nor a theological system of discipline and ritual will and should be distinguished from the successful contentions of the Native American Church and of humanistic organizations receiving favorable tax treatment by courts applying statutory religious exemptions.11

It is difficult to understand the meaning and significance of the assertion that the psychedelic experience is "nontheistic" and has "no transcendental referent"; and, in light of Seeger, which as Giannella concedes "seems to suggest the Court's ultimate definition of religion for constitutional purposes,"12 it is far from easy to accept his notion that "it will be extremely difficult to find an analogue to the sacramental worship of God in their [users of psychedelics] practices."13 In the first place, the psychedelic mystical experience can be deemed "nontheistic" and without "transcendental referent," only in the very limited sense of not involving belief in a personal God "out there," a sense which is nonetheless "religious" in theology or law. Psychedelic mysticism does involve Ultimate Unity or Communion with, and thus belief in, a Divine Force or Ground of Being;14 it is perceived as an immanent power, the manifestation of the indwelling nature of God.15 The experience has historically been deemed "transcendental" in the sense of carrying man beyond his ordinary symbolic perceptions, rational, conceptual framework and egoistic perspective; it involves confrontation of "the beyond within." The religious-psychedelic movement, like Dr. Thomas Altizer's "God is Dead"

6 Giannella, supra note 2, at 1426, 1431.
7 Id. at 1426.
8 Id. at 1426, 1431.
9 380 U.S. 163 (1965). See Brief, supra at 687-88, where Seeger is discussed.
10 Giannella, supra note 2, at 1430.
11 Id. at 1427-28, 1430.
12 Id. at 1425.
13 Id. at 1426.
14 See Brief, supra at 694; R. Masters & J. Houston, The Varieties of Psychedelic Experience 301 (1966).
15 W. Braden, supra note 5, at 17.
theology, is apparently carrying immanence to the conclusion of pan-
theism—God is Man. These psychedelic religious cultists are re-
turning to ontology—the metaphysics of Being: "They are asking
who they are, and who God is, and what is the relationship, if any,
between them and him . . . [They] accept the basic religious pre-
mises, as William James defined it: "The belief that there is an unseen
order, and that our supreme good lies in harmoniously adjusting our-
selves thereto.'"

The Seeger view of religious belief requires no stretching to em-
brace the mystical psychedelic experience. The Court construed "be-
lief in relation to a Supreme Being involving duties superior to those
arising from any human relation"—i.e., theism—as including belief
in "a power or being or faith to which all else is subordinate or upon
which all else is ultimately dependent." The Court included as
theists "those who think of God as the depth of our being," and
recognized the "Hindu philosophy [in which] the Supreme Being is
the transcendental reality of Hinduism which is 'truth, knowledge
and bliss.'" The Seeger Court referred approvingly to Dr. Tillich's
definition of God "not as a projection 'out there' or beyond the skies
but as the ground of our very being," and as "'not the God of
traditional theism but the 'God above God,' the power of being,
which works through those who have no name for it, not even the
name God.'" Petitioner Peter, whose conscientious objection claim
was upheld in Seeger, endorsed a definition of religion as "the
consciousness of some power manifest in nature which helps man
in the ordering of his life in harmony with its demands . . . ;
[it] is the supreme expression of human nature . . . ." Finally,
the Court formulated no less broad a test for determining whether a
belief is religious than whether the belief "occupies in the life of its
possessor a place parallel to that filled by the God of those admittedly
qualifying for the exemption . . . ."

The suggestion that religion requires a "cultic bond and a body

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16 Id. at 17-18.
17 Id. at 20-21.
18 380 U.S. at 174.
19 Id.
20 Id. at 174-75.
21 Id. at 180.
22 Id. Quoting from the Schema of the recent Ecumenical Council, the
Court recognized that an intrinsic function of all religion is providing answers
to ultimate questions: "Men expect from the various religions answers to the
riddles of the human condition: What is man? What is the meaning and pur-
pose of our lives? What is the moral good and what is sin? What are death,
judgment, and retribution after death?" Id. at 182. Cf. W. Braden, supra
Note 5, at 20-21.
23 380 U.S. at 169.
24 Id. at 176.
of established doctrine\textsuperscript{25} draws as little support from \textit{Seeger} and other decisions\textsuperscript{26} as from religious writings. The \textit{Seeger} claimants were not members of organized churches, nor did their views reflect established doctrine. In its opinion the Court observed:

\begin{quote}
Congress recognized that \textit{one might be religious without belonging to an organized church} . . . . Indeed, the consensus of the witnesses appearing before the congressional committees was that \textit{individual belief}—rather than membership in a church or sect—determined the duties that God imposed upon a person in his everyday conduct . . . .\textsuperscript{27}
\end{quote}

There is simply no basis for assuming that the Supreme Court's theologically sophisticated understanding of religion and religious beliefs, embracing the ancient and the contemporary, the oriental and the occidental, and therefore drawing no distinction between belief in a God "out there" and an Ultimate Force within, or between organized and personal religion, will be forgotten or ignored when and if the Court must determine whether the use of psychedelics can be an exercise of religion under the first amendment.\textsuperscript{28}

Professor Giannella is willing to accept as religious, for purposes of construing statutory tax exemptions for religious organizations, groups founded on "nontheistic" beliefs, because "they promote the common good just as religious associations do";\textsuperscript{29} and he would extend conscientious objector status (either under the free exercise or due process and equal protection clauses) to "those nontheistic conscientious objections that are based on an intensely felt, selfless, and thoroughgoing personal commitment to the brotherhood of man . . . ."\textsuperscript{30} Were religion to be constitutionally defined in terms of social utility, could one reasonably expect or desire that the Court would deny that the search for direct, experiential answers to ultimate questions which have perplexed and profoundly disturbed man from his beginnings is an activity of social value?\textsuperscript{31} Regarding commitment to the brotherhood of man, suffice it to note the observation that

\begin{itemize}
\item \textsuperscript{25} Giannella, \textit{supra} note 2, at 1430.
\item \textsuperscript{26} \textit{See} Brief, \textit{supra} at 687-88.
\item \textsuperscript{27} 380 U.S. at 172 (emphasis added).
\item \textsuperscript{28} Professor Giannella finds that the practices of the Native American Church protected in the \textit{Woody} case were "directly related to the worship of God and strictly limited in intensity, time, and place by a theological system of discipline," and asserts that it follows that "the indiscriminate use of hallucinogenic agents, in accordance with some private religious mystique, would have extremely difficult sledding in the courts." Giannella, \textit{supra} note 2, at 1428. Aside from the fact that this observation does not explain the \textit{Grady} opinion, it would seem relevant not to determining the religious status of the claim, but to assessing the degree of harm that might accompany religious exemptions. \textit{See} text accompanying notes 181-214 \textit{infra}.
\item \textsuperscript{29} Giannella, \textit{supra} note 2, at 1430.
\item \textsuperscript{30} \textit{Id}. at 1431.
\item \textsuperscript{31} \textit{See} Brief, \textit{supra} at 690.
\end{itemize}
[the] psychedelic experience does seem to hint at a brotherhood which is something more than a brotherhood. . . . [A] man who looks at ultimate reality will know thereafter from his own experience "that we are elements of a greater whole and that what one does to another he does ineluctably to himself."32

The "social value" of the religious aspects of "hippieism" is well expressed in a recent article33 by Dr. Harvey Cox of the Harvard Divinity School. He notes parallels between the conduct and beliefs found in the hippie movement, and the "antisocial" activities of St. Francis and the early Christian sects. He suggests that

[h]ippieness represents a secular version of the historic American quest for a faith that warms the heart, a religion one can experience deeply and feel intensely. The love-ins are our 20th Century equivalent of the 19th Century Methodist camp meetings—with the same kind of fervor and the same thirst for a God who speaks through emotion and not through the anagrams of doctrine.34

Psychedelic religion challenges the contemporary Christian church with the questions, "Why has conventional Christianity turned its back on man's age-old quest for the ecstatic and the mystical? Has Western Religion and its obsessive interest in doctrinal clarity and rational formulation lost sight of a very significant aspect of religious experience?"35

Perhaps more important, the psychedelic sects are confronting and living their answers to the most profound, practical question our society may face in the not-too-distant future, a question which "established" Western religions have gravely neglected—How are people blessed with extraordinary material wealth and an abundance of leisure time to find meaning and value in their lives?36 As Dr. Cox observes:

Many of these youngsters come from ordinary middle-class families, where the parents bowl and watch TV. They themselves, however, prefer to paint, make movies, write poetry, meditate, frolic in the meadows and talk to one another endlessly about God and love and what it means to be human. In doing so, they may be engaging in advanced research for the whole society, devising a new leisure life style.37

In conclusion, Dr. Cox asserts that

[the movement] demonstrates that man's thirst for God and love and authenticity may take strange forms, but it is never quenched. It also suggests that a church still absorbed in its own internal problems, and often preoccupied with the past, must bestir itself if its discipline and its vision are to mean anything to the young Americans of the Sixties and Seventies.38

32 W. Braden, supra note 5, at 189-90.
33 Cox, supra note 5.
34 Id. at 94.
35 Id. at 206.
36 Professor Michael Novak observes that hippies have turned from their parents' question "how to?" to the question "what for?" Novak, supra note 5.
37 Cox, supra note 5, at 207.
38 Id. at 210.
A final argument advanced by Professor Giannella for denying the psychedelic claimant religious status under the first amendment is that

to adopt a sympathetic view toward the nontheistic claim would be to equate the free exercise of religion with the pursuit of happiness. . . .
The blissful enjoyment of rich psychological vistas, whether new or old, cannot describe the heart of the religious experience for free exercise purposes, because such a definition would merge secular and religious values and eliminate the historical and theoretical basis for special treatment of the latter.

As demonstrated in the Brief, the psychological, mystical experience, in the view of reputable scholars, is indeed "the heart of the religious experience," and can be triggered in certain individuals by ingestion of psychedelic drugs. Moreover, it might be argued, in light of the relatively firm criteria by which the mystical experience can be recognized, that misgivings regarding judicial capacity to distinguish religious from psychological experience are unwarranted. Citations to recent studies, however, would lend apparent support to Giannella's argument, for in several experiments (of varying degrees of

39 Giannella argues further that the use of psychedelics subverts "the state's interest in maintaining normality in personal behavior." Giannella, supra note 2, at 1427. Since this consideration has nothing to do with the religiosity of the claim for psychedelics, it is misplaced as a reason for denying the use of psychedelics status as religious exercise, and will be treated in the subsequent discussion of a court's role in evaluating the interests protected or preserved by legislation interfering with religious liberty. See text accompanying notes 96-149 infra.

40 Giannella, supra note 2, at 1427 n.142.

41 See Brief, supra at 692-93. For further support for the capacity of psychedelics to produce authentic mystical experiences see, e.g., R. Masters & J. Houston, supra note 14, at 247-313; Pahnke, LSD and Religious Experience, in LSD, Man and Society 60 (R. De Bold & R. Leaf ed. 1967).

In Dr. Pahnke's "Good Friday experiment" (described briefly in Pahnke, supra at 70-76, and fully in his unpublished doctoral dissertation, Drugs and Mysticism: an Analysis of the Relationship Between Psychedelic Drugs and the Mystical Consciousness, (1963) (on file in the Harvard Library)), psilocybin—a psychedelic derived from the "sacred mushroom"—was administered to 10 theology students, while 10 others received nicotinic acid, an active placebo which produces a tingling sensation but no psychic effects. Members of the latter group were told they had been given psilocybin. They all spent the day (Good Friday, 1962) in the Boston University Chapel. Each of them gave accounts of their experience, which were graded "blind" by college graduates who had been given a checklist of criteria prepared by Dr. Pahnke after extensive readings of classical descriptions of the nondrug-induced mystical experience. Applying a rather strict test of correspondence in deciding whether an experience was "mystical," Dr. Pahnke found that three or four of the psilocybin subjects but none of the control subjects had such an experience.

42 Formulations of the characteristics of the experience by those who have studied mystical literature differ from each other only in minor respects. Compare W. Stace, Mysticism and Philosophy 110-11 (1960), with Pahnke, supra note 41, at 63-64 and Brief, supra at 690-92.
reliability) rather high percentages of subjects had or reported having had religious experience following ingestion of psychedelics.\textsuperscript{43} To accept such reports as authentic for constitutional purposes would indeed come close to obliterating or rendering meaningless the historic differences between religious exercise (somber, deep, profound) and secular recreation. It might be answered that a defendant's more

\textsuperscript{43} In two studies conducted by Dr. Pahnke, involving careful controls, conservative resolution of close cases, and analysis of the content of the reported experiences (rather than reliance on labels attached by the subjects), he reported 30 to 40\% mystical experiences in the Good Friday experiment, and 20 to 40\% in experiments at the Massachusetts Mental Health Center. Pahnke's Dissertation, supra note 41, at 68.

Other studies, using LSD, mescaline or psilocybin, relied on the subjective claims of volunteer subjects in responding to questionnaires. For example, question: "Looking back on your LSD experience how does it look to you now?" Included in a list of possible evaluations is: "A religious experience." A response was credited if the subject answered "quite a bit" or "very much." Other tests were somewhat less conclusive. For example, question: "What were you left with, after your experience?" One of the possible answers was: "A greater awareness of God, or a Higher Power, or an Ultimate Reality." The percentages of religious responses reported were: W. McGlothlin, S. Cohen & W. McGlothlin, LONG-LASTING EFFECTS OF LSD ON NORMALS (U.C. L.A. Inst. of Gov't & Pub. Affairs MR-75, 1966) (33\%); Ditman, Hayman & Whittlesey, Nature and Frequency of Claims Following LSD, 134 J. NERVOUS & MENTAL DISEASE 346 (1962) (32\%); Kurland, Unger, Shaffer & Savage, Pschedelic Therapy Utilizing LSD in the Treatment of the Alcoholic Patient: A Preliminary Report, 123 AM. J. PSYCHIATRY 1202 (1967) (75\%); McGlothlin, Cohen & McGlothlin, Short-Term Effects of LSD on Anxiety, Attitudes and Performance, 139 J. NERVOUS & MENTAL DISEASE 266 (1964) (27\%); Subjective After-Effects of Pschedelic Experiences: A Summary of Four Recent Questionnaire Studies, 1 PSYCHEDELIC REV. 18, 19 (1963), summarizing Savage, Harman, Fadiman & Savage, A Follow-Up Note on the Pschedelic Experience, in PSYCHEDELIC DRUG THERAPY: A NEW APPROACH TO PERSONALITY CHANGE (S. Unger ed. 1964) (83\%); and the Janiger study presented by W. McGlothlin, LONG-LASTING EFFECTS OF LSD ON CERTAIN ATTITUDES OF NORMALS: AN EXPERIMENTAL PROPOSAL (Rand Corp. reprint 1962) (24\%).

Summarizing his own studies and those of Janiger, supra, Ditman, Hayman & Whittlesey, supra, and Savage, supra, Dr. Leary contends: "(1) if the setting is supportive but not spiritual, between 40 to 75\% of psychedelic subjects will report intense and life-changing religious experiences; and \ldots (2) if the set and setting are supportive and spiritual, then from 40 to 90\% of the experiences will be revelatory and mystico-religious." Leary, The Religious Experience: Its Production and Interpretation, 1 PSYCHEDELIC REV. 324, 328 (1964). See also Leary, Litwin & Metzner, Reactions to Psilocybin-Administered in a Supportive Environment, 137 J. NERVOUS & MENTAL DISEASE 561 (1963).

