The Entheogen Law Reporter

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

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Living Off The Land

Notes for Surviving on A Hostile Legal Topography

The information in this article is presented on the premise that people who sincerely use scheduled entheogens in bona fide religious or spiritual practices, and do so in a manner which restricts any associated harms to themselves and others, are protected under the Religious Freedom Restoration Act of 1993, and, consequently, are not in violation of state or federal laws outlawing the possession, use, or manufacture of those scheduled entheogens. The following information is presented in this context only and is not, nor should it be considered as, advice or encouragement to violate the general laws proscribing the possession, distribution, or manufacture of controlled substances.

As readers of TELR are constantly reminded, some of the most efficacious entheogens are explicitly illegal to possess, or fall into a legal gray area. Past articles have discussed the religious defense to a charge of possessing an ostensibly illegal entheogen, and careful reading of those articles should provide readers with a wealth of ideas to better structure their entheogenic practices so as to maximize the likelihood of presenting a successful religious defense in the event of an arrest.

Unfortunately, the protection afforded by RFRA is, as typically invoked, one which comes into play *after* an arrest. In other words, as normally employed, RFRA is not a bar to arrest, but rather a potential defense to criminal conviction. For this reason, entheogen users who might have a valid religious defense, are nevertheless forced to practice their religion under the constant threat of arrest. This article will point out a number of steps which religious entheogen users have employed to proactively protect their privacy in the hopes of avoiding arrest in the first place.

Like medical harm reduction techniques, legal harm reduction begins by recognizing that the use of some entheogens (i.e., those that are scheduled) places the user in a certain amount of danger. A healthy degree of caution; one which never allows a religious user to forget that he or she is treading on unsteady and often uncharted legal ground, has operated as a built-in motivator for implementing a number of easy to follow rules. As with "safe-sex" techniques, the ideas discussed in this article will be worthless if unused. Therefore, the first step to staying out of the reach of the law, is to maintain a constant awareness for the dangerous legal terrain underfoot and act with the appropriate degree of caution.

Taking a few moments to candidly consider one's own level of risk aversion is the starting point. This is often a difficult analysis to make. As a simple guide to determining risk aversion, an entheogen user might consider asking him or herself the following questions:

(1) How would my life be impacted if I were *convicted* of a "drug crime?" (Would a professional license be lost or jeopardized? Could I withstand

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serving the potential prison term? As a convicted felon, would I ever again be employable in my field? Do I live in a state were such a conviction could lead to the forfeiture of my home?)

(2) How would my life be impacted if I were merely *arrested* for a "drug crime?" (Would the stress of an arrest be too much for me (and my family) to handle? Would a professional license be placed in jeopardy? Could I afford to hire a good criminal defense attorney? Could I afford to make bail – or would I likely have to remain in custody until the end of my trial and perhaps beyond? Do I live in a state where a mere arrest could lead to the forfeiture of my home?)

Entheogen users who answers these questions and are led to conclude that merely being *arrested* would take an unacceptable toll on their life as currently lived, should consider themselves as highly risk averse. Entheogen users who could withstand an arrest so long as they ultimately escaped conviction, should consider themselves moderately risk averse. Lastly, entheogen users who could withstand both arrest and a criminal conviction should consider themselves risk neutral.

The point of this thought-experiment is not only to get entheogen users to pause and take account of their situation, but also to emphasize the very important difference between avoiding *conviction* versus avoiding *arrest*. To many people, simply being arrested would bring their world crashing down, even if they were ultimately acquitted via a religious defense. These people need to know who they are.

Each user of visionary plants or substances must determine for him or herself just how much energy can be healthily devoted to legal considerations. Some risk averse shamanic practitioners might choose to use only clearly legal entheogens to completely eliminate legal fears. However, many entheogen users – of all risk aversion levels -- have developed powerful alliances with outlawed plants and substances which they consider far stronger than any outwardly imposed duties under the law.

The point is that any user of entheogens should take some time to collect his or her thoughts on these issues, undertake an individualized assessment of his or her own level of risk aversion, and live with a level of awareness and caution in accordance with that evaluation.

