William & Mary Law Review

Volume 6 (1965)
Issue 2

Article 10

April 1965

Constitutional Law - Freedom of Religion - Hallucinogens: The Right to Spirited Spiritualism. People v. Woody, 40 Cal. Rptr. 69 (1964)

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> is the benefit the bankrupt's estate and its creditors have derived from the services rendered.

The court concluded its opinion with a financial summary which showed a balance of $4,200 out of gross assets of $19,000; against this balance were claims of allowances for $5,500, and priority claims of over $50,000. Nothing was available for general creditors. On the basis of these figures, the court thought it was reasonable to reduce the appellants' fees from $2,500 to $750.

Bankruptcy courts under section 60(d) now have more latitude than ever before in assessing fair and reasonable attorneys' fees. *Levin and Weintraub* v. *Rosenberg*[11] involved a substantial reduction in fees, and it is immediately evident that courts handling bankruptcy matters have already strongly considered Congressional intent and the spirit of the Bankruptcy Act—to assess fees so as to give the greatest benefit to the creditors, and at the same time, to protect the bankrupt from further depletion of his estate.

David Beach

Constitutional Law—Freedom of Religion—Hallucinogens: The Right to Simulated Spiritualism. The Native American Church of California has no membership requirements, no church records, no recorded theology, but has an estimated membership of 30,000-250,000 Indians. The religion of the Church embraces the consumption of an hallucinogen, lophophora, better known as peyote. Lophophora embodies the Holy Spirit and the partaker enters into contact with the Deity. The clinical effects of the consumption of lophophora are manifold. Varying with the individual, it ordinarily produces two stages: in the first, it acts as a stimulant causing wakefulness with physical and mental exhilaration, and, in the second, as a depressant causing an intoxication with accompanying visions and hallucinations.

During a service, defendants in *People v. Woody*,[1] were apprehended and charged with the unlawful possession of lophophora in violation of Section 11500 of the Health and Safety Code.[2] They pleaded not guilty,

11. *Supra* note 3.

1. People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), reversing 35 Cal. Rptr. 708.

2. Cal. Health and Safety Code, § 11500; § 11540 specifically prohibits the possession of lophophora.

contending principally that their possession occured in the exercise of their religion, and, as such, the statute making such possession unlawful abridged their constitutionally guaranteed right to the free exercise of religion as declared in the First Amendment.[3] The trial court rejected the contention, upheld the statute prohibiting possession of this toxic substance, and supported their conclusions by their judicial cognizance of the reasonable relation to the promotion of public health, safety, and general welfare. The Appellate Court affirmed the decision, but the Supreme Court of California reversed the judgment by their balancing of competing values on the symbolic scale of constitutionality. The court felt that the unprescribed use of lophophora was but a slight danger to the state, and to the enforcement of its laws, while the use of lophophora incorporated the essence of defendants' religious expression. Anticipating reactions, the court in summary said:

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotics law than to carve out of them an exception for a few believers in a strange faith.[4]

A state has the inherent power within Constitutional limits to promote health, safety, and general welfare of the society,[5] and whenever conditions appear in the state which present a substantial threat, the duty arises on the part of the state to enact such provisions.[6] California has previously sustained public health, safety and welfare statutes although rights of citizens may be affected,[7] if by any fair construction it has a tendency to effect its object.[8] Furthermore, if the meaning of the provision is plain, then there is no opportunity nor justification for judicial construction.[9]

The decision in *People v. Woody*[10] allows a carving and an exception from the health and safety laws of California based upon the First Amendment, operative upon the states by means of the Fourteenth

3. U.S. CONST., Amend. I.

4. *Supra* note 1 at 821.

5. Reetz v. Michigan, 188 U.S. 505 (1903); Mugler v. Kansas, 123 U.S. 623 (1887); State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926), discussing the laws punishing unlawful possession of lophophora in Montana. See generally, 31 U. CINC. L. REV. 335 (1962).

6. People v. Kervick, 42 N.J. 191, 199 A.2d 834 (1964).

7. Rosenblatt v. Cal. State Board of Pharmacy, 69 Cal. App.2d 69, 158 P.2d 199 (1945).

8. *In re* Gray, 206 Cal. 497, 274 Pac. 974 (1929).

9. Sandelin v. Collins, 1 Cal.2d 147, 33 P.2d 1009 (1934).

10. *Supra* note 1.