R. Masters & J. Houston, supra note 14, at 307, objectively applying Dr. Stace's criteria to the subjects' narrative descriptions, reported a considerably lower incidence of genuine mystical experience than the findings summarized above. They found that only six of 206 subjects had authentic mystical experiences with psychedelics, that all six "were over forty years of age, were of superior intelligence, and were well-adjusted and creative personalities," and that they had "in the course of their lives either actively sought the mystical experience in meditation and other spiritual disciplines or have for many years demonstrated a considerable interest in integral levels of consciousness."
assertion that he achieved a “religious experience” is legally inadequate, being a conclusion of law; that his use of religious metaphors to describe his experience, or even a correspondence between certain stages of his described “trip” and stages of the mystical experience, does not constrain a court to accept his experience as religious; and that it should not be so characterized unless the defendant confronted or touched what he felt to be the depth of his being, experienced, in his view, unification with the Source of Reality at his deepest level, or derived ultimate meaning, direction or structure for human experience. In reply it might be asserted that the defendant’s description is nevertheless “subjective,” and that any judicial formula ultimately adopted as a definition of “religious experience” would be exceedingly vulnerable to perjurious exploitation. But was not the religiosity of the claimant’s assertions in *Seeger* and *United States v. Ballard* determined by “subjective” testimony—descriptions of beliefs and visions? Does not the jury’s power to find lack of sincerity provide sufficient protection against fraudulent claims?

We could continue this “dialogue,” but I submit that it would lead us astray, for our starting point—Giannella’s contention that mystical experiences are indistinguishable from psychological experiences or the pursuit of happiness—misses the point. The question a court must ask is not “Has the defendant attained a religious experience through this drug?”—but is closer to, “Does the defendant’s testimony, subject to a jury finding of sincerity, indicate that he employs this drug in the exercise of his religious beliefs?” That the defendant or others have attained a mystical experience via the drug is neither a necessary nor sufficient condition to status as a religious claimant; it is simply evidence in support of his claim. The courts have never required that the religiously motivated act be intrinsically or exclusively “religious.” Such a requirement would exclude from first amendment protection the employment of wine as a sacrament or religious symbol, since it is also used socially. Nor of course need the substance be one which produces the full-blown religious experience; the use of a substance to ease the path to meditation, contemplation and communion (the role which, according to Leary’s testimony, marihuana plays in his religion), as well

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46 As an alternative to this broad definition of religious exercise, we suggest consideration of a standard more closely related to the essence of religion. See text accompanying note 57 infra.
47 Indeed, the conscientious objector cases have held that a claimant is entitled to the statutory religious exemption if one of his grounds is sincere religious objection, even though he may also object to participation in war on other grounds, e.g., philosophical, political. See *Fleming v. United States*, 344 F.2d 912 (10th Cir. 1965).
as for symbolic or sacramental purposes, may well be in the exercise of one's religion.\textsuperscript{48} And even where the drug has produced the religious experience in the defendant or others, the claimant's testimony may indicate that his purposes were other than that which the Constitution deems "religious."

With respect to Giannella's thesis, individuals who use psychedelics for psychic introspection, aesthetic visions or insights, or sensory, sexual or undifferentiated adventure, are as distinguishable from religious claimants as are those who resist military induction for political reasons, refuse jury service out of financial selfishness and decline Saturday employment in order to be with their families. Contrary to the thrust of Giannella's argument, the fact that different individuals may have different motives for a given activity has not left the courts with the necessity of "equat[ing] the free exercise of religion with the pursuit of happiness"; they have equated the former, not surprisingly, with the pursuit of religion or religious beliefs.\textsuperscript{49}

Turning to other considerations arguably relevant to the question whether an activity is religious exercise under the first amendment, it is submitted that there is no justification for the Fifth Circuit's conclusion that Leary's use of marihuana was not protected because it is not a "formal requisite of the practice of Hinduism" and is not practiced universally among Hindus.\textsuperscript{50} Is it not "religious exercise" if, as Sri Kalidas testified (in the court's words), "marihuana plays a very important part in the rituals of the Hindu sect conducted by Sri Asoke Fukir [the sect which, according to uncontradicted testimony, Dr. Leary joined in India],"\textsuperscript{51} and these rituals have religious significance to the claimant?

"Formal requisites" play a minor role in Eastern religious life; religious practices are learned less through commands recorded in sacred scriptures than through nontranscribed traditions. Furthermore, the official tenets of the central church with which an individual claims affiliation cannot be conclusively indicative of what his

\textsuperscript{48} Perhaps the Brief tended somewhat to exaggerate the similarity of experience produced by marihuana and other psychedelics. The fact that marihuana did not induce the levels of consciousness brought about by "sacred mushrooms" and other psychedelics played no role in the court's opinion, and as the textual argument urges, should not have.

The fact that other drugs used by Dr. Leary brought about the full-blown religious experience for him and others was evidence in support of his contention that (a) he had become a religious person in search of religious answers, values and experiences; and (b) marihuana, the mildest member of the psychedelic experience, served the claimed role in his religious life.

\textsuperscript{49} As he recognizes, one who seeks a religious exemption from drug laws will not find it easy to persuade a fact-finder of his sincerity. Giannella, \textit{supra} note 2, at 1428.

\textsuperscript{50} See note 1 \textit{supra}.

\textsuperscript{51} 383 F.2d at 857.
beliefs are or should be. Within every major religion there are numerous differences among numerous sects, not infrequently to the point of conflicts the parties regard as fundamental. It is now rather clear that the protection of the first amendment encompasses the religious beliefs and activities of members of an unorthodox sect,\(^5\) the unorthodox religious beliefs and activities of a member of any religious sect,\(^6\) and indeed the religious beliefs and activities of any individual, whether or not a member of any religious organization.\(^7\)

Furthermore, the Fifth Circuit's position that only requisites of one's religion are protected, if meant in the sense that failure to observe the practice must be sacrilegious, is far too narrow. Meaningful religious commitment embraces a good deal beyond avoidance of sin; indeed the concepts of sin and sacrilege play a minor role in many of the world's religions.

The court's distinction of *People v. Woody*\(^5\) on the ground that peyote plays a central role in the Native American Church suggests that in using the term "requisite," the court was endorsing the lower court's "essentiality" test, to which we responded on the law and facts in the Brief.\(^6\) We seriously doubt that faced with a religious objection to jury service, the court would require that the belief be "central" or indispensable to the claimant's religion.

The "centrality" rationale was no doubt significantly influenced by the court's belief that the use of marihuana is a grave evil. This suggests a flexible definition varying with the gravity of the harm—in other words, a sliding scale of religiosity, "centrality" or "essentiality" requiring correspondingly more (or less) compelling governmental interests to justify suppression. Such a "balancing test" would seem unworkable in view of the impossibility of assigning a discrete series of weights to a range of governmental interests on one

\(^{52}\) See, e.g., United States v. Ballard, 322 U.S. 78 (1944).

\(^{53}\) Indeed, even if (contrary to the Leary record) the official doctrine of an organized religion or sect to which the claimant professes to belong, apparently rejects or denounces practices which he claims has personal religious significance, the disparity would bear only on the factual issue of sincerity and would be far from legally conclusive. "Does not the right of conscience extend to disagreement with religious authorities about the implications of religious tenets?" Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 Wis. L. Rev. 215, 274. Cf. United States v. Seeger, 380 U.S. 163 (1965).

\(^{54}\) In *Seeger*, the Court instructed draft boards and lower courts to inquire "whether the beliefs professed by a registrant [claiming conscientious objector status] are sincerely held and whether they are, in his own scheme of things, religious." 380 U.S. at 185. It should be noted that the successful *Seeger* claimants had not relied on their membership in any religious organization.

\(^{55}\) 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); see note 1 supra.

\(^{56}\) See Brief, supra at 695-98.
side, and religious interests on the other. The soundness of this apprehension is strongly corroborated by the complexities encountered in attempting to fix just one point on one side of the balance—the magnitude of state interest which should be deemed "compelling."

There is something to be said for distinguishing between a standard which includes all activities motivated by or in pursuit of religious beliefs,\(^{57}\) and the narrower standard of activities closely related to worship—prayer, communion, or the religious experience (i.e., contact with the Force or Process or Being one regards as the most fundamental or the universal first premise), activities which are principally motivated by a deep, psychological commitment to experiencing or knowing (at a transrational, transintellectual level) answers to ultimate questions of existence. The latter standard would limit the considerable protection implied by the requirement of a compelling state interest to those activities which reflect the raison d'être of religious freedom, those which embrace the sacred core of man's life and which deeply involve him in a profound search for solutions to problems of eternal and universal significance.

Furthermore, such a definition of religious exercise would reduce what appears to some as friction between our values of religious freedom and egalitarianism; it would better reflect the fact that religion is not socially, psychologically or ontologically "equal to" other bases for engaging in given activities, legal or illegal; it would thus perhaps more persuasively demonstrate why religion is constitutionally entitled to special immunities which may be denied to other pursuits. An activity motivated by man's need to touch and know the essence of Existence, the Supreme Force, the Godhead, and to absorb into his being answers to the most important questions of mankind, is not equivalent, in social or personal significance, to an activity undertaken on shallower, more transient foundations, or in search of less profound truths. Denial of the latter does not, in Giannella's terms, involve "the same sense of acute loss—the loss of the Be-all and End-all of life."

\(^{57}\) Notwithstanding the criticism of the Seeger opinion for the fuzziness of its analogy to belief in a Supreme Being, we submit that belief in a Supreme Being broadly understood as belief in a fundamental or ultimate force or process or design, and the psychological commitment to this belief, is the essential characteristic of all religion. Any belief substantially rooted in this basic belief should be deemed a religious belief. For one of the less disappointing efforts to define religious belief with greater specificity, and a review of judicial efforts prior to Seeger, see Comment, Defining Religion: Of God, the Constitution and the D.A.R., 32 U. Chi. L. Rev. 533 (1965). The comment concludes that religious belief must include (a) a belief regarding the meaning of life; (b) a psychological commitment to this belief; (c) a system of moral practice resulting from adherence to this belief; and (d) an acknowledgement by its adherents that the belief or belief system is their exclusive or supreme system of ultimate beliefs.
II.

Evaluating the Governmental Interest

Leary v. United States: The Opinion of the Fifth Circuit

In reaching the conclusion that religious freedom must be subordinated to the legislative interest in prohibiting possession of marihuana, the Fifth Circuit panel deemed "not pertinent" "the evidence about its so-called harmless nature." After wavering in its expressions of the appropriate test—suggesting that a religious exemption, inter alia, from criminal legislation or from legislation enacted "in the interest of the public welfare and protection of society," is never required—the court eventually adopted the language by which the majority of the Supreme Court in Sherbert v. Verner had distinguished the polygamy, vaccination, and child labor decisions: "The conduct or action so regulated have invariably posed some substantial threat to public safety, peace or order." Appreciation of the court's approach to its constitutional duty may be gained from the following excerpt:

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. Thus the question is whether the conduct or action so regulated and prohibited under severe criminal penalties by Congress (i.e. trafficking in marihuana) has posed "some substantial threat to public safety, peace or order," [citing Sherbert].... Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana 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-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Six issues and eight pages beyond the above holding, in the course of dealing with arguments wholly unrelated to the free exercise claim, the court spoke in terms of still another test, and referred to testimony before the 1937 Congress relating to the "injurious effect

58 383 F.2d 851 (5th Cir. 1967).
59 Id. at 860.
60 Id. at 859.
62 383 F.2d at 860.
63 Id. at 860-61.
Numerous expert witnesses referred to the dangerous nature of the drug, its effect on those who use it, to criminal episodes of terrible character which accompanied its use. The evidence was voluminous and convincing that marihuana is a serious evil to society. Thus did Congress wisely and prudently enact this law and clearly meet the "compelling state interest" test imposed in Sherbert v. Verner...".

Religious Freedom v. Governmental Interests: Striking the Balance

The history of the free exercise clause in the Supreme Court is a history of erratic vacillation, perplexing contradiction and unalleviated absence of predictability. The question, "What justification is required before religious liberty may be infringed?" has evoked a spectrum of answers reflecting the widest range of judicial views about the importance of religious liberty. In some opinions it is said that criminal legislation as such, or laws related to public order, health, welfare or morals are sufficient to overcome religious liberty; in others it is argued that an infringement of religion is constitutional as long as the purpose or effect of the law is secular; and in others it is claimed that the practice is protected unless it amounts to a "grave" abuse and the state has a "compelling" interest which cannot be preserved without significantly infringing upon religious exercise. Notwithstanding this highly temperamental judicial calendar, to one commentator, Sherbert marked "the dawn of a new day for religious freedom claims" (although it would seem that Cantwell v. Connecticut and West Virginia State Board of Education v. Barnette had already cast some bright rays). The language used in Sherbert, and relied on in Leary, to distinguish opinions denying religious claims ("substantial threat to public safety, peace or order") is on its face different from the language the Court went on to apply in sustaining Mrs. Sherbert's claim—i.e., compelling interest—no alternative.

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64 Id. at 869.
65 Id. at 869-70.
66 E.g., Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 166 (1878).
69 Galanter, supra note 53, at 241.
70 310 U.S. 296 (1940).
71 319 U.S. 624 (1943).
72 This observation is qualified by the facts that Barnette's invalidation of the compulsory flag salute, although based on the first amendment, did not turn on proof that the refusal to salute was religiously motivated; and Cantwell, involving religious expression, could well have rested solely on the freedom of speech guarantee.
73 374 U.S. at 403.
74 Id.
75 Id. at 407.
grave abuse endangering paramount state interest\textsuperscript{76}-no alternative.\textsuperscript{77} Nevertheless, once agreement is reached on the importance of religious freedom, all "three" \textit{Sherbert} "tests" can and should be construed to require the same conclusion in any free exercise case.

What can and should be required of any test is that it give religious freedom and conflicting social interests their due, and that it pay heed to the institutional limitations on judicial determination of legislative facts.

The first premise in formulating and applying a "test" is the idea which flows through our constitutional history, and which seems to have survived other currents, that religion is a specially protected value, constitutionally entitled to greater immunities, if not privileges, than are given to non-first amendment liberties, notwithstanding the establishment clause or notions of egalitarianism.\textsuperscript{78} As suggested in

\textsuperscript{76} \textit{Id.} at 406.
\textsuperscript{77} \textit{Id.} at 407.
\textsuperscript{78} In upholding the congressional draft exemption for conscientious objectors, the Court said of the establishment theory: "[I]ts unsoundness is too apparent to require" discussion. Selective Draft Law Cases, 245 U.S. 366, 390 (1918). In \textit{Sherbert v. Verner}, the establishment argument was rejected as follows: "The extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant's right to unemployment compensation under the state statute serve to abridge any other person's religious liberties." 374 U.S. at 409. Even the two Justices dissenting from the \textit{Sherbert} holding requiring an exemption, agreed that a religious exemption would not constitute an "establishment." 374 U.S. 418, 422 ("There are . . . many areas in which the pervasive activities of the state justify some special provision for religion to prevent it from being submerged by an all-embracing secularism"). It has been suggested that the government's obligation of "neutrality" must be viewed in the light of the majority's ability to protect its own religious exercise simply by not enacting inhibiting legislation. See Galanter, \textit{supra} note 53.

This is not to deny the extraordinary difficulty in formulating a principle by which to determine the applicability of the establishment clause. Although language occasionally appears in establishment holdings which, if literally applied, would preclude religious exemptions from nondiscriminatory legislative burdens, the Court has never been receptive to that reading of the first amendment which would require government to ignore the religious character of an interest for all purposes (\textit{e.g.}, \textit{Kurland, Religion and the Law} (1963)); and in no case has the Court rejected a free exercise claim for relief on establishment grounds. \textit{Cf. Cammarano v. United States}, 358 U.S. 498, 515 (concurring opinion).

This is not a necessary or appropriate occasion to review or adorn the literature on establishment, since (a) there is very little likelihood that the present Court would utilize the establishment clause to deny a free exercise claim of a user of psychedelic drugs (\textit{see note 223 supra}; and \textit{see generally Note, The Conscientious Objector and the First Amendment}, 34 U. Chi. L. Rev. 79 (1967)); (b) there is a vast literature addressed to the establishment problem; and (c) it is obvious in view of the importance we place in this article on free exercise that any formulation we might advance or endorse to
the Brief\textsuperscript{79} and preceding sections of this commentary, such special immunity is justified \textit{inter alia} by the substantial utilitarian value of man's seeking for knowledge and experience, for answers to first questions through the Force or Energy or Power which he regards as most fundamental; and by the fact that (by definition) religion involves values and beliefs which man regards as more sacred than any other aspects of his existence.