Entheogen users who have chosen to use scheduled entheogens in their religious practices have followed some fairly simple guidelines which have significantly reduced the likelihood of being arrested. In order to arrest a person for possessing a scheduled entheogen, the police must first obtain information that the person is indeed in possession of the entheogen. Because many entheogens (at least in personal use amounts), are relatively low in mass, Law Enforcement is faced with an obvious problem of detection. Additionally, because the use, cultivation, and purchase of entheogens are all victimless crimes (in contrast to most other crimes), police officers rarely learn about an entheogen-related offense by way of a victim's report.

So, what is it that leads to the average arrest of an entheogen user? In the *overwhelming* number of cases, the arrested occurred as the direct result of a serendipitous discovery made by a police officer while he or she was investigating a non-entheogen-related offense.

Many people, for example, have been arrested after a police officer stopped their vehicle for a minor traffic infraction and, upon approaching them, the officer detected the aroma of marijuana or saw a partially smoked joint on the vehicle's floorboard, thereby gaining the legal right to search the car for more marijuana or any other scheduled substances. Many arrests have also occurred after police responded to a loud party or rave and saw contraband, or evidence of its use, in plain view.

In many cases, police officers have actively used a minor offense or infraction as a platform for fishing for drugs. This has often occurred after a police officer stops a motorist for a minor traffic violation and has a inchoate hunch that the occupants might be in possession of drugs. It's extremely common for the police officer to "ask" the driver if he or she will consent to a search of the automobile.

Granting consent to an officer's request to search has been, in *many* cases, the act which led directly to the arrest of an entheogen user – an arrest which would not have occurred had the person legitimately refused to consent.

A request for consent *is* a request to waive the Fourth Amendment

Some police officers are forthright and plainly ask for consent to search a car for drugs. Many other officers, however, are not so forthright and will sneakily phrase their request to make it easily misinterpreted as *requiring* compliance. For example, after handling the routines of a traffic violation the officer might ask the driver "would you please step out of the car and open the trunk of your car please?" While the written version of this request ends in an obvious question mark, note that when said out-loud, the fact that the officer is asking a question – not telling the driver what to do – is not nearly so apparent.

In such a situation, an otherwise law-abiding citizen, who is understandably nervous in the presence of police officers easily, but mistakenly, believes that he or she has no choice but to comply with what seems like a demand.

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A police officer's request for consent to search is equivalent to requesting that the person completely waive his or her protections under the Fourth Amendment. In the face of such a request, it is *perfectly appropriate* for the person to invoke the Fourth Amendment's protections by refusing to grant consent for such a warrantless invasion of privacy.

To help ease the awkwardness which many people feel when standing-up to a police officer, some people have told the officer that they're late for an important appointment and need to be on their way. Other people have been able to redirect some of the stress, by telling the officer that their company lawyer has advised employees never to consent to a warrantless search and that they're just following the lawyer's advice.

Some non-lawyers think that the very act of refusing to grant consent to an officer's request for consent would itself give the officer probable cause to believe that the person is in possession of contraband. While this might seem reasonable on first blush, there is a very good reason why such a presumption by police officers is not permitted. Permitting police officers to make such an inference would effectively destroy the Fourth Amendment by turning it into a "tails you lose; heads the officer wins" double bind. Either way (whether the person granted consent or withheld consent), the response would justify a warrantless search by the officer. In other words, an officer would *always* be able to avoid the Fourth Amendment simply by prefacing any warrantless search with a request for consent. Regardless of the suspect's answer, the officer would gain a legal justification for searching. For this reason, the United States Supreme Court has made very clear that a person's refusal to grant consent may not itself be used by police officers to justify a warrantless search.

Many court cases teach that it is naïve to assume that an officer will forgo an actual search simply because the person consents. (In other words, it is dangerous wishful thinking for people to assume that the act of granting consent will convince the officer that they must not be hiding anything such that the officer will forgo searching.) A person in possession of a scheduled entheogen when an officer is asking for consent to search, holds the outcome of the encounter in his or her own mouth. Consenting to a search is like walking into a police station, handing over scheduled entheogens, and asking to be arrested.

Entheogen users, faced with an officer's request for consent, have avoided arrest by collecting their thoughts, being brave, and politely but confidently refusing to waive their Fourth Amendment right. If more people would do the same, this simple action would dramatically reduce the number of entheogen users arrested each year.