Amendment.[11] When this type of assertion is made, the State must convincingly show an overriding and compelling state interest[12] to justify the possible infringement of personal rights.[13]

The First Amendment inhibiting legislation in regard to religion has a double aspect. It prevents compulsion by law of the acceptance of any creed or the practice of any religion. It permits freedom of conscience and freedom to adhere to any religious organization or form of worship. On the other hand, it safeguards the free exercise of the chosen form of religion.[14] A dual concept emerges: the freedom to believe and the freedom to act.[15] The first is absolute, but the latter cannot be. One's conduct must remain subject to regulation for the protection of society.[16] If it were otherwise, one could excuse any behavior by becoming a law unto himself through the expression of his professed religious belief.[17]

The Supreme Court in the well known *Reynolds v. U.S.*[18] case held Congress could constitutionally apply to Mormons a prohibition against polygamy, and, in doing so, promulgated a basic test for the constitutionality of state legislation. The degree of abridgement of religious freedom must be ascertained, and the degree of danger to the state must be determined.[19] However, an inadequate showing of state interest will invalidate state legislation regardless of the degree of the infringement of an individual's religious belief.[20]

The use of lophophora by the defendants in their religious belief can be examined, not by intruding into the religious issue, but by question-

11. Cantwell v. Conn., 310 U.S. 296 (1940); Schnuder v. State, 308 U.S. 147 (1939).

12. Gibson v. Fla. Leg. Investigation Comm., 372 U.S. 538 (1962).

13. Murphy v. Cal., 225 U.S. 623 (1911).

14. Cantwell v. State of Conn., *supra* note 11.

15. *In re* Currence, 248 N.Y.S.2d 251 (1963).

16. Shelden v. Fanin, 221 F. Supp. 766 (D. Ariz. 1963); U.S. v. Williard, 211 F. Supp. 643 (N.D. Ohio 1962); Holdridge v. U.S., 282 F.2d 302 (8th Cir. 1960); Cude v. State of Ark., 377 S.W.2d 816 (Ark. 1964); State v. Congdon, 76 N.J. Super, 493, 185 A.2d 21 (1962); Craig v. Md., 220 Md. 590, 155 A.2d 684 (1959).

17. Davis v. Beason, 133 U.S. 33 (1890).

18. Reynolds v. U.S., 98 U.S. 145 (1878).

19. Braunfeld v. Brown, 366 U.S. 509 (1960); Prince v. Mass., 321 U.S. 158 (1943); Bridges v. State of Cal., 314 U.S. 252 (1941); Whitney v. People of State of Cal., 274 U.S. 357 (1926); Schenck v. U.S., 249 U.S. 47 (1918); Levitsky v. Levitsky, 231 Md. 338, 190 A.2d 621 (1963).

20. Sherbert v. Verner, 374 U.S. 398 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1959); Niemotko v. Md., 340 U.S. 268 (1950); W. Va. State Board of Education v. Barnette, 319 U.S. 624 (1943); *In re* Jenison, 125 N.W.2d 588 (Minn. 1963); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791 (1962).

ing whether or not the claimant holds his belief honestly and in good faith.[21] Assuming the use of lophophora to go to the essence of their religion, the indiscriminate use of it as a "health restorer" as found in the trial court, should have been given more attention by the Supreme Court of California.[22] Instead, they briefly stated that they did not, in fact, use it in place of medical care. This is not necessarily a contradiction, as they may well have sought medical aid, reserving lophophora for minor ailments. Surely the court was cognizant of the effect of indiscriminate and unprescribed use of an hallucinogen. The danger to private citizens operating motor vehicles would alone be sufficient to show a compelling state interest. By ignoring the specific health and safety laws of the state, the court has legally sanctioned unprescribed use of lophophora, endangering the paramount interests of the individual, and depriving society of protection which it needs and should have. The public interest is clearly established, the action of the legislature is embodied in a properly drawn law satisfying the requirements of definiteness and certainty, and it should not be prevented from giving such protection on the basis of a doctrinaire and inflexible interpretation of the federal bill of rights.[23]

If the courts did not deem this a sufficient compelling state interest to permit legislation limiting religious freedom of action, it should have affirmed the appellate court's holding for yet another reason. Neither a state nor Congress can pass laws which aid one religion, aid all religions, or prefer one religion to another.[24] If the distribution of Gideon Bibles in public schools amounts to a preference of one religion to another,[25] how then may the Supreme Court of California accord to the Native American Church the right to unprescribed use of a narcotic in violation of health and safety laws without, in fact and in law, preferring their religion to another?

Balancing of values is the essence of judging. However, the Supreme

21. U.S. v. Ballard, 322 U.S. 78 (1944). *Contra,* State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926), the court while examining the tenets of the Native American Church found no basis for the use of lophophora in Romans, Isaiah or Revelations as claimed. The court held the use or lophophora to be inconsistent with good order, peace and safety.

22. Feiner v. N.Y., 340 U.S. 315 (1960).

23. Nutting, *Is the First Amendment Obsolete?* 30 GEO. WASH. L. REV. 167 (1947).

24. Everson v. Board of Education, 330 U.S. 1 (1947).

25. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953); see also, Schempp v. School District, 374 U.S. 203 (1963) (Bible reading in schools); Brown v. Orange County Board of Public Instruction, 128 So.2d 181 (Fla. 1960) (prohibiting the distribution of King James Bibles in schools).

Court of California has not considered the whole spectrum of values. The compelling state interest should have sufficed to affirm the conviction of the defendants, especially when the reversal does result in the preferential treatment of the members of one religion to another.

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