Just as it would too severely limit the legislature to hold that denials of religious exemptions are only permissible where essential to avoid destruction of absolutely vital legislative interests,\textsuperscript{80} so it would too narrowly limit religious liberty to uphold restrictions whenever the legislation (or denial of religious exemptions) merely tends to further a legitimate legislative interest. As is true of any verbal balancing test designed to resolve competing claims in an area of social control, the words used cannot supply a mathematical measure against which the degree of harmfulness of a prohibited activity can be weighed; they can at best convey to courts an impression of the importance of the protected interest, influence judicial attitudes and values, and color the perspective from which competing claims of state and citizen are resolved. In that light it should suffice to suggest that religious exemptions may not constitutionally be denied unless (1) they would seriously jeopardize (pose a significant threat to) a very important ("compelling," "paramount," "substantial") state interest,\textsuperscript{81} and (2) such interest could not adequately be protected by legislation which would avoid significant infringement of religious freedom.\textsuperscript{82}

\textsuperscript{79} See Brief, supra at 675-76. 
\textsuperscript{80} For reasons manifest in the textual discussion throughout section I, in our view, equal protection would not be denied those who do not qualify for a religious exemption from general statutory burdens. Nonreligious activities are simply not equal, in relevant respects, to religious ones, particularly if the latter involve worship, a search for ultimate answers at the deepest levels, or other aspects of the fundamental religious experience or undertaking. Cf. Fernandez, \textit{The Free Exercise of Religion}, 36 S. CAL. L. REV. 546 (1963). 
\textsuperscript{81} The above formulation is subject to our recommendation that even where the government cannot establish the absence of an acceptable less-
The latter requirement embraces the concept of the less-restrictive alternative. The state, in preserving paramount interests, must choose the legislative path which will have the least restrictive impact on protected freedom. This principle, reiterated in Sherbert, is derived from decisions enforcing freedom of speech and other constitutional guarantees.\(^\text{83}\)

\[\text{Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.}\(^\text{84}\)

Thus the Court has invalidated legislation infringing expression, "because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose."\(^\text{85}\)

Although the majority opinions in Braunfeld v. Brown\(^\text{86}\) suggest that the burden is on religious claimants to demonstrate that the secular purpose of the challenged legislation could be achieved with equal effect by regulations which do not significantly impede religion,\(^\text{87}\) the Court was extremely imprecise in its efforts to indicate the conditions under which the claimant must bear that burden.\(^\text{88}\)

\(^{83}\) The Supreme Court applied the less-restrictive alternative doctrine to legislation infringing on economic interests, when they were considered cherished constitutional values. Compare Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513-17 (1924), and Weaver v. Palmer Bros. Co., 270 U.S. 402, 412-15 (1926), with Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246-47 (1941). See generally, Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967). The Court has also invalidated discriminatory burdens on interstate commerce on finding that the state's goals could be effected by alternative legislation. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). The free speech cases are discussed at text accompanying notes 140-44 infra.


\(^{87}\) Id. at 607.

\(^{88}\) The test suggested in Braunfeld is as vague and ambiguous as language can be: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." Id. at 607. The first sentence in the quoted passage is inconsistent with the Braunfeld holding, and indeed would give more to religion than any Justice has ever suggested. The Sunday closing
and implied that its holding in this regard was limited to “indirect” infringements of religious liberty. The Sherbert Court clarified the burden of proof, broadly construing the concept of “direct” infringement, and holding that “even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”

laws, which Braunfeld dealt with, did have the effect of impeding the observance of Sabbatarian religions, by making it more costly to close one’s business on Saturday and observe the religious obligations of that holy day. Obviously the state interest underlying the statute producing such an effect must be considered, since the right to observe one’s religion, by acts or forbearances, is not absolute. The Court found a strong state interest in providing one uniform day of rest. The second sentence, putting the burden of demonstrating a less-restrictive alternative on the religious claimant, where the purpose and effect is to advance secular goals and the burden on religion is indirect, raises more questions than it answers. Does it apply whenever a statute imposing indirect burdens has any secular effects? If so, then sentence one is applicable only where the purpose or sole effect is to impede religion. Yet the Sherbert Court, invalidating a provision requiring availability for Saturday employment as a condition to unemployment compensation, relied on sentence one (plus finding lack of a compelling state interest), even though such provision had secular effects. 374 U.S. at 404. Furthermore, the second sentence refers only to an indirect burden on religion. Does it mean to imply that the state must prove lack of less-restrictive alternatives if the burden is direct? Is a burden “indirect” because incidental to the purpose or principal effect, because it takes the form of denial of a “privilege” rather than imposition of a penalty, or because it “merely” makes the religious practice more expensive? According to Sherbert none of these conditions indicates a direct burden. Id. Was the burden in Braunfeld “indirect” because the state was not imposing punishment or withholding benefits on the basis of acts or forbearances which had religious significance for the claimant? While such a distinction—between the government as immediate and remote cause of adverse consequences—ignores the fact that the statute is effectively responsible for privately imposed consequences, statutes which impose such an “indirect” burden (and thus require the religious claimant to demonstrate alternatives) would be rare. On the basis of (a) this meaning of “indirect” burden on religion, (b) the fact that those receiving religious exemptions from Sunday closing laws could thereby take economic advantage of non-Sabbatarian competitors, and (c) the requirement of uniformity in the very conception of the governmental goal, Braunfeld can live in the same constitutional mansion as Sherbert (although surely with one foot out the door because of the relative insubstantiality of the governmental interest).

89 See discussion in note 88 supra.

80 374 U.S. at 407 (emphasis added). While it is often said to be a general rule that a citizen has the burden of establishing that governmental action violates his constitutional rights (i.e. that such action is presumably constitutional), once the government is shown to have invaded a constitutionally protected interest, the burden often shifts, requiring the government to justify that invasion. See, e.g., Beck v. Ohio, 379 U.S. 89 (1964) (state must show probable cause to justify warrantless arrest); Gibson v. Florida Legislation Comm., 372 U.S. 539, 546 (1963) (to justify legislative investigation which intrudes on freedom of expression, state must “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest”).
Not every less-restrictive alternative should invalidate a statute infringing religious freedom. The statute should be upheld if and only if the less-restrictive alternative would significantly threaten very important governmental interests. Application of this doctrine will be examined throughout the following discussion.

In considering a claim for a religious exemption, it is not a court's function to make a de novo determination whether there is the requisite danger and lack of alternatives. The legislative judgment is entitled to a fair degree of judicial deference, not only for reasons relating to federalism or separation of powers, but also because the legislative process is presumably better suited to obtaining social, scientific or economic data, evaluating the impact of a practice on important social interests, and assessing the relative efficacy of possible solutions. Nevertheless the courts cannot carry out their function of protecting "constitutionally protected" rights by regarding as conclusive the fact that the legislature "believes" a practice is an "evil" and "serious threat," or by sustaining all legislative judgments that are not clearly arbitrary or capricious. As the Court indicated in Barnette and Sherbert, the judicial acceptance, in due process cases, of legislative judgments supported by minimum rationality is not appropriate where legislation invades first amendment interests. The government should not, however, be required to persuade a court, beyond a reasonable doubt or even by a preponderance of evidence, of the requisite harm and lack of alternatives. The government should be required to show, at least where the religious claimant comes forward with contrary evidence, that a legislature could reasonably find that the requisite danger and lack of alternatives are demonstrated by a preponderance of available evidence.

The Importance of the Legislative Interest

It has been claimed, in support of legislation prohibiting the possession or use of marihuana and other psychedelic drugs, that they lead to some or all of the following: (1) violent crimes; (2) sex offenses; (3) genetic defects; (4) bizarre behavior; (5) suicides;

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64 See Brief, supra at 675.
65 In other words, to justify infringement of a freedom protected by the first amendment, the government must show both an evil greater than a mere colorable interest and more persuasive evidence of that evil than is needed to justify interference with due process liberties.
66 See Brief, supra at 681-85.
67 See, e.g., Studies Conflict on LSD Damage to Chromosomes, N.Y. Times, Oct. 21, 1967, at 21, col. 3.
(6) psychoses; (7) "deterioration" (mental or physical); (8) addiction or "preaddiction" (physiological or psychological); (9) "vagabondage" (indolence, sloth); (10) social dependency; (11) quietism; or that (12) such use is widely regarded as immoral. Which of these allegations of harm, if supported by substantial evidence, would justify infringement of religious liberty?

... it would not seriously be suggested that the value of the free exercise of religion could or should justify behavior which creates a significant risk of crimes of violence, sexual imposition, genetic deformities, or even direct and revolting psychic intrusion (e.g. indecent exposure). Beyond this looms the deeply rooted and unsettled philosophical and political controversy about the proper limits of state control over individual behavior through the criminal law, most recently manifested in the stimulating dialogues (provoked by the "Wolfenden Report" and the strictures of John Stuart Mill) between H. L. A. Hart and Lord Patrick Devlin, each with several scholarly interpreters and defenders. The task of the judiciary is made more burdensome by the fact that neither the Supreme Court nor constitutional commentators have made much progress toward an elaboration of rationale for judicial performance of the freedom calculus. The discussion which follows is not an effort to construct a general theory to guide judicial determination of compelling harms; its purpose is to identify various values that legislation affecting psychedelics may be thought to serve, and to suggest considerations that bear on the existence and magnitude of legitimate governmental interests in protecting these values by criminal legislation.

It is useful to examine John Stuart Mill's suggested limitations on state power, not for the purpose of determining the constitutional scope of the police power (Mill is no more a constitutional prophet than Herbert Spencer), but to gauge both the strength of governmental claims against various "evils" and the magnitude of concomitant risks necessary to demonstrate a compelling interest justifying infringement of religious freedom. Mill asserted the very simple principle... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty

98 For the suggestions that prolonged and heavy use of marihuana leads to mental and physical deterioration, psychological addiction, social dependency, vagabondage and withdrawal, see N.Y. Times, Oct. 9, 1967, at 1, col. 2, and N.Y. Times, Sept. 20, 1967, at 58, col. 3. See also Wyzanski, Marijuana: It's Up to the Young to Solve the Problem, New Republic, Oct. 21, 1967, at 15.
99 The discussion which follows assumes, in many cases contrary to fact, that the assertion of each of these evils can be supported by sufficient evidence.
100 REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957) (report to Parliament).
101 J. MILL, ON LIBERTY (World's Classics ed. 1966).
of action of any of their number is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreatying him, but not for compelling him, or visiting him with any evil in case he do otherwise.100

Application of this thesis would seem to preclude physical and psychic (as well as moral) paternalism; society would have no right to prohibit behavior which leads to suicide or psychosis on the ground that such behavior is contrary to the actor's best interests. The Supreme Court of Illinois has held it improper for the state to authorize a blood transfusion in violation of the patient's religious convictions, even when it was necessary to save her life.104 Reviewing decisions of the United States Supreme Court, the Illinois court concluded that

[t]hose cases which have sustained governmental action as against the challenge that it violated the religious guarantees of the First Amendment have found the proscribed practice to be immediately deleterious to some phase of public welfare, health or morality. The decisions which have held the conduct complained of immune from proscription involve no such public injury and no danger thereof.105

H. L. A. Hart, the leading proponent of the position that the law may not enforce morality as such, contends that legal paternalism is not necessarily inconsistent with that principle, and he is amenable to modifying Mill's philosophy by affirming the validity of legislation designed to prevent people from suffering with or without their consent.106 Hart's justification for paternalism designed to prevent self-inflicted physical suffering is as follows:

[There is] a general decline in the belief that individuals know their own interests best, and . . . an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts.107

The assumption underlying Professor Hart's remarks is that the act reveals the actor's incompetence to determine whether the conduct is

104 Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).
106 H. Hart, supra note 102, at 30-34.
107 Id. at 32-33.
contrary to his best interests; anyone who deliberately inflicts harm (i.e. that which the “average” or “normal” person would consider harmful) on himself must be irrational or non compos mentis. But why should a majority impose their assessment of the value of each of their lives and well-beings on a dissenter if his manifestation of his views interferes in no significant way with the interests of others, and if the prevention of his conduct will not even improve the lot of others? The paternalistic rationale would involve the state in far-reaching infringements of personal choice. When society presumes to decide when a man may voluntarily risk his life, it must also decide what values are worth various risks of death. On the one hand there is the individual’s concept of his own best interest, and the value of freedom of personal choice; on the other hand there is society’s purported concern for the best interests of the individual, but, by hypothesis, no social interest harmed by the conduct. Even without the special value of religious freedom, it is doubtful that our democratic traditions could tolerate pervasive criminal prohibitions against the behavior of legally competent adults, on the sole basis of the paternalism rationale.

Perhaps stronger justification for the prohibition of acts which entail at least a fairly high risk of self-destruction is the economic (and possibly the psychic) impact on dependents\(^\text{108}\) and close relations.\(^\text{109}\) Since economic harm to dependents follows only some cases of death, and is of a lesser magnitude than the evil of violence and sexual imposition, a considerably greater risk of suicide should be required than the risk of the latter consequences to justify restriction of religious liberty; and if such a risk exists only from certain abusive practices, perhaps the prohibition should only be applied to those abuses and to those religious users having dependents, under the doc-

\(^{108}\) Glanville Williams observes that Seneca, who did not disapprove of suicide, nevertheless admitted a duty to live for others, such as one’s parents or wife. G. Williams, The Sanctity of Life and the Criminal Law 253 (1957). It is interesting to note that (a) while under Roman law attempted suicide was not generally forbidden, attempted suicide by a soldier was considered desertion from his post, id. at 254, and (b) the first Christian enactment dealing with suicide was directed against the suicide of servants. Id. at 257. Cf. J. Mill, supra note 101, at 99, suggesting that while failure to perform specific and assignable obligations is punishable, conduct that might lead to such failure is not. See text accompanying note 103 supra.

\(^{109}\) See the opinion of Judge J. Skelly Wright, in Application of Directors of Georgetown, 331 F.2d 1000 (D.C. Cir. 1964), holding that a religious objection to receiving a blood transfusion could not prevail where the patient was the mother of an infant. Aside from regulating the sui generis relationship between parent and child, would a state be justified in prohibiting suicide in order to prevent the “emotional damage” to close friends and relatives of the deceased? See G. Williams, supra note 108, at 270-71. Would a legislature be acting within acceptable limitations were it to forbid abandonment by parent or spouse where economic obligations were met?
trine of the least restrictive alternative.\textsuperscript{110} Other arguments for legislating against conduct entailing a risk of death will be discussed below, since they also pertain to other alleged evils of psychedelics.\textsuperscript{111}

Much of the above discussion also applies to the asserted state interest in preventing psychosis; the state's interest in the individual's psychic welfare as such should not sustain infringement of religious liberty. Its interest in protecting dependents from hardship, and the public treasury from the costs of welfare and commitment could justify prohibition or regulation only if (1) the probability of psychosis and/or the estimated numerical strength of the religion were so high as to indicate a compelling financial burden;\textsuperscript{112} and (2) such less restrictive alternatives as limiting the quantity or frequency of use, screening potential users for actual or incipient mental illness, or restricting the prohibition to users with dependents, would impose a compelling financial burden on the government.