Many cases teach that, in addition to refusing to consent to a search, entheogen users should always keep scheduled entheogens out of view. While this is common sense, people often forget that if stopped for a traffic violation, they will likely have to reach into their wallet in order to obtain their driver's license and into their glove compartment to obtain their vehicle registration. Many people have been arrested after a police officer stopped their car for a minor traffic violation and spotted some LSD tabs when the motorist opened his wallet, or a baggie of marijuana when the motorist went to retrieve the vehicle's registration from the glovebox. These are plain view observations which permit a police officer to automatically seize the contraband on sight.

Therefore, keeping private items out of plain view often means thinking ahead. Closed – even better yet, locked – opaque containers have been successfully employed. Briefcases, perhaps because many judges use them to carry their own private items, have been recognized as particularly private containers. One federal court (the 11th Circuit) recently described this particular characteristic of briefcases, noting:

> A briefcase is often the repository for more than business documents. Rather, it is the extension of one's own clothing because it serves as a larger "pocket" in which such items as wallets and credit cards, address books, personal calendar/diaries, correspondence, and reading glasses often are carried. *Few places outside one's home justify a greater expectation of privacy than does the briefcase.* (Emph in orig.)[1]

. . . it is unwise to store nonaromatic entheogens near aromatic entheogens

The plain view doctrine has been extended to include plain *smell*, and plain *touch* discoveries. If an officer is able to detect the aroma of an illegal substance coming from a container, many judges will apply the plain smell doctrine to hold that the officer had a right to seize the container from which the aroma emanated.

On a related note, many cases teach that it is unwise to place *nonaromatic* scheduled entheogens, near *aromatic* scheduled entheogens, like marijuana. Were a dog to alert to the marijuana or an officer detect its aroma with his own nose, the officer would seize the marijuana and, in so doing, likely spot the other entheogens kept nearby. Had the nonaromatic entheogens been kept separate from the marijuana they might never have been discovered with the result that the eventual criminal charges would have been less severe, if arrest was not entirely avoided.[2]

The doctrine of plain *touch* often comes into play when a police officer is conducting a legal pat-search and feels an object which he or she, "based on extensive training and experience," can positively identify as contraband. In such a situation, most officers will seize

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the tactilely detected item and many judges will uphold that seizure by invoking the plain-touch doctrine.

One exception to the rule that most entheogen-related arrests occur as the result of serendipity, arises when law enforcement agents are able to identify a particular event which they believe will involve a large proportion of drug users – including entheogen users.

Many arrests occurred at Grateful Dead concerts for just this reason. (A recent article in *Z Magazine*, for example, quoted Michael Heald, spokesperson for the DEA in San Francisco as saying "We go where the drugs happen to be – at the concerts.")[3] In May of this year, police made more than 100 arrests during the four-day "Weedstock" festival in Sparta, Wisconsin. Thirty-three people were arrested during a similar festival (the "Hemp Fest") held that same month in Davenport, Iowa.

Normally, police officers and DEA agents are far more focused on addictive drugs or those with a much larger user base than the more esoteric shamanic inebriants. Police are, however, fairly familiar with LSD in its various forms and carrier mediums, as well as psychoactive mushrooms. For this reason, there is an increased risk associated with possessing or obtaining such entheogens at a public event which will predictably draw users of illegal drugs.

It is theorized that the United States Postal Service and private express mail services are the world's largest traffickers in scheduled substances – unwittingly, of course. With over 180 billion pieces of mail delivered each year (580 million per day), its obviously impossible for the Postal Service and private carriers to detect all the entheogens sent through the mail. LSD, for example, is not only odorless but can also be placed on sheets of paper, essentially unidentifiable from the average letter. Nevertheless, each year, the post office and private mail carriers seize millions of dollars worth of scheduled substances, make controlled deliveries of the letters or packages, and arrest the recipient. (For more on controlled deliveries see Q&A in this issue.)