The assertion that a practice creates a risk of "psychosis" or mental or physical "debilitation" should not be judicially accepted without inquiry into the state's definition of those terms. Medical terminology is the language of sickness. What to a religious mystic are beatific visions, transcendence of worldly consciousness, and spiritual illumination and enlightenment, may carry such medical labels as stupor, intoxication, hallucination and delusion.\textsuperscript{113} Similar linguistic pitfalls inhere in suggestions of detrimental physical effects:

Suppose we were to ask what are the effects of playing tennis on the individual? In response, we would have to describe a heightened pulse rate, facial flushing, sweating, marked adrenal activity and so forth. In some cases, we would observe loss of breath followed by feelings of dizziness and nausea, in some instances, death has even resulted. We could well conclude with a fairly frightening sounding clinical picture for a reader who has never experienced a game of tennis. The description would not be untrue, but out of context it would have a far different effect on our reader than it suggests to the tennis player.\textsuperscript{114}

\textsuperscript{110} Of course if emotional impact is considered a cognizable state interest, this less-restrictive alternative would not be satisfactory.
\textsuperscript{111} Indeed the suicide argument has very weak empirical support even where the most powerful psychedelics are concerned. See note 191 infra.
\textsuperscript{112} The quantification problem is discussed at text accompanying notes 163-80 infra.
\textsuperscript{113} A perfect example is the opinion in State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (see Brief, supra at 680 n.42), quoted in Leary v. United States, 383 F.2d 851, 862 (5th Cir. 1967): "[I]t is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia . . . ." 267 N.C. at 605, 148 S.E.2d at 569.
\textsuperscript{114} SKOLNICK, Coercion to Virtue: A Sociological Discussion of the Enforcement of Morals in President's Comm'n on Law Enforcement and Administration of Justice, 10 Selected Consultant's Papers II (1967).
Unusual mental and physical phenomena, even if temporarily and partially incapacitating, (e.g., those produced by the more potent psychedelics) hardly justify infringement of fifth amendment liberty, let alone religious freedom\(^\text{116}\) (particularly in view of comparable risks from permissible substances or activities). Moreover, we have been sufficiently educated by Thomas Szasz\(^\text{116}\) and others to be at least wary of the possibility that medical "experts" will find strongly corroborative of psychosis, any pattern of behavior, perceptions, or beliefs which manifest extreme or outrageous unconventionality, but which are not, in a nonsocial sense, intrinsically malevolent to the psychic welfare, or symptomatic of such detriment. Under some views of psychosis the man who has recently experienced the classic mystical enlightenment and confrontation, who has been profoundly moved by his voyage, whether or not drug induced, may well be a most likely candidate for psychiatric commitment. Throughout history the religious mystic has been treated as a madman. If the first amendment is not to be undermined, courts must, in reviewing claims that drug ingestion leads to mental illness, demand a definition of psychosis which minimizes the possibility of weighing the religious experience as a negative consequence of religious freedom.

How substantial is society's interest in preventing long range deterioration, debilitation, sloth, indolence, withdrawal, and psychological dependency, which are alleged to result from constant and large dosages of marihuana and other psychedelics? Society's interest in protecting dependents and in avoiding the cost of providing medical, psychiatric or social care is important, but is only as relevant as the risk that the user will be unable to sustain himself or his dependents.\(^\text{117}\) If prolonged use has the effect of providing some in-

\(^{115}\) Such temporary disablement would at most justify restriction of drug ingestion to circumstances which minimized the possibility of harm (e.g., presence of guide, arrangements for fulfilling needs of dependents, prohibition of driving).


\(^{117}\) In a case challenging restrictions on the distribution of alcohol but not involving first amendment freedoms, the Supreme Court considered the argument that "as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation." Rejecting this argument, in Crowley v. Christensen, 137 U.S. 86 (1890), the Court responded: "There is in this position an assumption of fact which does not exist, that when the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls on him. . . . But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him." Id. at 89–91; As noted in the Brief, supra at 685, national prohibition legislation did grant a religious
dividends with a motive to abandon their obligations, but does not significantly reduce their capacity to respond to the threat of penal sanctions, then the deterrent suggested by Mill—punishment for non-performance of specific and assignable obligations—would seem an appropriate less-restrictive alternative to prohibition.118 If indeed the use of a particular drug under certain conditions (e.g., frequency, quantity) or by ascertainably vulnerable users, creates a serious risk of physiological or psychological addiction and of rendering the user so weak and dependent that he cannot meet his specific obligations or must be taken care of by society,119 then society would be justified in prohibiting the use of that drug under those conditions or by such users.120

The possibility that the user may exchange higher income-producing activities for lower ones is obviously not sufficient to evoke the "dependents-welfare costs" rationale. But does the state have an interest, enforceable by criminal sanctions, in inducing its citizens to lead an economically productive, competitive, service-oriented, concerned, active social existence? Is the state justified in demanding,


118 See J. MILL, supra note 101, at 99.

119 See Wyzanski, supra note 98, at 16: "Undoubtedly for those who use marijuana so frequently and so excessively as to become social derelicts, society pays a large cost. In the first place, these unfortunates use either private or public resources for their medical and social care. In the second place, and of great consequence, our relatively limited medical, hospital and welfare personnel and facilities used for those victims of marijuana are unavailable for others whose illness or poverty is more deserving of our compassion." See also Devlin, supra note 102, at 218, 227. The notion that two distinct costs are involved reflects unsound economics. The cost is the difference between what society now spends on medical and social welfare and what it must spend if a new class of welfare recipients comes into being.

Judge Wyzanski, supra at 16, goes on to observe that "there is no such thing as a vice which is purely private in its total aspect. He who overindulges in any way with respect to drugs, with respect to food, with respect to liquor, with respect to sensuality, alters the lives of others than himself and his private associates. He is unavailable for civic obligation which rests upon him. He bears a responsibility for the unavailability of social and medical services greatly needed by others."

The fact is, of course, that we do not prohibit indulgence in many activities which if done excessively would impair one's capacities to meet his obligations, including his duty to sustain himself. Indeed Judge Wyzanski concludes that these dangers (presumed) from excessive use of marihuana do not justify the social and economic costs of prohibition (let alone the constitutional cost of infringing religious freedom). Id. He observes that "[i]n the end, liberty tends to be sacrificed for the supposedly greater advantage of health, safety and morals. To some, including myself, the sacrifice is inconsistent with our ultimate political beliefs." Id.

120 Perhaps even "excessive" use could be permitted even where there is sufficient risk of disability, if a religious society accepted the full financial responsibility of caring for its members.
on pain of punishment, that its citizens eschew a life of quietism, withdrawal, passivity, meditation, reflection, subsistence income, and social and political disengagement? Mill’s contention that society has no business interfering with the exercise of liberty except to prevent harm to others provides no ready answer, for “harm” might be said to include economic detriment, and in an economically interdependent society one man’s diminution of productivity arguably affects every man’s lot. But the assumption that the average citizen contributes more to society than he takes from it is probably incorrect. If so, then as Hume said, “A man who retires from life does no harm to society: he only ceases to do good; which, if it is an injury, is of the lowest kind.” In any event our system has generally relied on economic and social motivation to allocate human “resources” to their most productive employment, and has respected the right of individuals to choose for any motives whatsoever liveli-

121 Cf. Wickard v. Filburn, 317 U.S. 111 (1942), upholding the imposition of a financial penalty on a farmer’s growth of produce for his own consumption as within the commerce power because such consumption reduced his demand for wheat and affected the market price. “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” Id. at 127-28.

Mill recognized the economic interdependence argument: “How it may be asked can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself from rendering services which he owes to his fellow creatures generally.” J. Mill, supra note 101, at 97. Mill’s answer was that punishment should be limited to violations of a “distinct and assignable obligation to any other person or persons.” Id. at 99. “[B]ut with regard to the merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.” Id. at 100.

122 “Of how many of us is it true that the world or any part of it would be the loser were we to end our citizenship of it? In my opinion, of very few. Anyway, it seems to me a problem for each person to decide for himself, if any problem is to be left to individual solution.” Roberts, Euthanasia and Other Aspects of Life and Death 31-32 (1936). It is a macroeconomic truisim that income received by capital and labor equals the output of goods and services. Unless labor as a class is receiving less than its contribution to output, the average worker is receiving no more or less than his productivity.

123 D. Hume, On Suicide, in Of the Standard of Taste and Other Essays 158 (Library of Liberal Arts ed. 1965).
It has not made criminal the living of a contemplative life. It can hardly claim a compelling interest in prohibiting religious activities which lead to or manifest this life, simply because of the diffuse and remote impact of low economic productivity.\textsuperscript{124} We do not ignore the fact that it has come to be accepted that government has a legitimate role in influencing the vocational and professional ambitions of its citizens through fellowships, scholarships, loans, industrial subsidies, manpower retraining programs, job corps, etc., as well as through the enormous sums spent on "normal" government contracts for defense and space activities. The issue assumes significantly more ominous dimensions when it begins to look as if the government has gone beyond inducement by the carrot to coercion by the stick—as where the government denies draft exemptions to those whose vocation or profession are not deemed to be essential to the national interest. \textit{See} excerpts from Selective Service Document, \textit{Channeling} (July 1965), in RAMPARTS, Dec. 1967, at 34-35: "The meaning of the word 'service' with its former restricted application to the armed forces, is certain to become widened much more in the future. This brings with it the ever increasing problem of how to control effectively the service of individuals who are not in the armed forces.”

The club of induction has been used to drive out of areas considered to be less important to the areas of greater importance in which deferments were given, the individuals who did not or could not participate in activities which were considered essential to the defense of the Nation. The Selective Service System anticipates further evolution . . . in this area.

"Throughout his career as a student, the pressure—the threat of loss of deferment—continues. It continues with equal intensity after graduation. His local board requires periodic reports to find out what he's up to. He is impelled to pursue his skill rather than embark on some less important enterprise and is encouraged to apply his skill in an essential activity in the national interest. The loss of deferred status is the consequence for the individual who has acquired the skill and either does not use it or uses it in a non-essential activity.”

Although this document has been withdrawn, recent recommendations of the National Security Council along similar lines have provoked intense controversy within and without the halls of Congress. For a report of a major constitutional challenge to the requirement that conscientious objectors engage in alternative civilian "service" as directed by their Selective Service Boards, see letter from Professor Richard Flacks, in \textit{New York Review of Books}, Dec. 21, 1967, at 42. Certainly, traditional notions of a free society would be profoundly affronted by a law deeming it criminal for a person to devote the ordinary working hours to endeavors less productive than his capabilities (the vagueness problem aside) or to endeavors other than those specifically prescribed for him by a governmental authority.\textsuperscript{125} “The concern is that the anti-materialism and introspection of the Eastern mystic, if practiced on a large enough scale, would pose a threat to our status as the industrial and military colossus of the modern-day world. . . . [Suppose] that a Buddhist movement were to become extremely successful in the United States. Suppose it resulted in many of the nation's brightest youths eschewing responsible positions, taking up instead menial jobs that provided them with mere subsistence and devoting the bulk of their mental energies to contemplative and spiritual activities. Would the fact that this trend threatened our social, military and economic institutions justify an abridgement of the religious freedom of the Buddhists or of the free speech
It might be argued that banning the use of psychedelics does not interfere with one's right to choose a way of life because these drugs "diminish freedom of choice" and almost invariably "twist the mind" in certain directions. But if the user knows the direction in advance of consuming the drug (a condition which could be legislated), is not society simply prohibiting him from choosing to travel in that direction? In rebuttal to this answer, one might employ Mill's justification for holding invalid an agreement to sell one's self as a slave:

The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.\(^1\)

One difficulty with applying this argument is that it may be impossible to make a meaningful determination whether one who chooses a quietistic life following use of psychedelics has lost his freedom. We could not consider as evidence, without begging the question, the fact that the user has renounced his earlier way of life. How could we tell whether the drug (1) enhanced his freedom by increasing his knowledge, illuminating his values and expanding his options for meaningful choice (an explanation which might be given for mass conversions to pacifism subsequent to viewing a powerful antiwar film); or (2) diminished his capacity to resist the lure of intoxicating and seductive illusions? Moreover, the slavery example is significantly qualified by Mill's staunch defense of contractual freedom, and must be viewed against the background of his strong disapproval of paternalism. In using a drug, like making a contract, one may be giving up freedom along certain lines for a temporary period, in order to enjoy certain benefits—e.g., religious experience. An argument that a drug twists the mind should be considered as weighing against psychedelic religious freedom only where there is satisfactory proof that it leads to "mental illness," defined to minimize the possibility of treating unorthodox social, aesthetic or religious value

of those who advocated that more adopt that faith? "It cannot be reasonably argued that it would . . . ." Laughlin, LSD-25 and Other Hallucinogens: A Pre-Reform Proposal, 36 Geo. Wash. L. Rev. 23, 39-40 (1967). At some point, however, given the less pacifistic outlook of other nations, would not our government be justified on grounds of national preservation, in taking steps to prevent our emergence as a nation of pacifists?

judgments as independent and substantial evidence of mental disease.

Professor Giannella argues that the denial of religious exemptions for the use of drugs is justified by the state’s power to regulate public morals, and by “the state’s interest in maintaining normality in personal behavior which is akin to its interest in maintaining public morality.” The “normality” rationale is an example of a danger

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127 Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Guarantee, 80 Harv. L. Rev. 1381, 1426-27 (1967). He distinguishes State v. Bullard, 269 N.C. 599, 148 S.E.2d 565 (1966) (see Brief, supra at 680) from Woody on two grounds: (a) “Whereas North Carolina seemed to intimate that the use of peyote was intrinsically immoral, California treated it strictly as conduct subject to criminal sanction in order to protect the public health,” Giannella, supra at 1407, and (b) “the result in Woody can be justified if one regards only the regular use of peyote as a corrupting practice . . . .” Id. at 1408. As Giannella reads these opinions, the California court could have been impressed with the fact that within the Native American Church “[o]nly a prescribed amount of peyote is used once a week as part of a fairly well-defined ritual, with the purpose of achieving a communal experience of union with God,” and “could have concluded that such limited sacramental use was quite distinct from a religiously inspired use which advocates reliance on peyote as a way of life.” Id. On the other hand, “the North Carolina court probably would have concluded [even if it is believed Bullard were sincere] that he had made the use of peyote a dominant way of life rather than a way to experience God in a highly restricted ritual.” Id. at 1409.

The difficulty with the argument that the California Supreme Court did not recognize the peyote prohibition as embracing considerations of morality as well as health, is that the Woody court considered and rejected as paternalistic the state’s argument that the use of peyote obstructed the Indians’ moral progress toward acculturization. Giannella answers that Devlin’s view (that society may enforce morals as such) was not tested and rejected in Woody because “[a]n indirect attempt by the state to eliminate a lawful, albeit backward tribal ethos is not to be equated with its direct coercive protection of the dominant moral climate of a society.” Id. at 1407. This concedes that the California statute was indeed “morals legislation” (in Professor Fuller’s sense of “morality of aspiration” see Fuller, The Morality of Law (1964)), but what basis is there for the assumption that it was directed primarily at the Native American Church? Since the court granted the religious exemption, yet did not suggest it was prepared to invalidate the statute under the due process clause, it most probably rejected Devlin’s view, as put by Giannella, that “to warrant criminal sanctions the morality must be so important that it cannot allow of a religious exemption.” Id. at 1406.

Giannella’s second explanation of Woody as being consistent with the state’s power to regulate morals—i.e. that the Native American Church restricted its use of peyote—ignores the California Supreme Court’s decision in In re Grady, 61 Cal. 2d 687, 384 P.2d 728, 39 Cal. Rptr. 912 (1964), granting an exemption to a self-styled peyote preacher (if his alleged religious beliefs could be shown to be sincere) where no showing was made or required to the effect that the claimant restricted his use of peyote. The manner of religious use may be relevant to an issue of “standing” to assert a less-restrictive alternative. See text accompanying notes 199–214 infra.

128 Giannella, supra note 127, at 1427. “To the extent that such practices are forbidden by the criminal law, because contrary to public morality, no problem arises so long as the courts continue to deny all exemptions from criminal statutes of this kind.” Id. at 1426–27.
emphasized above, for Giannella's justification for punishing the use of psychedelics as abnormal behavior is that such pursuits do more than seek limited exemption from regulations that have been designed to serve psychological or "mental health" purposes, if you will. They quarrel with those very ends. They tend to be as subversive of the existing secular order as conduct made criminal because it is offensive to public morality. He does not say why it is part of the "mental health" function of the law to prohibit abnormal conduct, or in what way such conduct (which is not defined to require physical, economic or psychic harm to the actor or others) subverts the existing secular order.

The problem can best be viewed as an aspect of the question, To what extent may a state enforce through the criminal laws, morality as such? Lord Devlin's thesis is that (1) a common morality is necessary to the preservation of society; (2) immoral conduct can loosen the invisible bonds that hold society together and eventually lead to its "disintegration"; (3) just as society protects its essential political structure by punishing treasonable conduct, so may it protect itself by punishing some immoral conduct, even though such behavior causes no demonstrable secular injury; and (4) in determining what immoral behavior may be punished, a legislature should ask itself whether the vast majority, (or whether 12 "right-minded" men drawn at random, would unanimously) view the behavior with intolerance, indignation, and disgust—whether it is a vice regarded as so "abominable" that its "mere presence is an offense." Professor Hart and his supporters respond: It does not necessarily follow that the failure to prohibit any conduct generally regarded with disgust, indignation and intolerance, will lead to disintegration of society, to a breakdown of those universal moral standards truly necessary for existence of society. The treason analogy ignores the fact that a change of morals, like a change in the government, may be a sign of social health and progress. The prohibition of conduct irrationally regarded as immoral, tends to freeze

129 Id. at 1427.
131 Devlin, supra note 130, at 24.
132 Id. at 13.
133 Id. at 14.
134 Id. at 15, 17.
135 See generally H. Hart, supra note 130.
existing morality and inhibit desirable social change. A moral principle, more widely and deeply held than any particular intensely felt preference, is that restrictions of freedom may not be justified by mere prejudice, rationalization and personal aversion. In determining whether to enforce a particular morality, a legislature should ask whether the practice is itself harmful or whether, if not prohibited, it will have harmful repercussions on that part of the common moral code actually essential to hold society together.

It is submitted that for courts to adopt the view, in free exercise cases, that the legislature may deny religious exemptions for any conduct widely regarded as immoral and abominable, on the a priori assumption that failure to do so will destroy society, would negate a principle purpose of the Bill of Rights—to protect the dignity and individuality of the man in the minority from invasion by majority authoritarianism. To ban the religious use of psychedelics simply because such use is deeply offensive would deny any validity to Justice Brandeis' view, repeated by numerous Justices, of the intent of the Framers of the Constitution:

They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.\(^{136}\)

It cannot be denied that the Court has, in its polygamy decisions, affirmed infringements of religious freedom, on the ground that the conduct violated prevailing morality;\(^{137}\) and the inclusion of morals or morality in descriptions of the object of the "police power" (along with order, health, safety and welfare) is frequent.\(^{138}\) Nevertheless there are heavy strands in our constitutional history that would support judicial reexamination of purported governmental power to regulate morals. As Professor Henkin has suggested, to the philosophical arguments of Mill and Hart

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\(^{137}\) See Cleveland v. United States, 329 U.S. 14 (1946); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). Professor H. L. A. Hart suggests that prohibition of bigamy can be justified on a public nuisance theory, i.e. "as an attempt to protect religious feelings from offence by a public act desecrating the ceremony." H. Hart, supra note 130, at 41. Other nonmoral grounds have been given, based on the functions of the institution of the family within our society and the threat to these functions presented by bigamy and polygamy.

\(^{138}\) See the review of such pronouncements in Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 402-04 (1963).
we have added the special concerns of the American Constitution: that
government should be limited; that the limitations should be subject
and susceptible to judicial scrutiny and enforcement; that legisla-
tures shall therefore be limited, to the rational and the reasonable
[the foregoing based on the due process clause]; that in addition—for
reasons particular to our society [the establishment clause]—legisla-
tures are debarred from enacting those nonrationalities of the major-
ity which reflect its religions.  

The obscenity decisions do not detract as seriously as Professor Hen-
kin suggests, from a principle that immorality per se is not an
adequate basis for restriction of a first amendment freedom. The
obscenity doctrine does not permit legislatures to ban any speech it
deems immoral. It requires that the material arouse a prurient
interest, an impact presumed (but not proven) to provoke illegal
sexual behavior. It also requires that the material have no re-
deeming social value, a criterion which severely limits (although
certainly not to the satisfaction of Mill’s followers) the state’s power
to enforce morals. In view of the constitutionally protected status of
bona fide religious pursuits, and the proven link between psychedelics
and the religious experience, a court could not deny redeeming social
value without denying a principal rationale of the free exercise clause
itself.

Moreover, that reading of Devlin which would allow prohibition
of conduct widely thought to be disgusting and intolerable on the
basis of an unsupported presumption that such conduct would lead
to “disintegration” of society, cannot well survive the Court’s reading

139 Id. at 413-14.
140 Id. at 412.
141 See Kingsley Int’l Pictures Corp. v. Regents of Univ. of New York,
360 U.S. 684 (1959). Whatever the outcome of pending cases before the Su-
preme Court involving challenges to legislation against the burning of un-
expired draft cards, defended on grounds of national security, it is highly
doubtful that courts would uphold, under a “public morals” power, legislation
forbidding individuals to burn their expired draft cards.
142 Roth v. United States, 354 U.S. 476, 487 (1957). Of course some sexual
behavior presently deemed illegal could not be punished were “immorality” a
constitutionally inadequate basis of penal legislation. We are here suggest-
ing only that immorality cannot justify prohibition of first amendment free-
doms. Perhaps heavy penalties for conduct beyond first amendment protec-
tion forbidden only because regarded as immoral (or which produces rela-
tively trivial “evils”) warrants application of the eighth amendment’s prohi-
bition of cruel and unusual punishment.
144 The Supreme Court has said that obscenity is not speech, within the
meaning and protection of the first amendment. Roth v. United States, 354
U.S. 476, 493 (1957). But such question-begging cannot solve cases; the Court
has had to define obscenity and requires as a necessary (but not sufficient)
condition that the material have no redeeming social value. Id. at 494. While
the Court may be able to differentiate various utterances or publications by
that standard, it could not intelligently hold that all religious beliefs and
practices in which drugs play a significant role, have no redeeming social
value.
of the Constitution per Mr. Justice Jackson in *Barnette*, where the state sought to justify a compulsory flag salute as a means of enforcing a concensus of political (not merely moral) ideals. The Court observed that the asserted freedom did not interfere with or deny the rights of any other individual;\(^\text{145}\) that compelled uniformity leads to deep divisions and bitter strife;\(^\text{146}\) that it had no reason to "fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization";\(^\text{147}\) that eccentricity and abnormal attitudes provide rich cultural diversities, and that "[w]hen they are so harmless to others or to the State as those we deal with here, the price is not too great."\(^\text{148}\)

Finally, it is noteworthy that the language in *Sherbert*, relied on by the Fifth Court in *Leary*, distinguishing earlier decisions, spoke of acts which posed "some substantial threat to public safety, peace or order," omitting any reference to morals. If the *Sherbert* Court meant what it went on to say, regarding the requirement that the regulation serve a compelling interest, which could not be served by alternative legislation, it is difficult to believe that the Court will find such a justification in deeply felt, widespread irrational disgust and intolerance toward a practice (if indeed there were a consensus of such feelings about the use of psychedelics), without demanding proof by the state of probable harmful consequences to secular interests or to moral principles which significantly preserve such interests.\(^\text{149}\)

**Significant Risk Requirement**

In assessing the state's interest in prohibiting an activity (or denying a religious exemption), courts should not accept as justification proof of the mere possibility that the activity will produce a compelling evil. For the state interest in prohibiting an activity

\(^{145}\) 319 U.S. at 630.

\(^{146}\) Id. at 641.

\(^{147}\) Id.

\(^{148}\) Id. at 642. Of course the facts of *Barnette* can be distinguished from prohibition of psychedelics on the ground that in the former, the state demanded an act affirming a belief. But in prohibiting psychedelics society is imposing its belief that a practice is immoral on some who believe it has positive religious significances; indeed in *Barnette* the dissenters to the flag salute prevailed without judicial inquiry into their religious convictions. See Devlin, *Mill on Liberty in Morals*, 32 U. Chi. L. Rev. 215 (1965).

\(^{149}\) A state should prevail where revulsion against a practice is so intense and widespread that permitting it would undermine the bases of the moral code necessary to security of person and property. The dynamics of such a process would involve the willingness of people to take the law into their own hands against those receiving exemptions, or to disregard other legal strictures because of anger, disrespect for law, or a belief that if something so evil is permissible, anything goes.
threatening such an evil is, all other things equal, directly proportional to the risk that the evil will materialize. In terms of language in the principal opinions, the greater the probability that activity X will lead to harmful consequence Y, the more "substantial" the "relation" between X and Y, the "graver" is X's "abuse" and the more "compelling" the state's interest in suppressing X.

Moreover, since purported resultant evils are of different magnitudes, the less serious the cognizable evil, the higher the risk which should be necessary to overcome the religious claim. For example, whereas a risk that one in 500 ingestions will produce violent crime might justify prohibition, a risk of one in 100 that the user will fail to support his dependents might not.

The key concept is "dangerousness"—the risk times the magnitude of harm. Courts would be well-advised, in considering whether an activity (or the grant of a religious exemption) significantly jeopardizes an important legislative objective, to follow Chief Judge Learned Hand's test (under the free speech provision), adopted by the Supreme Court in Dennis v. United States:150 "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."151

Comparative Dangers of Nonprohibited Activities

In support of the argument that the government had no compelling interest in prohibiting the use of marihuana, the Brief152 pointed to evidence that alcohol was at least as harmful (i.e., entailed no less risk of similar or graver consequences). Is this kind of proof relevant? Professor Giannella contends that where a religious exemption from a prohibited or required practice (e.g., vaccination) would involve "even the smallest risks" to "public health," courts might be justified in disregarding the fact that other practices, not legislatively forbidden (e.g., use of swimming pools), involve "much greater" risks of similar or greater harms.153 His reasons are that (1) exemptions "from public health requirements should perhaps be expressed by the legislature, which is directly responsible to the electorate";154 and (2) "the evil involved may be such that should disaster strike, the courts would incur intense bitterness."155 This argument would surrender religious freedom to labels.

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150 341 U.S. 494 (1951).
151 Id. at 510, quoting from United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).
152 See Brief, supra at 684-85.
153 Giannella, supra note 127, at 1393.
154 Id.
155 Id.
The mere possibility that the practice may adversely affect some aspect of "public health" or "public safety" does not magically render the state's interest "compelling," or important, or "paramount":¹⁵⁶ nor does it render irrelevant comparable risks from nonprohibited activities. Suppose, for example, a legislature finds that the daily risk of fire breaking out in the average home is two in 10,000 (.0002), but that in homes where candles are burned the risk is three in 10,000 (.0003). If the legislature should prohibit the use of candles, surely an automatic denial of an exemption for religious ceremonies could be justified neither by the rubric "public safety," nor by the "smallest risk" that disaster would strike and "the courts would incur intense bitterness."

If we liberally translate "smallest risk" into "significant risk," Giannella is arguing that courts should not impose such a risk on society, notwithstanding the fact that some unprohibited activities involve higher risk of harm. But in determining whether a risk is "significant" (or an interest "compelling," and so forth), courts cannot operate in a vacuum. In the realm of constitutional balancing there is no bureau of weights and measures. No needle or dial reads off a ready answer. Does a .0003 risk of fire in a house where candles are burned present a "compelling" interest in prohibiting candles? Perhaps not, if society is quite willing to live with a .0004 probability of fire from electric blankets.¹⁵⁷ Of course, the fact that a nonprohibited activity is more dangerous than the forbidden one is not a fortiori proof that the state's interest in banning the latter is not compelling. Gas stoves might be more dangerous than candles, but the social disutility of forbidding the former could be enormous. The stronger the reason for not prohibiting a dangerous activity, the weaker the claim that a religious exemption must be granted for an activity equally as dangerous. For example, were the use of a certain drug, involving a 20 percent risk of death, permitted where and only where a physician deems it medically necessary (where in his opinion it could reduce a higher risk of death from other causes), this would be no basis for concluding that denial of an exemption for religious use of this drug is not justified.¹⁵⁸

¹⁵⁶ Striking down a provision of the Subversive Activities Control Act of 1950, tit. I, § 5, 64 Stat. 992, prohibiting members of a "Communist-action organization," which is under a final registration order, from working in defense plants, Mr. Chief Justice Warren, writing for the Court, warned of the tyranny of the labels "national defense" and "war power." "[T]he phrase 'War Power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit.... [T]his concept of 'national defense' cannot be deemed an end in itself justifying any exercise of legislative power designed to promote such a goal." United States v. Robel, 88 Sup. Ct. 419, 423 (1967).
¹⁵⁸ If a medical exemption is very broad, permitting wide risks to be
Nevertheless, orthodox equal protection doctrine will not suffice. Under such analysis, a legislature could constitutionally prohibit the use of candles while permitting the use of electric blankets, since it could rationally differentiate on the basis that candles served principally decorative functions while electric blankets maintained one's physical comfort. But that is not an adequate reason for denying a religious exemption from the ban on candles. Religious freedom is a preferred value; legislators are constitutionally obliged to accord it considerable magnitude in their social utility calculus. Is it not obviously a constitutional anomaly for legislators to ignore the wholly frivolous use of the dangerous drug alcohol, while punishing with heavy penalties those who use a no more dangerous drug in pursuit of God? A court should not be deterred from protecting constitutional rights by fear of community bitterness, particularly if such bitterness is irrational, prejudiced or manifestly ignorant of constitutional principles.

It has been argued by Dr. Donald Louria, President of the New York State Council on Drug Addiction, that the appropriate question a legislature must ask, in considering whether to repeal marihuana prohibitions, is not whether marihuana is more or less harmful than alcohol, which society tolerates, but whether society should tolerate the cumulative evils which would flow from unrestricted use of both alcohol and marihuana. This point will best be analyzed below, following discussion of other material issues.

Number of Adherents

We have argued in behalf of Dr. Leary (in a portion of the Brief not included above), that “in light of the exemption from restrictive legislation granted by the federal government to religious users of peyote and appellee's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation would be an invidious religious

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159 Cf. note 119 supra.
160 Cf. Dworkin, supra note 130.
162 See text following note 215 infra.
163 Under regulations promulgated by the Food and Drug Administration, the sale and distribution of peyote intended for use in religious practices by the Native American Church are exempted from statutory prohibitions. 21 C.F.R. § 166.3 (1967). See also Hearings Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 69th Cong.; 1st Sess. at 370 (1955).
discrimination in violation of the First and Fifth Amendments.\textsuperscript{164} The Fifth Circuit responded that “[t]he exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice.”\textsuperscript{165} Dealing directly with the first amendment contention, the court found it “difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes.”\textsuperscript{166} If we assume that the number of religious exemptions which would follow from the grant of a free exercise claim is relevant to a determination of harmfulness, the court was wholly unjustified in equating the mere assertion of a religious claim with its successful assertion.\textsuperscript{167} As argued in the Brief,\textsuperscript{168} it would be a rare case in which a jury could be defrauded into accepting a specious claim. Those who acquire and declare or otherwise manifest their purported religious beliefs subsequent to arrest or to their use of marihuana, would have correspondingly serious difficulties in persuading a jury of their sincerity,\textsuperscript{169} whichever party bears the burden of proof on that issue.\textsuperscript{170} An additional deterrent to fraudulent claims for religious

\textsuperscript{164} See Fowler v. Rhode Island, 345 U.S. 67 (1953) (invalidating conviction of Jehovah’s Witness for holding a public meeting where other religious groups were permitted to hold more orthodox religious ceremonies); Sherbert v. Verner, 374 U.S. 398 (1963) (the Court found it significant that South Carolina protected the right of employees to refuse to work on Sundays while denying unemployment compensation to those religious convictions precluded Saturday employment). See also United States v. Jakobson, 325 F.2d 409, 415 (2d Cir. 1963), holding the congressional draft exemption a violation of the first amendment because it discriminated among religions. On review the Supreme Court avoided this constitutional doctrine by construing the statute to include all religions. United States v. Seeger, 380 U.S. 163 (1965); cf. United States v. Ballard, 322 U.S. 78 (1944): “The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.” Id. at 87.

\textsuperscript{165} Leary v. United States, 383 F.2d 851, 861 n.11 (5th Cir. 1967).

\textsuperscript{166} Id. at 861.

\textsuperscript{167} The total number of claims, fraudulent and bona fide (as opposed to the number of successful claims), may be relevant to a determination of the cost of administering a system of religious exemptions, if this is a permissible consideration. But cf. Sherbert v. Verner, 374 U.S. 398, 407 (1963); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

\textsuperscript{168} See Brief, supra at 698.