As Issue 1 of TELR described, some of these seizures have been the result of the package fitting what is known as the "drug package profile." A significant number of seizures have also been the result, of a serendipitous discovery made when a package was poorly packaged, damaged in transit, and found to be leaking a suspicious substance. I am aware of least one criminal case in which an employee of Federal Express testified that it is the company's policy anytime there might be an insurance claim, to open the package and examine its contents.[4] Other arrests have resulted from using false phone numbers and incorrect addresses. Testimony from another case indicated that when Federal Express cannot resolve a delivery problem through research, it is company practice to open the package to see if any other delivery information can be found inside.[5] As a non-governmental entity, Federal Express is unconstrained by the constitution. Employees do not need a search warrant — or any reason whatsoever— to open a package and search for contraband. In contrast, the US Postal Service *is* constrained by the constitution and, with the exception of incoming international mail, can only open first-class mail *if* a search warrant so authorizes.

It should not go unmentioned that us-

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Donut Dunked

In mid-June of this year, police in Madison County, FL, arrested a man known to his friends on the Internet as "Donut." He was arrested for possession of several Schedule I entheogens, and charged with three counts of possession of controlled substances, each a third degree felony in Florida. The substances in question were LSD, psilocybin-containing mushrooms, and mescaline sulfate (yes, the genuine article).

Under the terms of a plea bargain, Donut pled guilty to the three counts in return for a withheld adjudication (no conviction on his record) and no prison time. He forfeited the vehicle he was traveling in, as well as the $2000 cash bond he posted following his arrest. Finally, he was sentenced to five years drug offender probation. A condition of his probation is that he successfully complete an *in-patient* drug treatment program which could last as long as one year, with a six month follow-up period.

In correspondence with TELR (authorized for printing), Donut explained the circumstances that led to his arrest:

> I was stopped for excessive speed. A stupid, stupid thing given the contents of my car, but I was simply distracted that morning, my concentration drifted off of the speedometer, and the next thing I knew there were lights in my rear-view mirror. The cop wrote me a ticket and then asked me if I had any contraband in the car. I, of course, said "no." The officer then asked if I would mind if he searched my vehicle. I said something to the effect of: "Well, as you can see by the speed I was traveling at, I'm in quite a bit of a hurry to get back to Orlando, where I have pressing business, so I'd prefer it if you did not." He happened to have a dog with him in his patrol car, and said that he had the right to walk the dog around the car. If the dog alerted, I would then lose my right to refuse the search. He did so, the dog apparently alerted, and he then searched my car and found my stash. My attorney did not try and challenge the search. He told me that in his opinion, we would have very little chance of getting it thrown out, and that if we went to trial in Madison County (the most redneck, xtian, zero-tolerance, enforcement-oriented county in the state) I would not only likely lose, but probably receive the maximum sentence, so it was in my best interests to accept the deal (according to his judgment).

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ing the US Postal Service or a private carrier to send or receive a package containing a controlled substance is a distinct federal offense punishable by up to four years in federal prison and a $30,000 fine. (21 U.S.C. 843.)

Finally, a number of relatively popular entheogens are preparations of plants which, while endogenously producing scheduled substances, are not themselves expressly listed as controlled substances. As discussed in previous issues of TELR, possession of the vast majority of these plants does not violate the law. (The primary exception has been *Psilocybe* mushrooms which while not scheduled themselves have been called by some courts "containers" of the controlled substance psilocybin, and therefore illegal.)

Under federal law, and the laws of every state, it is considered "manufacturing" a controlled substance to extract a controlled substance from a plant. Therefore, the extraction process itself is often the key turning point between a perfectly lawful plant and an arguably illegal extraction. Aside from the important ritual aspects of performing the extraction and brewing process in conjunction with each ingestion of such an entheogen, cases teach that it is legally wise to prepare (i.e., extract) only so much of an entheogenic plant constituent as will be consumed in the very near future. Legally speaking, it is *much* safer to possess an unscheduled plant that endogenously produces a scheduled substance then it is to possess an extract of that plant -- which a prosecutor could argue is an illegal "mixture containing a controlled substance."

Notes

[1] *United States v. Ramos* (11th Cir. 1996) 12 F.3d 1019, 1024.

[2] In some states (like California), possession of less than one ounce of marijuana is not an arrestable offense. The officer is restricted to seizing the marijuana and writing the offender a citation. But, if the officer also finds a single tab of LSD, or a single capsule of MDMA, it's off to jail.