\textsuperscript{169} Belatedness of “religious conversion” is a factor casting doubt on sincerity of conscientious objector claims. United States v. Corliss, 280 F.2d 808 (2d Cir. 1960). “Sudden accessions of belief may be utterly sincere, as the memorable one on the . . . Damascus road, but they seldom synchronize so perfectly . . . with external facts making them convenient . . . .” Id. at 812.

\textsuperscript{170} It is by no means clear who should bear the burden of proof on the sincerity issue. The California Supreme Court, in In re Grady, 61 Cal. 2d 887,
exemptions from criminal statutes is the probability that convictions following unsuccessful religious defenses will draw heavier penalties than convictions based on pleas of guilty.

Whether a court is estimating the total number of claims, fraudulent and genuine (arguably relevant to assessing the cost of administering an exemption system), or the number of successful claims (relevant to assessing the total impact of exemptions on statutory objectives), the Supreme Court has indicated that the government cannot rest on mere speculation. There must be support for these claims in the record. There was nothing in the Leary record to suggest either that the probable cost of administering a religious exemption system would produce a compelling governmental interest, or that the probable number of successful claimants for religious exemptions create such an interest or would be as high as, let alone significantly greater than, the number of adherents to the Native American Church.

The discussion in the Brief, in the quoted language of the Fifth Circuit’s opinion, and in the preceding paragraphs, assume that the number of individuals entitled to religious exemptions is relevant to a determination of society’s interest in denying the religious claim. But it is by no means obvious that the numerical strength of a particular religion or religious belief should be the basis of a determination of the constitutional rights of its adherents. Arguably, it is in some sense improper to deny to those whose religious beliefs are shared by many, exemptions which would be granted to members of small, isolated sects, or to “revoke” an exemption, once found con-

394 P.2d 728, 39 Cal. Rptr. 912 (1964), placed the burden on the claimant. Perhaps this is justified by the fact that once religious infringement is shown, the burden is on the government to defend it; the defendant’s religious sincerity involves a second-level “standing” question. On the other hand, consider that (a) the Supreme Court, in finding no constitutional right to a religious exemption from Sunday closing laws, observed that such an exemption “might make necessary a state-conducted inquiry into the sincerity of . . . religious beliefs, a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees.” Braunfeld v. Brown, 366 U.S. 599, 609 (1961); (b) In Sherbert v. Verner, 374 U.S. 398, 407 (1963), the Court expressed the proposition on which it “intimate[d] no view” that consideration of evidence of spurious claims might be “foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, United States v. Ballard, 322 U.S. 78 . . . ”; and (c) while Ballard did recognize that a claim based on religious beliefs could be defeated by a finding of insincerity, it may be that the danger that a jury will improperly find a belief “insincere” solely because it thinks the belief “false” would justify placing the burden on the government of proving insincerity by a preponderance of evidence.

171 But see note 167 supra.


stitutionally required, when the religion grows beyond a given size.\footnote{Id. at 296. On remand from the United States Supreme Court, In re Jenison, 375 U.S. 14 (1963), the Minnesota Supreme Court, reversing a criminal contempt conviction of a woman who based her refusal to render jury service on religious grounds, stated: “[U]ntil and unless further experience indicates that the indiscriminate invoking of the First Amendment presents a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt.” 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963) (emphasis added).} Yet, while certain types of harm endanger compelling interests because of their quality (e.g., personal violence, genetic deformities), and thus require universal prohibition,\footnote{That is, denial of exemptions to every activity which significantly threatens to produce the harm, with the possible exception of activities which preserve interests of greater magnitude than either religion or the statutory objective—e.g., medical practices which save lives. Some regulatory schemes, involving mala prohibita offenses, may contemplate universal compliance. Although the Supreme Court in Braunfeld v. Brown, 366 U.S. 599 (1961), found that Sunday closing laws fit this category, the statutory scheme was riddled with exceptions, and in any event it is doubtful that such laws would have survived a “compelling state interest” test.} other dangers may or may not involve compelling interests, depending on the incidence of activity. The latter situation arises, for example, where the economy or state treasury is threatened (e.g., from increased social and medical welfare payments to the claimant or his dependents), or where society’s interests can be fully protected as long as available manpower does not fall below a given level (e.g., selective service, jury duty).

Treating the number of religious exemptions as relevant would not favor small over large sects with regard to religious practices in violation of the same statute. The right to a religious exemption cannot rationally be made to depend on the outcome of a race to the courts or the legislature; it cannot be granted only to the first claimants. Insofar as the quantity of religious exemptions is relevant to assessment of harm, what should be considered is the total number of adherents to all religious beliefs which involve practices contrary to a given statutory stricture. There is no anomaly in finding that the first amendment requires exemption for religious violation of statute X while denying an exemption for religious violation of statute Y, even if the latter practice is no more dangerous than the former, on the basis of a finding in the former case that the religious practice is rare and, in the latter case, that the different religious practice is widespread. Such a situation reflects the same constitutional logic which gives a small gathering “greater” first amendment protection than a large crowd.\footnote{If the total assemblage is so large as to justify infringement of first amendment rights, a large subgroup could not validly be punished while a small subgroup were given constitutional protection.} The difficulty is not that the number of adherents is or should be irrelevant, but that the assessment may be beyond the bounds
of judicial competence. How are the litigants to acquire evidence of the number of individuals whose religious beliefs are infringed by the statute? Not simply by consulting membership lists of organized religions, since religious beliefs and practices of the non-affiliated are also protected.\textsuperscript{177} Moreover, religion is open to everyone. Those who today possess no religious beliefs, or follow religions whose practices are lawful, may tomorrow find their way to contact with the Divine and experience meaningful answers to ancient and ultimate questions, through practices which are presently illegal and the subject of constitutional challenge. Recognizing the complexity of judicial crystal-gazing, it would not be unreasonable to conclude that a religious exemption is constitutionally required only where a universal exemption would not significantly threaten a paramount governmental interest.\textsuperscript{178}

Notwithstanding these observations, it seems unnecessarily suppressive to deny an exemption for a manifestly unusual religious claim (e.g., freedom from jury service) on the basis of an unsubstantiated presumption that the underlying religious belief is, or may become, widespread and indeed universal. Estimates of the number of users or religious users of the drug, while varying considerably, can provide courts with a useful picture of the present maximum quantitative effect of a religious exemption. Should the very grant of an exemption subsequently produce an intolerable increase in the number of claimants (and the tolerably low number of claimants for conscientious objector status suggests that it would be error to presume such an effect), no constitutional stricture would prevent legislative or judicial revocation of the exemption.\textsuperscript{178} The course most consonant with maximizing religious freedom, while protecting substantial governmental interests in situations where the substantiality of the interest depends on the quantitative incidence of exemptions, is to require that unless there is some basis in fact which could support a legislative finding of the compelling quantitative impact, an exemption should be granted, accompanied by a judicial attitude of

\textsuperscript{177} Moreover, those who are affiliated with religions which do not require a given practice may nevertheless be religiously committed to that practice. But as the conscientious objector cases recognize, a disparity between the official doctrine of the formal religion claimed by the defendant and his professed beliefs is evidence casting doubt on his sincerity.

\textsuperscript{178} Sherbert v. Verner, 374 U.S. 398 (1963), can be read as holding that even a universal exemption from the requirement of availability for a 6-day work week would not jeopardize a paramount state interest since the major purpose of the state's unemployment compensation program—alleviating hardship—would still be served.

\textsuperscript{179} Judicial revocation should probably be announced prospectively, in an opinion granting the exemption or denying it on grounds other than quantitative harmfulness. But cf. Ginzburg v. United States, 383 U.S. 463 (1966).
The Less-Restrictive Alternative

An exemption for all religious acts in violation of the statutory prohibition is obviously one example of a less-restrictive alternative—the least restrictive of religious freedom for it is unconditional. If this would produce suppressible danger, a state must nevertheless choose regulation over prohibition where the former can reduce the danger to a level which constitutionally must be tolerated (i.e., not a significant threat to a paramount interest). Thus, for example, the government might have a compelling interest only in limiting the frequency or quantity of usage of certain drugs, or forbidding or restricting usage of certain drugs by people with dependents or with strong psychotic potential. Unless the cost of administering such regulations is not so great as to constitute a compelling interest, legislation which forbids acts beyond these categories (that which is overinclusive) cannot constitutionally be applied to religious acts.

In a paper entitled LSD and Constitutional Morality, this author has examined the principal claims regarding the dangers of LSD—that it leads to self-inflicted harm from panic reactions, long term psychoses and recurrent psychotic symptoms. The thesis was ad-
vanced, based on medical-scientific studies, that certain safeguards can reduce the risk of these harms (presumed for present purposes to be constitutionally cognizable) to a nonsuppressible level. While indiscriminate use of LSD produces psychotic reactions requiring hospitalization in perhaps no less than 2 to 4 percent of the population, a major study (involving 5,000 subjects and 25,000 ingestions of LSD or mescaline) indicates that where ingestions are supervised, only 8/100 of 1 percent of subjects previously screened to exclude those with present or incipient emotional disorders, have prolonged (more than 48 hours) psychotic reactions, and virtually none attempt suicide; and even where emotionally disturbed patients ingest LSD under supervision, only 18/100 of 1 percent have prolonged psychotic reactions, and 12/100 of 1 percent attempt suicide. In another study of over 200 subjects lacking previous mental disorder, “no subject ever experienced a postsession psychotic reaction, much less at-

Back, Chromosomal Damage in Human Leukocytes Induced by Lysergic Acid Diethylamide, 155 SCIENCE 1417 (1967). Since a compelling state interest in protecting future generations from hereditary deformities cannot be gainsaid, reasonable proof of even a relatively low risk would justify prohibitions of ingestion under conditions which create that risk. Present evidence is inconclusive (as Dr. M. M. Cohen was among the first to admit); there are studies which indicate no significant correlation between use of LSD and chromosome damage or between chromosome breaks in white blood cells and genetic deformities (see, e.g., N.Y. Times, October 27, 1967, at 21, col. 3), and others which suggest such correlation only where the mother ingested high dosages during pregnancy (in which case only users in that category could justifiably be denied religious use). Should scientific experts disagree, a court could of course properly find that the legislature could reasonably accept the testimony of those who believe there is a correlation, albeit a low one, between the use of certain uses of a particular drug, and genetic defects. There may be some verifiable risks of even this harm that are so low as not to justify suppression of religious practices. Regarding comparative risks from permissible activities, recent studies have found a relationship between birth defects and the expectant mother’s ingestion of tranquilizers, analgesics and antihistamines.

The data is presented to illustrate a possible application of the less-restrictive alternative doctrine. The aforementioned paper advanced the thesis that a legislature is obliged by considerations of political morality (even if not by constitutional strictures) to protect values reflected by the constitution (e.g., the right to pursue aesthetic experience and development, to seek knowledge of oneself, to be let alone (privacy)), by choosing that course of protective regulation which will least infringe on those values. Just how a court reviews medical-scientific evidence in order to determine whether a legislature could reasonably find a compelling interest in denying a religious exemption and in rejecting alternatives will be explored in the next section; particular attention will be paid to the marijuana issue.

See THE UTOPIATES 117 n.7 (Blum & Blum ed. 1964).

Cohen, Lysergic Acid Diethylamide: Side Effects and Complications, 130 J. NERVOUS & MENTAL DISEASE 30 (1960). “Only one instance of a psychotic reaction lasting more than two days was reported” in “experimental subjects who had been selected for their freedom from mental disturbances.” S. COHEN, THE BEYOND WITHIN 210-11 (1964).
tempted or completed suicide.”188 Other studies have found (1) that of 70 LSD users admitted for emergency psychiatric treatment at the U.C.L.A. Neuropsychiatric Institute during a 6-month period, none had taken the drug after screening or with supervision;189 (2) that panic reactions of users admitted to Bellevue Hospital were related to the setting under which the drug was taken (e.g., many had taken the drug alone), and the user’s psychological state at the time of ingestion (“recovery was rapid and these patients were usually discharged within 3 days”), and that in all studied cases of extended psychoses the users (admitted to Bellevue) were either psychotic, or had serious personality disturbances prior to ingestion;190 and (3) that “[e]ven after reviewing 1000 medical publications, surveying all of the literature . . . the author [employed by the Food and Drug Administration] was unable to confirm reports that a psychosis can develop in a hitherto mentally healthy individual several months after his last LSD intake.”191

In light of this and other evidence, it was suggested that legislatures could significantly reduce the danger192 by adopting regulations permitting the use of LSD by those who “pass” psychiatric screening for present or incipient mental illness, are adequately prepared for the “trip,”193 and are attended by a qualified guide194

190 Statement of Dr. William A. Frosch, Psychiatrist, Hearings Before a Special Subcomm. of the Comm. on the Judiciary, 89th Cong., 2d Sess. 302-05 (1966).
191 Ochota, What is the Clinical Evidence, NEW REPUBLIC, May 14, 1966, at 21. Dr. Ochota also noted that “the suicide rate (in investigational group) has been reported as 0.1 percent [it is not clear whether this figure is based on the Cohen study, supra note 187], a remarkably low rate considering that LSD has been usually given to the rather severely ill patients, including chronic alcoholics, neurotics, psychopaths, drug addicts, etc.” Id.
192 “While a legislature may be morally justified in overriding constitutionally protected values when the danger level (risk times harm) rises above a certain point, it is not justified in suppressing such values completely if it can reduce the danger below the level of serious concern by regulations which substantially preserve the protected freedoms. So even if the unsupervised, uninformed ingestion of LSD by a population not screened of pre-psychotic personalities does create a serious danger warranting restrictive legislation, I submit that a politically moral law-making body has an obligation to permit men to pursue God, creativity, knowledge, personal development and adventure, by means which create no greater risk of harm than the manufacture of knives, the construction of buildings or highways, the performance of minor surgery and perhaps even the practice of psychoanalysis.” Finer, LSD and Constitutional Morality, supra note 183, at 13.
193 "When neither the subject nor his companions have prepared for the "trip" or have any realistic understanding of the nature of a psychedelic experience, what for the informed, can be glory, insight and joy, can, for the
(and perhaps also with a physician on call). In a stimulating recent article, Professor Stanley Laughlin, Jr. has proposed that use of LSD be permitted either at public clinics, or at regulated private institutions, under safeguards similar to those recommended above. It is doubtful that the cost to the government of administering these regulations would be such as to provide a compelling reason for rejecting that alternative, particularly in view of the far greater public sums that are devoted to interests of lesser constitutional magnitude than religious freedom.

uninitiate, be shock, terror and anguish. I wonder how an African bushman would react if he suddenly found himself sitting at the window of an airplane during a noisy take-off over a city of skyscrapers and neon lights with no one present but a Braniff hostess in her psychedelic circus suit, who spoke not a word of Bush-talk.” Id. at 12.

There is no existing academic training of guides or gurus. But the same was once true in psychoanalysis. Teachers and students will come from the behavioral sciences, from religion, from the arts, and perhaps from medicine. Standards of competence will be developed. Perhaps at the beginning, before we are sure of the caliber of our guides, and unless and until evidence of minimal risk is strong, doctors should be at least on call during all administrations.” Id. at 14. We also suggested that “perhaps some restrictions on the physical and social setting could be derived from factors known to be highly conducive to a “bad trip” (e.g., bizarre, hostile, or excessively clinical environment).” Id. at 13.

For an enlightening discussion of the qualifications a guide should possess, the most favorable characteristics of the setting in which a psychedelic session takes place, and the preparations of subjects, see R. Masters & J. Houston, supra note 188, at 129-50.

The state’s historical interest in the welfare of minors probably justifies prohibition of their use at a lower danger point, but whether the risks given the suggested safeguards exceed that point is an open question.

Laughlin, supra note 125.

Id. at 56-57.