[3] See, Kelley T. & Berstein D., "LSD, Deadheads, and the Law," *Z Magazine* 41-44, April 1996.

[4] *United States v. Jacobsen* (1984) 466 U.S. 109.

[5] *Seeley v. State* (1995) 669 So.2d 209, 210.

Readers seeking more information like that in this article might enjoy the just-released 2nd edition of my book Marijuana Law. *See page 115 for details.*

Donut Dunked

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I can certainly understand the concerns expressed by Donut's attorney and would not second guess his advice that Donut accept the plea offer and forgo challenging the search. Nonetheless, I do believe that the search of Donut's car was unconstitutional.

Without more evidence, a police officer who stops someone for speeding has no reason to believe that the person is transporting contraband. Therefore, the officer cannot legally prolong the motorist's detention any longer than to write a citation and perhaps run a warrant check.

Forcing Donut to stay put while the officer walked a drug-sniffing dog around the car was unjustified and unconstitutional. The fundamental question was: "Did the officer have specific articulable facts that would have caused a reasonable person in his position to suspect that Donut was transporting drugs?" United States Supreme Court cases teach that a routine traffic stop does not give rise to reasonable suspicion that the driver is carrying contraband. Therefore, the officer can't prolong the motorist's detention for ANY amount of time beyond writing the traffic citation and perhaps running a warrant check.

Unfortunately, what happened in Donut's case is all too common. Most prosecutors will make their plea offers contingent on the defendant not contesting the legality of the search. In such circumstances, even defendants who have a good argument that they were unconstitutionally searched are placed in the very difficult position of having to place all their eggs in the single basket of a suppression motion. If the defendant wins the motion, the evidence seized in the unconstitutional search will be suppressed and the case likely dismissed. On the other hand, if the defendant loses the motion, he has lost the opportunity to accept the more lenient plea offer and faces the maximum punishment possible. Because trial judges will go to great lengths to avoid granting a motion which would suppress all the evidence against a defendant, there's no guarantee that even a plainly unconstitutional search won't be upheld on a specious theory.

On a final note, Donut reported that his attorney "used my spiritual quest as the basis for mitigating circumstances in my case. At my bond reduction hearing and in plea negotiations, he noted my use of these materials in the context of a sincere search for wisdom, understanding, and enlightenment in an attempt to change me in the court's eyes from a nefarious polydrug abuser/potential dealer into a "misguided" seeker. It was apparently effective, sticking in the judge's mind enough that at sentencing (weeks later) he remarked to me "The Quest is over."

Terence McKenna Gagged (Almost)

It's all resolved now, but for several weeks in May it looked like Terrence McKenna had been drafted into a First Amendment legal battle.

Triggering a strange chain of events, the *Los Angeles Times* profiled McKenna in a May 3, article titled "Talking With The Tim Leary of the 90s." The article highlighted McKenna's various theories, essentially depicting him as an edgy experiential theorist proclaiming the benefits of psilocybin and DMT. The article mentioned his upcoming speaking engagement at L.A.'s Wadsworth Theater.

The same day that the article appeared, an anonymous caller contacted the Department of Veterans Affairs complaining about McKenna's upcoming talk. The complaint led Richard Pasquale of the VA to contact UCLA and pressure the University to cancel McKenna's talk. (The Wadsworth Theater, while leased to UCLA by the Veteran's Administration, is located on VA land and is also close to a VA hospital which treats veterans struggling with drug and alcohol dependency.) Mr. Pasquale pointed to a provision in the VA's lease of the theater to UCLA which purported to bar any event at the theater "that is deemed adverse to the interests of the United States or to the mission and program responsibilities of the Department of Veteran Affairs." An anonymous VA official was quoted by the *LA Weekly* as saying that the VA viewed McKenna's upcoming talk as "comparable to having happy hour at the Betty Ford Clinic."[1]

Responding to the VA's complaint, UCLA acted to move McKenna's upcoming talk out of the Wadsworth Theater and into a venue on university property. However, no theater was available with the appropriate number of seats.

With McKenna's talk in jeopardy, Carol Sobel, an attorney with the Southern California chapter of the ACLU, filed suit against the VA on behalf of McKenna. Alleging a "violation of plaintiff's core constitutional rights to engage in protected expression in a public forum," Ms. Sobel sought a temporary restraining order which would force the VA and UCLA to allow the event to go on as scheduled in the Wadsworth Theater.