The cost of protecting against fraudulent religious claims is probably no higher for conditional exemptions than for unconditional exemptions. It would seem that the cost of determining whether a statute is infringing on bona fide religious exercise, like the cost of providing a fair criminal trial, is the unavoidable price of ensuring constitutional freedoms at their minima. At some point, however, the question whether there is a constitutional freedom may turn in part on the economic cost of sustaining the claim (e.g., the right to appointed counsel in traffic court or habeas corpus proceedings, the right to jury trial for petty offenses, the right of a prisoner in state X to be brought speedily to trial by state Y). Thus it would be going too far, in protecting religious exercise, to expect the state to provide psychiatrists, training programs, guides and safe environments for religious use of psychedelics. This would arguably run afoul of the establishment clause (although if religious exercises can be protected from prohibitive state laws only by state action “favoring religion,” the establishment clause as interpreted would undermine the free exercise clause).

In any event, where programs designed to minimize dangerousness are privately financed, the public costs involved in regulating them would be relatively minimal (e.g., licensing personnel, auditing periodic reports, etc.)
March 1968

PSYCHEDELICS AND RELIGIOUS FREEDOM 745

The "Standing" of Religious Claimants

Does every person who violates a criminal statute in pursuit of his religious beliefs have "standing" to assert the less restrictive alternative doctrine? More specifically, the intriguing question of "standing" is this: Where a state has a compelling interest in prohibiting the use of a drug under condition X (e.g., during pregnancy) or non-Y (e.g., without psychiatric screening), but not under condition non-X or Y, and has actually prohibited use under the latter (safe) as well as the former (dangerous) conditions, should a religious defense to prosecution be denied either where the claimant's religious tenets do not restrict his use to safe conditions (non-X or Y); or, where his religious views are silent on this matter and he fails customarily to so restrict his use? Since, by hypothesis, qualitatively dangerous religious use is not an alternative the legislature must permit, the issue is whether the dangerous religious user may assert the rights of the safe religious user, where no legislative distinction has been made.

Few of the factors that militate in favor of standing to assert the rights of others are present where one who engages in dangerous use.

199 This question seems implicitly raised by Professor Giannella's distinction of Woody from Bullard on the ground, inter alia, that assuming both California and North Carolina found regular use of peyote to be immoral, the claimants in the former case used "[o]nly a prescribed amount of peyote . . . once a week as part of a fairly well-defined ritual . . ." while the claimant in Bullard was a member of the Neo-Native-American Church, "which did not appear to have a traditional body of teachings on the use of peyote," and he evidently "made the use of peyote a dominant way of life rather than a way to experience God in a highly restricted ritual." Giannella, supra note 127 at 1408-09.

The discussion in the text following this note suggests that a religious claimant should not prevail if his own conduct would not fall within the protection of an acceptable less-restrictive alternative. Suppose that any such alternative would impose a prohibitive financial administrative burden on the state? Would the fact that most religious users of the drug limited their use to "safe" conditions and that "dangerous" use would create a compelling interest only if numerically substantial (e.g., economic dependency) warrant holding that an unconditional (i.e., sans regulations) religious exemption should have been legislatively granted unless and until the quantity of dangerous users became intolerable?

200 The fact that the claimant is a criminal defendant gives him "pure" article III "case or controversy" standing. We are using the term "standing" in the broad sense that one does not have standing to challenge on constitutional grounds the application of a statute to him unless his conduct or status meets certain requirements relating to his claim. Thus we would say that one who did not claim to be engaged in religious activity does not have standing to raise the free exercise claim as a defense to his prosecution. See note 210 infra.

Contrary to Giannella's viewpoint, we would not hold that the enforcement of morality as such should be deemed a compelling state interest. See text accompanying notes 130-48 supra.

202 See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962).
ous and prohibited conduct, albeit in pursuit of religious beliefs, assails the constitutionality of certain applications of the statute he violates. The statute does not on its face relate to or infringe on first amendment liberty; the party whose conduct is constitutionally protected against the statute—the religious, nondangerous actor—is not less able to obtain judicial relief than the party in court and the defendant does not have any representative status vis-à-vis the third party. Even though the constitutional right involved is very important, the courts could properly invalidate the application of the statute to safe religious conduct, without invalidating the statute in toto or as applied to all religious conduct; by hypothesis such selective invalidation, treating the statute as "severable" in its applications, would be consistent with the most important legislative purposes. Just as one who is not religious has no standing to challenge a statute on the ground that it interferes with the religious rights of others, a public official would not be heard to claim that the statute under which he is prosecuted is invalid as applied to private persons and a doctor could not assert the constitutional rights of his patients, so one whose religious behavior is not constitutionally protected should not benefit from the invalidity of applications of the statute to relatively safe religious practices.

The factual question whether a religious claimant's practices are or are not dangerous (suppressible) is not reached where the defendant's claims are "religious" as a matter of law, and the government has failed to persuade the court that the legislation could reasonably be found necessary to prevent significant threats to very important interests. In such a case the only factual issue is whether the re-

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206 See Sedler, supra note 202, at 608-12.
210 This assumes that the mere fact that there are dangerous ways by which the statute can be violated, does not necessarily mean the statute serves a compelling interest. The government's right to show that the defendant's actual conduct would not be immune from prosecution under a less restrictive statutory alternative should not be converted into power to punish for conduct which, while violative of the statute, goes substantially beyond legislative intendment. Although the difficulty of articulating a workable principle for determining what violations of the statute involving dangerous characteristics go beyond the contemplated acts and evils, perhaps supports a view that any dangerous violation is punishable, consider a statute enacted on the erroneous assumption that the ordinary use of aspirin involves a high risk of violent crimes or suicide. Is it proper to deny a (hypothetical) re-
ligious claims are sincerely held. On the other hand, should the court be persuaded that the legislature could reasonably find that the statute does protect compelling interests, and no less-restrictive alternative could prevent injury to those or other compelling interests, then the government prevails; the defendant's religious sincerity or actual practices become irrelevant. The defendant's actual practices (and sincerity) become relevant where (1) he has professed to a use of the drug that is "religious" as a matter of law; (2) the government has successfully defended the legislation as protecting a compelling interest; (3) the defendant has come forward with some evidence of less-dangerous, less-restrictive alternatives; and (4) the government has not established that the legislature could reasonably reject these alternatives as significantly endangering compelling interests.

The state need not persuade the court of the last requirement, if it can demonstrate that the defendant's actual practices in violation of the statute are so dangerous as not to be constitutionally deserving of protection under a less-restrictive alternative. The state's burden on this issue is not satisfied by proof that the defendant's religious beliefs do not restrict his use to certain circumstances which a court would regard as nonsuppressible conduct. While the claimant's case is furthered by evidence that his religion imposes such limitations (suggested by the colloquialism, "he does it religiously") the government must prove that the defendant's use is dangerous, what-

ligious user of aspirin "standing" if it is shown that he ingests 30 aspirins a day and the court finds that such use does significantly endanger paramount state interests? (The argument that the defendant should not be punished for crimes other than those forbidden by the legislature is not a persuasive basis for a negative response: the defendant may not be punished unless the jury finds that he violated the statute; the question here is, When may the government show a dangerous violation to defeat a religious claim?) Should the suggestion not be found acceptable, the textual recommendations are modified only to the extent that proof of the harmfulness of the defendant's actual practices relieves the government of an obligation to defend the statute as such.

For a discussion of the burden of proof on this issue, see note 170 supra.

I.e., legislation not significantly endangering paramount interests, including an intolerable financial burden. If "safety measures" would impose prohibitive costs, then a defendant who used the drug safely would not be engaging in behavior protectible under any less-restrictive alternative which the legislature would be obliged to adopt. He should not be granted an exemption, for it is not the court's function to administer its own regulations but to determine whether the legislature could reasonably reject alternatives permitting greater religious freedom. Where the legislature could do so, the statute and its application to religion are valid.

As recognized in note 210 supra, it is arguable that proof of the defendant's dangerousness should also relieve the government of having to defend the statute as serving a compelling interest—the defendant's conduct might be said to prove that interest.

Query: Should the inquiry regarding the dangerousness of the de-
ever the reasons behind the defendant's claimed avoidance of dangerous use. Finally, where there is a relevant factual question about the defendant's conduct (to be distinguished from the legal question as to what kind and degree of danger is constitutionally suppressible), the jury should decide it along with the sincerity issue (the defense fails if the jury finds against the defendant on either ground), regardless of our analytic reliance on the "standing" concept, which, in its purer forms, involves jurisdictional issues for judicial determination.

The Cumulative Harm Thesis

As noted earlier,\textsuperscript{215} it has been argued that even if marihuana is no more dangerous than alcohol, society may reasonably decide not to suffer the cumulative evils which would flow from legalization of both substances. Let us assume that the cumulative harm theory could overcome some rather persuasive arguments for modifying the total prohibitions on general marihuana use;\textsuperscript{216} given the first amendment, our purpose is to determine the circumstances under which a legislature could preserve the religious use of marihuana and alcohol, while avoiding a cumulative danger level we can characterize as "compelling"—a level higher, in some unspecified degree, than the present danger from relatively unrestricted consumption of alcohol. We should recognize that even where the claimed harms are based on quantitative consequences, as under the cumulation theory (e.g., total medical and welfare payments to the user or his dependents), courts do not have complete empirical data sufficient to perform mathematical calculations, and have no means of converting the value of religious exercise into a cardinal magnitude; nevertheless, in order to illustrate the appropriate lines of analysis (however fuzzy

\footnote{215} See note 161 supra and accompanying text.

\footnote{216} Among the negative consequences of existing marihuana legislation are: (a) the suppression of liberty, regarded comprehensively to encompass a right to be let alone; (b) the disrespect for law, manifested by and flowing from pervasive disregard of strictures widely thought to be irrational and anomalous; (c) the often distasteful and not infrequently illegal and unconstitutional police practices associated with enforcement, such as the use of secret informers, entrapment, fourth amendment violations, and other forms of "dirty business"; (d) the broad discretion of law enforcement personnel to select the subjects of arrest and prosecution, providing opportunity for discrimination and persecution on political, ideological, ethnic, or socioeconomic bases; (e) the heavy costs of enforcement, due to the inefficacy of the deterrent rationale, and the concomitant channeling of scarce police resources away from defense of life, limb and property; and (f) the imposition of prison sentences and criminal stigma on many individuals who lack typical criminal characteristics, the corresponding suffering of the defendants and their families, and their resultant bitterness and cynicism toward a government and society that can ill afford the loss of the allegiance and good will of its youth.
they appear in judicial reality), we will quantify variables bearing on the assessment of cumulative harm.

Let us assume that equivalent risks of harming legislatively cognizable interests are presented, respectively, by the average users of alcohol and marihuana; that the risk is .01 of producing 1 unit of social disutility;\textsuperscript{217} assume further that in a given jurisdiction there are 2 million people above drinking age, 1 million of whom can be considered users of alcohol (under minimal criteria). Society thus tolerates 10,000 units of disutility by declining to increase restrictions on consumption of alcohol.

One alternative to the present scheme is simply to permit the unrestricted religious use of marihuana without modifying the present permissible policy toward alcohol consumption.\textsuperscript{218} How do we calculate the net increase in social harm? It is not simply the number of religious marihuana users (e.g., 50,000) multiplied by an average risk of harm (again, .01). We must estimate also the effect of interaction between use of marihuana for religious purposes and the use of alcohol. To obtain the incremental harm we must first subtract from the harm caused by 50,000 religious marihuana users at a presumed risk of .01 (500 disutility units) the disutility produced by those who have given up: (1) the normal use of alcohol to engage in religious marihuana use at the same risk (e.g., 25,000 at .01; reduction of 250); (2) a dangerous use of alcohol (e.g., .05) for normal religious use of marihuana (e.g., 3,000; net reduction is 120); and (3) the normal use of alcohol for a safer (.005) religious use of marihuana (3,000; net reduction is 15). To the remaining incremental harm (115 disutility units) we must add the harm from the following: (1) those who still use alcohol but also use marihuana for religious purposes, thus increasing their dangerousness (e.g., 10,000 from .01 to .02; increment is 100);\textsuperscript{219} and (2) those who have given up alcohol but

\textsuperscript{217} This might mean, for example, that the chances are one in 100 that the user will cost the state $100 (a unit of disutility). As suggested earlier, while the amount society must spend providing subsistence or medical care to the user and his dependents might properly be considered a cognizable evil, reduced productivity of the user should not.

\textsuperscript{218} Of course, the alternative least restrictive of first amendment and fifth amendment freedoms would be "exemptions" under no greater restrictions than are presently placed on the use of alcohol. Even under the broad legislative standard whether prohibition is in the public interest, a legislature might well conclude, after considering the disadvantages of the present system, that the public good might best be served by permitting the use of marihuana for general purposes (a) with no greater restrictions than inhibit consumption of alcohol; (b) with restrictions on the quantity or frequency of marihuana use and/or the characteristics of the user; or (c) with restrictions on the use of alcohol and marihuana.

\textsuperscript{219} Of course it is possible that the use of alcohol and marihuana in quantities that would separately produce .01 risks would, when combined by one user, produce a risk greater than the sum of their separate risks (.02).
use marihuana more dangerously (e.g., 5,000 from .01 to .03; increment is 100).

Whether the cumulative danger from the less-restrictive alternative (10,315 disutility units) gives the government a compelling interest in rejecting this alternative depends of course on a court's assessment of the value of religious freedom. It seems doubtful that the 3.15 percent increase in economic costs, in our example, over what society was willing to bear in order to preserve nonprotected activities (activities which it could constitutionally have prohibited on far less than a showing of compelling interest), should tip the scales against a claim for religious exemptions.\textsuperscript{220} If the allowance of an unconditional and general alcohol "exemption," and an unconditional and religious marihuana exemption, exceeds the constitutionally "compelling" danger level,\textsuperscript{221} another less-restrictive alternative which might sufficiently reduce the danger would be the imposition of con-

\textsuperscript{220} Such an increase in a noneconomic quantitative evil might endanger a compelling interest. For instance, if permitting unconditional religious use of LSD involved such a danger of psychological ineligibility for the draft that the total increase of ineligible registrants was over 3 percent, there might well be a compelling reason for denying such an exemption (in estimating the increment those religious users of LSD who would in any event be draft exempt, e.g., conscientious objectors, should be excluded).

Should a court decline to estimate the number of religious users, and, contrary to our recommendations, presume (from the mere theoretical potential, without evidentiary basis) that a religious exemption would be universally granted (see discussion in text accompanying notes 163-80 supra), it would be less likely to find that the grant of an unconditional exemption from marihuana legislation, with unrestricted use of alcohol, would be an acceptable less-restrictive alternative.

It would seem incongruous for a court to assume that all 2 million people in the hypothetical jurisdiction would use marihuana for religious purposes and then compare the consequent theoretical danger of religious marihuana use with the actual danger from the present use of alcohol, since theoretically all 2 million people could be using alcohol tomorrow. What are the implications of assuming universal religious use of marihuana and universal use of alcohol (the latter either because (a) use is not statutorily limited, or (b) there is some religious (presumably universal) use of alcohol)? Do we assume that everyone will use both drugs, combining average quantities and risks of each? (This would increase total disutility to 40,000 given the magnitudes employed in the text.) Or do we estimate the percentages of the 2 million actual and potential alcohol users who will switch completely or partially to marihuana, and their average deviation from the presumed .02 dangerousness per combination user, as well as the potential marihuana smokers who will stay with alcohol in whole or in part, and their average deviation from the .02 combined dangerousness? This would give us the actual incremental danger from cumulative use, but does not this violate the universality presumptions? Is the universality hypothesis tenable if it produces absurd results?

\textsuperscript{221} In taking into account the effects of substitution and complementariness, the effect of the availability of both drugs (marihuana limited to religious use) on the use of each is determined by a number of personal motives, only one of which may be economic (i.e., influenced by the relative costs of the two drugs).
ditions on general alcohol use (limiting the quantity, frequency or circumstances of use, or characteristics of the user), while allowing religious use of marihuana or alcohol, with conditions if necessary.\textsuperscript{222} It is arguable, however, that the establishment clause requires imposition of conditions on religious marihuana use before consideration of the necessity for placing restrictions on general alcohol consumption.\textsuperscript{223}

If the imposition of conditions on alcohol use and the restriction

\textsuperscript{222} The cumulation argument assumes that the dangers from the use of alcohol and marihuana are quantitative; society's interest is more or less compelling depending on the number of users (whereas if a drug produces a significant risk of personal violence or genetic deformities such harm is compelling regardless of the number of users). If imposing conditions on nonreligious use can reduce the quantitative danger below the constitutionally suppressible level, there is no justification for imposing any conditions on bona fide religious use, which by hypothesis, involves neither an intrinsically compelling danger, nor one which is any longer compelling by virtue of cumulation with other permissible uses. If conditional nonreligious use plus unconditional religious use still leave a compelling danger, a less dangerous alternative would impose conditions on religious marihuana use (one such condition, not suggested above, might prohibit the religious marihuana user from nonreligious consumption of alcohol).

\textsuperscript{223} One contention which might be advanced is that the establishment clause denies government the right to preserve religious freedom at the expense of other freedoms. But does this not imply, contrary to the Supreme Court's holding in the Selective Draft Law Cases, 245 U.S. 366 (1917), that the draft exemption for conscientious objectors is an establishment since the religious exemption of one man deprives another of his liberty? Indeed this establishment argument would deny exemptions from any burdensome legislation (including that which the Supreme Court would clearly regard as permissible "accommodation," see, e.g., Zorach v. Clauson, 343 U.S. 306 (1951)), for such exemptions will always be at the expense of nonreligious interests; a religious exemption implies that society can tolerate a religious exemption, and thus denies nonreligious violators a chance to obtain one of those exemptions under nonreligious criteria. The fact that a court may effectively tell the legislature to impose conditions on alcohol consumption instead of denying religious exemptions for marihuana use, brings it no closer to an establishment than if there were existing limitations on general alcohol use, and given the accompanying danger level a court held that society could afford unconditional religious freedom to use marihuana. In the former situation society had chosen to allow conditions on general alcohol use which were so dangerous that religious freedom as to marihuana could not be "safely" exercised. Society would have to remove those conditions in the absence of a compelling interest in not doing so. The unregulated use of alcohol for nonprotected and nonvital purposes fails to approach such a compelling interest.

A more discriminating establishment argument would be that imposing conditions on general alcohol consumption before imposing them on religious marihuana use goes beyond the mere preservation of religious freedom and seeks to maximize it. We would agree that if the restrictive conditions would not significantly obstruct religious beliefs and practices, there would be no justification under the free exercise clause for withholding such restrictions on the ground that they are necessary only if restrictions on general alcohol use could not sufficiently reduce the danger. For a court to grant an unconditional religious exemption on that basis in such a case might well violate the establishment clause.
of marihuana use to religious purposes also under safeguards, would not sufficiently reduce the danger—a rather improbable assumption—then society would be faced with a choice between permitting either the religious use of marihuana (and alcohol) or the general use of alcohol, but not both. The choice would have to be to forbid all uses of alcohol that are neither religious nor otherwise vital (e.g., medical), unless the administrative costs of such a scheme are so considerable as to constitute a compelling interest. Thus, the only situation where the cumulative harm theory would justify denial of religious exemptions for marihuana use, notwithstanding a finding that marihuana is no more dangerous than alcohol, is where the total risks engendered by the conditional exemptions for religious and other vital uses of marihuana and alcohol, with all nonvital uses of both substances prohibited, exceeds the total present risks from unconditional and unrestricted use of alcohol, with all uses of marihuana prohibited, and significantly endangers a compelling interest. The extreme unlikelihood of this result is illustrated by the fact that a necessary but not sufficient condition is that either the total number of religious users exceed the number of general users of alcohol—the risk per user remaining the same; or that the risk per user increase so substantially (by virtue of those individuals who ingest both substances for religious purposes!) so as to offset the reduced number of users.

Harmlessness: The Factual Determination

How does a court approach the task of determining whether the prohibited conduct is in fact sufficiently dangerous to provide the government with a compelling interest in preventing it; or, whether there are less-restrictive alternatives that would reduce the danger below constitutionally cognizable magnitude? Initially a court must decide what allegations of harm to consider. The legislative history (properly utilized) is obviously relevant as a source of insight into the harms on the minds of those who enacted the statute. Also relevant is the legislative history accompanying reenactments or revisions of the statute, or passage of additional statutes dealing with the same drug.

Suppose the legislature feared two or more compelling evils, and not all its fears are supported by adequate evidence? Is the applica-

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224 Given the fact that most of the evils of alcohol can be traced to certain abusive practices, as well as to social and psychic characteristics of drinkers, it would seem that restrictive regulations could be rather effective.

225 In determining whether society has a paramount interest in avoiding the administrative costs of a less-restrictive alternative, it is relevant to consider the costs manifestly tolerated in enforcing the present statutory schemes relating to marihuana and alcohol.
tion of the statute to religious practices to be upheld as long as the legislature had reasonable grounds to fear any one of the evils? If the legislative history tends strongly to indicate that fear of a particular evil, found by the court to be unjustified, had a significant influence, it may be that we cannot be confident (by virtue of legislative history and/or widespread popular beliefs) that the prohibition would have been enacted on the basis of the legislature's fear of other evils, even if such fear is found to be justifiable (i.e., the claim could reasonably be found to be supported by a preponderance of evidence). Suppose further, or in the alternative, that subsequent to any relevant legislation, allegations of new dangers achieve currency among the general public or within certain circles. Is the allegation "counted" in favor of the government, notwithstanding the fact that the court cannot "know" whether these allegations and their supporting evidence would have moved the legislature to enact the prohibition?226

Regarding the first problem, it is suggested that a court should find that the statute is supported by a compelling interest wherever there is adequate evidentiary support for any paramount interest which significantly influenced passage of the legislation under review or related legislation. In assessing the purpose underlying legislation, a court is not limited to legislative history, but may look to widely held beliefs and assumptions regarding the evils at the time such legislation was enacted. Regarding new allegations of harm, or other claims which played a minor role in the legislative history, the evil alleged by the prosecution may nevertheless be so great (e.g., genetic defects), or the contemporary evidence so strong, that it would be untenable to conclude that the legislation would not be enacted today on the basis of such evil. In such cases the court should find that the statute does serve a compelling interest. If the defendant should wish to challenge the government's case that the legislature could reasonably find compelling interest X, on the ground that X is not within legislative intendment (the defendant need not if the state's proof of harm or of the absence of an adequate, less-restrictive alternative, is insufficient), he should bear the burden of persuading the court that X did not significantly motivate the legislature, and that X is not such a grave evil supported by such strong evidence as to require the conclusion that the prohibition would now be enacted substantially on the basis of X. Whenever a sustainable compelling interest is found under this approach, the government need show only that the legislature could reasonably have rejected

226 We are not here speaking of new evidence in support of claimed evils that gave rise to the legislation, reenactments, or supportive legislation, but of newly alleged evils.
the defendant’s claim that a particular less-restrictive alternative would have avoided the significant risk to a paramount state interest.227

In considering evidence of harmfulness relating to any compelling evils (whether or not a significant influence on the legislation), including the alleged evils of less-restrictive alternatives, a court should not limit itself to evidence in existence when the legislation was passed. While the constitutionality of a statute does not depend on passing fancies in the world of science and medicine, over a period of time increments to a body of knowledge may undermine or strengthen the ground on which legislative conclusions once rested; and it may be demonstrated that a belief which at one time may (or may not) have reasonably been found supported by a preponderance of evidence is now unreasonable (or reasonable). The government’s claim is that at the time the defendant exercised his religion contrary to statutory strictures, his conduct was not protected by the Constitution. If the legislature could not constitutionally deny religious exemptions (conditional or unconditional) for the defendant’s conduct on the day the defendant committed the prohibited acts, his conduct is not now subject to punishment.

Since the protection of social values through assessment and prevention of social evils is ordinarily the province of the legislature, the legislative decision is entitled to deference notwithstanding the fact that certain statutory applications interfere with religious exercise. It is given that deference by virtue of the standard of review. The government need not persuade the court by even a preponderance of evidence that there is in fact a compelling interest in enacting the statute and denying the alternatives. The court need only be

227 The government’s burden should not be increased by virtue of the fact that a legislature may not have explicitly considered the proffered alternative; rejection of alternatives is implicit in the enactment. It may be argued that where the legislature was not apprised of religious use, a court should not assume that, had it been so apprised it would have rejected a particular alternative, just as it should not assume that the legislature relied on any compelling interest asserted by the government; and that in both cases there should be either proof of actual reliance (on a claimed evil) and rejection (of a particular alternative), or such strong proof of such a grave evil in the prohibited conduct and less-restrictive alternatives that it would be untenable to assume that the legislature would have failed to enact the legislation and reject the alternatives. But we have assumed that where a claimed harm was a significant factor underlying the legislation, and is supported by what could reasonably be considered a preponderance of evidence, that the legislation would have been enacted in the face of the religious claim, we should make the parallel assumption that where a legislature relied on or presumably would have relied on a claimed evil it would have rejected both the unconditional religious exemption and any alternative which could reasonably have been rejected on the basis of evidence of harmfulness before the court (testimonial or published).
convinced on the basis of all the testimonial and published evi-
dence before it that the legislature would not be unreasonable in
concluding that a preponderance of evidence demonstrates such in-
terest. Where the evidence is such that a court in a civil case would
not have erred in denying the defendant a directed verdict at the
conclusion of all the evidence (in a hypothetical case where the
plaintiff had to satisfy a jury of danger to a compelling interest),
then the court cannot hold that the legislature erred. Certainly this
standard gives the legislature a broad range of discretion within
which its "mistakes" (judged by absolute standards) are not subject
to judicial review.

In the final analysis however, the constitutional judgment rests
with the courts. A court betrays its constitutional mandate when it
holds, as did the Fifth Circuit, that (1) "it is not incumbent upon the
Government to produce evidence" to contradict expert testimony and
scientific studies tending to prove that the prohibited practice is rela-
tively harmless;\textsuperscript{228} (2) since "Congress has demonstrated beyond doubt
that it believes marihuana is an evil in American society and a seri-
ous threat to its people,\textsuperscript{229} this congressional conclusion is beyond
review even when it infringes on religious freedom; or that (3) to
uphold such infringement a court need look no further than testi-
mony given by law enforcement officials at congressional hearings 20
years prior to the prosecution, testimony which had subsequently
been found "disproved" or "not proved" by disinterested high-level
government agencies such as the LaGuardia Commission,\textsuperscript{230} the 1963
White House Commission on Narcotics and Drug Abuse and the 1966-
1967 Presidential Crime Commission.\textsuperscript{231}

Had the court examined the evidence, the fact that loud claims on
both sides of the harmfulness question have found their way to the
printed page would not establish that Congress could today reason-
ably decide that the use of marihuana endangers a compelling in-
terest sufficient to overcome religious freedom. While a court is not
equipped to second-guess legislative resolution of bona fide scientific
disputes, it can and should determine whether there is indeed such
honest scientific disagreement on whether use of a drug involves a
given risk of a given evil, which the court regards, respectively, as
significant and compelling. In so doing, greater weight should be
given to conclusions of uncommitted scholars, results of controlled
studies, and findings of disinterested, authoritative agencies assessing

\textsuperscript{228} 383 F.2d at 860.
\textsuperscript{229} Id. at 861 (emphasis added).
\textsuperscript{230} The Mayor’s Comm. on Marihuana, The Marihuana Problem in the
City of New York (1944).
\textsuperscript{231} President’s Comm’n on Law Enforcement and Administration of
the state of evidence,232 than to the unscientific and often self-serving claims of law enforcement officials,233 obviously unscientific tracts or articles laced with hearsay or hysterical, inflammatory language,234 materials which use ominously sounding medical terminology to describe unusual but not pernicious effects,235 or reports and writings which place primary reliance on these preceding sources.236 In other words, a court, while applying a deferential standard of review, must evaluate the evidence as a disinterested, sophisticated fact-finder.

An article-by-article analysis of the marihuana materials would take us beyond the intended office of this commentary (indeed, other psychedelics seem more likely to be involved in contemporary religious movements); we simply state our conclusion and invite others to test it against all available evidence, virtually all of which is cited in the Brief or in the note below.237


233 "[W]e must] eliminate from the minds of the people and especially from the minds of the legislators the idea that the people who arrest or prosecute drug addicts have superior knowledge of drug addiction." Kelz, Drug Addiction: A Medical Problem 172 (1962).

234 "Mr. Anslinger's conception of marihuana which has been widely accepted because of its author's international influence is as distorted as the conception of alcohol held by the Anti-Saloon League. It pictures a life of delirium, wildness, gruesomeness, irresponsibility, violence and crime. It is a scene populated with stories of horror, of girls screaming and crying, of families murdered, and of vicious criminals preying on the unsuspect. It ties marihuana in with racketeers and mobsters, with depravity and sin, with evil men and evil attitudes." Skolnick, supra note 114, at 13-14.

235 See text accompanying notes 114-16 supra.

236 Professor Skolnick suggests that a study of international drug agencies which have made extreme claims against marihuana illustrates "how organizations are created and used to promulgate a distorted conception of social reality, that is, how falsehood achieves the status of authoritative truth via organizational control." Skolnick, supra note 114, at 14. He points to the overlapping personnel among these agencies, their refusal to consider scientific evidence undermining various claims of dangerousness, the grossly disproportionate influence of two or three quasi-experts (Anslinger, Dr. Pablo Wolff) on their policies, and most interestingly, the fact that their claims of dangerousness are either without citation, or are cited to works which are themselves mere assertions or hearsay based on little or no experimental evidence, materials that are outdated and controverted, their own earlier reports or the findings of a small circle of cordial "authorities." "We have found a mythology in which later writers cite the authority of earlier writers, who also had little evidence. We have found, by and large, what can most charitably be described as a pyramid of prejudice, with each level of the structure built upon the shaky foundations of earlier distortions." Id. at 16.

237 See Brief, supra at 681-85 and the following materials cited in the Brief on Appeal for the United States in Leary v. United States: Halbach, Isbell & Seevers, Drug Dependence: Its Significance and Characteristics (World
The fears which have motivated federal legislation and heavy penalties against the use of marihuana (i.e., that it leads to crime, heroin and physiological addiction), cannot reasonably be thought to be supported by the weight of existing evidence. Proof of a connection between marihuana and mental illness is also quite tenuous; the principal support for that claim rests on studies conducted in India with heavy and chronic users of hemp derivatives far more powerful than marihuana; and, as Professor Blum found: "[I]n the United States neither cannabis psychosis nor cannabis dependency has been described." There is some evidence that a psychotic episode can occur in predisposed individuals. But the evidence is weak, the risk is low, the case against alcohol is at least as strong, there are less-restrictive alternatives, and it is highly doubtful that Congress or the state legislatures, but for their misguided fears of other evils, would have found a compelling interest in punishing possession or allowing presumption of other crimes from the fact of possession. The remaining case against marihuana is that prolonged and excessive use is associated with (but not clearly the cause of) lethargy, social disengagement, slothfulness, loss of productivity and initiative, and perhaps eventual dependency on private or public economic and medical support. It is submitted that neither the risk nor the harm is substantial enough to do violence to a paramount state interest; certainly not to any such interest which society cannot protect by substantially less-restrictive infringements of religious freedom.

Health Organization Bull. 1965); Hodapp, Marihuana: A Review of the Literature for Analytical Chemists (Bureau of Customs 1959); Merrill, Marihuana, The New Dangerous Drug (Opium Research Comm., Foreign Policy Ass'n 1950); Walton, Marihuana: America's New Drug Problem (1938); P. Wolff, Marihuana in Latin America: The Threat It Constitutes (1949); Creighton, Narcotics: Their Legitimate and Illicit Use, (Bureau of Narcotic Enforcement, Cal. Dep't of Justice 1956); Marcovitz & Myers, The Marihuana Addict in the Army, 6 War Medicine (1944); Munch, Marihuana and Crime, 18 Bull. on Narcotics 15, 16 (1966); Stuart, Ganja, 12 West Indian Medical J. 157 (1963). See also N.Y. Times, Sept. 14, 1967, at 41, col. 4.

238 Blum, supra note 232.

239 A conclusion buttressed by the fact that in the face of much stronger evidence of the psychic dangers of LSD, Congress chose not to prohibit possession, several states have declined to act, and those states prohibiting possession have deemed it a misdemeanor.