Evidently recognizing that they had no leg to stand on, the Justice Department filed a statement of non-opposition to the suit, leading United States District Judge Consuelo Marshall to grant the requested restraining order. As a result, McKenna's talk was ordered returned to its original venue in the Wadsworth Theater, where it did in fact occur on Friday, May 10, 1996.

The anonymous VA official who analogized McKenna's talk at the VA-owned theater to having a happy hour at the Betty Ford Clinic, missed the boat for at least two reasons. First, McKenna was not handing out psilocybin mushrooms, but merely *discussing* them in a wide-ranging talk covering everything from mathematics, to shamanism, to his theory of time as a fractal process modeled by the King Wen sequence of the *I Ching*. It's extremely disconcerting that a department of our federal government would move to stop the dissemination of such ideas.

The First Amendment was not designed to protect only pro-government speech. Obviously, its drafters were concerned that in the absence of a clear provision that "government shall make no law abridging the freedom of speech," the government would use its enormous resources to eliminate the expression of dissenting ideas.

The second problem with analogizing McKenna's talk to happy hour at the Betty Ford Clinic, is the utter failure to recognize the crucial distinction between private and public venues. A private clinic is free to restrict – even on the basis of content – the events held on its property. In contrast, McKenna's talk was scheduled to take place in a *public* forum; indeed, the Wadsworth Theater is a quintessential public forum traditionally devoted to assembly, debate, and the communication of thoughts.

To enforce a content-based exclusion in such a forum, the government must show that the exclusion is *necessary* to serve a compelling state interest and narrowly drawn to achieve that end. This is the most stringent test in all of constitutional law.

Whether the whole fiasco was "breathtakingly stupid" as characterized by Ms. Sobel, and/or "a conspiracy against the First Amendment. . . hatched in the bowels of a federal agency and carried out by an employee of a public university for purposes of suppressing free speech" as characterized by McKenna, it once again highlights the extreme emotional volatility often associated with public discussions concerning psychedelics.

Freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom.[+]

Notes

[1] "We'd Love To Turn You Off" *LA Weekly*, May 31- June 6, 1996.

[+] Justice Cardozo (*Palko v. Connecticut* (1957) 302 U.S. 319, 327.

Questions & Answers

Q: Is there any procedure for requesting an opinion or ruling from a court when there is no criminal matter involved? Specifically, can one go before a judge and present argument and evidence that they intend to engage in religious practices involving entheogens and get some sort of preemptive ruling on the matter? A related move might be to seek a restraining order against search and seizure for simple possession, production and distribution of entheogens during sessions or at a particular times and places (rituals, holidays and consecrated sites, for example) – something that would increase the burden of demonstrating probable cause for a search warrant, or require special circumstances pointing to criminal activities other than the mere presence of entheogens.

A: I can think of a number of procedures for seeking a preemptive ruling. First, a religious user could petition the DEA for an exemption from the federal law that prohibits the person from possessing an entheogen which is central to the person's religious practice. Most likely, the DEA would either completely ignore the petition or summarily deny it. The person would then have to file suit in federal district court suing the DEA to grant the petition. This was the procedural path taken in 1969 by Dr. John Aiken, president of The Church of the Awakening. After the Bureau of Narcotics and Dangerous Drugs (the predecessor to the DEA) denied Dr. Aiken's petition, he appealed the denial to the Ninth Circuit. Unfortunately, the Ninth Circuit upheld the BNDD's denial. See *Kennedy v. Bureau of Narcotics and Dangerous Drugs* (1972) 459 F.2d 415.)

Another method, and probably favored, would be to assert a claim under the Religious Freedom Restoration Act, alleging that a state and/or federal controlled substance law violates RFRA by substantially burdening your religious practice. The terms of RFRA expressly authorize such a preemptive suit when they speak in terms of "claims":

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the rules of standing under article III of the Constitution. (42 USC 2000bb-1(c).)

Lastly, in a more experimental vein, one might be able to make a preemptive move by seeking a Writ of Prohibition in a local court. Theoretically, the person would declare that he or she intends to engage in a religious practice involving the use of a scheduled entheogen on a future date certain, and argue that the practice is protected under RFRA and that a writ should be granted ordering law enforcement agent's not to arrest the person for simple possession of the entheogen. Practically speaking, however, I can't imagine any judge having the courage to grant such a writ.

Most religious entheogen users are probably best advised to maintain a very low profile in the hopes of completely avoiding the government's attention. All of the above tactics require the entheogen user to walk directly into the gears of the legal system, and into the law enforcement spotlight. Also, one should consider that the legal expenses associated with a preemptive action would likely be significantly greater than the costs of presenting a religious defense following an arrest. On the other hand, compared to a religious defense following a surprise arrest, one significant benefit of bringing a preemptive suit is that the religious user has almost complete control over the factual scenario which will underlie the entire case.

Q: Is it possible to reverse existing convictions, re-try, or appeal cases under the new terms of the RFRA, analogous to the release of prisoners should marijuana be decriminalized?

A: Yes. RFRA contains a specific paragraph which makes its protections retroactive. The paragraph states:

> This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993. (42 USC 2000bb-3(a).)

Q: What did the government learn by searching the Hogshires' property? (See "Author of *Opium for the Masses* Arrested for Possessing Poppies" in 11 TELR 100.) Can the government check the subscribers of Jim Hogshire's zine *Pills-A-GoGo*? Will the G-Man now record the names of people who are in contact with them? If Your office is invaded will my name be available to the narcs?

Also, if an overseas package is opened by U.S. Customs, what is their normal procedure if something illegal is inside or if it is suspicious? I've ordered controlled substances from overseas only to receive an empty package with "EXAMINED BY U.S. CUSTOMS" tape on it. Approximately 1 out of 10 packages come back that way. Should I be worried?

A: With respect to the search of the Hogshires' apartment, it's my understanding that although the police were waiving around copies of Jim Hoghsire's *Pills-A-GoGo* newsletter, they did not seize the subscriber list. Even if the subscriber list had been seized, however, the subscribers would most likely have nothing to worry about. The subscribers are committing no crime by subscribing to the newsletter, nor does their act of being subscribers to such a newsletter equate to probable cause that they are in possession of dangerous drugs without a prescription.

What would be seized if my law office (also the office of TELR) is ever the subject of a search by police agents is impossible to say. You might be comforted to know that it's very rare for a court to issue a search warrant for a criminal defense attorney's office.

Questions & Answers

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My office, like all defense attorney offices, is filled with confidential documents which are protected by the attorney-client privilege, and courts are wary about doing anything that might violate that privilege and perhaps lead to the dismissal of a criminal case. Nevertheless, the answer to your question is that were such a search to occur, it is possible that your name could fall into the hands of law enforcement. To get the subscriber list, however, the authorities would need a warrant that expressly authorized its seizure. Additionally, they would have to make the seizure during one of the windows in which the subscriber list was not PGP encrypted.

With respect to ordering substances from foreign countries, you should know that if the substances are controlled under U.S. law, you are committing the crimes of attempted importation (and/or importation) of controlled substances.

As your experience confirms, in many situations in which U.S. Customs discovers controlled substances in incoming international packages they simply seize the contraband and destroy it. This is the likely outcome when the amount of contraband discovered is extremely small and/or the drug is relatively unpopular with the public-at-large. At anytime, however, rather than just seize the contraband, the government could make a controlled delivery and then prosecute the package recipient for a federal or state crime of importing a controlled substance and/or possession of a controlled substance.

I just finished representing a man charged with importing from Thailand – in violation of *California* law – almost 2000 grams of opium. As discussed in previous issues, incoming international mail can be searched for any reason at all; no search warrant is required. In this case, a Customs agent found the opium and then notified the city police were the addressee lived. Fifteen city police officers staked out my client's house while a postal inspector made a personal delivery of the package. About one-half hour after delivery, the police raided the house.

I was surprised to learn that Customs agents would contact *local* police rather than always turn the case over to *federal* authorities. Obviously, city police and county prosecutors are much more likely to see such a case as a big deal and go forward with the prosecution whereas federal agents and federal prosecutors might not have.

Resources, Books & Announcements

The Peyote Foundation is a new non-denominational organization whose stated purpose is to promote the understanding of the peyote plant, peyote people, and peyote spirituality. It was founded on May 11, 1996, and has applied for federal nonprofit status.

According to the first issue of its newsletter, the *Peyote Awareness Journal*:

> The Peyote Foundation will generate greater awareness of the peyote plant and its sacramental uses. We encourage membership and participation from any interested individuals. We do not promote one religious sect over another. We will not seek to define what a bona-fide peyotist is. We intend to publish a newsletter, establish a library, research and initiate conservation efforts for the genus *Lophophora*, develop sacramental greenhouses, maintain a membership of supportive individuals and create an educational and inspirational facility.

Among other articles, the second issue of the journal reports on the arrest and trial of a religious peyote and mushroom user in Arizona known as White Dog.

The Foundation currently stewards over 800 peyote cacti in greenhouses on Foundation property in Arizona. (Arizona is one of the states with an express statutory exemption -- not limited to the Native American Church -- protecting religious peyote users.)

Associate membership in The Peyote Foundation is $40 per year and includes a subscription to the *Peyote Awareness Journal*. A six-issue subscription to *PAJ* (without membership) is $25 in the USA, $35 elsewhere. The Peyote Foundation, POB 778, Kearny, AZ 85237.

Psilocybin Mushrooms of the World: a Guide to Identification by Paul Stamets has just been released. I saw this book at the Telluride Mushroom Festival and without any doubt it is the most comprehensive field guide to psilocybin-producing fungi I've ever seen. The book is filled with incredibly rich photographs and describes nearly 100 species including dangerous look-alikes. 256 pages. Softcover. Order direct from Fungi Perfecti for $28.50 (including shipping) 1-800-780-9126.

Psychedelic Resource List – The Book by Jon Hanna of Soma Graphics should be available by the time you read this. I saw a pre-publication copy and was impressed with its completeness and with the usefulness of Hanna's evaluations of the various companies and their services. Over 240 companies and organizations related to visionary plants and substances are described and evaluated. The *PRL* is like a hip Better Business Bureau for the entheogen interested. 120 page softcover with detailed index. 19.95 plus $3.00 S/H (USA) or $5.00 (foreign). CA residents add $1.55 for sales tax. Order from: Soma Graphics, POB 19820, Sacramento, CA 95819.

Marijuana Law expanded and updated 2nd edition by Richard Glen Boire. If I do say so myself, this is an essential legal guide for marijuana smokers and *Cannabis* cultivators. Eighty-five percent of the book is directly relevant to users of entheogens other than marijuana.

Gray Areas magazine says it's "The definitive book on the subject," and drug defense attorney Tony Serra (depicted in the movie *True Believer*) says the book "gives us the legal armaments with which to resist unfair police methods. . . It is like our self-defense manual to guide us to freedom through the maze of onerous anti-marijuana laws." 271 pages. $15.95 + $3.50 s/h (CA residents please add $1.15 sales tax.) Spectral Mindustries, POB 73401, Davis, CA 95617-3401.

Council on Spiritual Practices has released a new version of its Code of Ethics for Spiritual Guides. The Code provides helpful ethical guidelines useful to anyone assisting another person in an entheogen-assisted religious experience. Given that a necessary element of any religious defense pursuant to RFRA will require proof that harm to self and society has been minimized, evidence that one abided by such an ethical code would presumably bode well in the event of arrest.

The Code of Ethics for Spiritual Guides can be obtained via the CSP web-site (www.csp.org), by e-mail (csp@csp.org), or by sending a self-addressed stamped envelope to: Council on Spiritual Practices, POB 460065, San Francisco, CA 94146-0065.

Shulgin Legal Trust Fund was established to reimburse Sasha and Ann Shulgin for approximately $40,000 they paid (out of their retirement fund) for fines and defense expenses stemming from the surprise raid on Sasha's laboratory in October of 1994. As of September 1996, the fund was still about $15,000 shy of its goal. To contribute to the fund, please make checks payable to "Alexander T Shulgin Trust," and send them to: Alexander T Shulgin Trust, POB 322, 343 Soquel Ave. Santa Cruz, CA 95062.

Non-Indian religious peyote users should be as protected as similarly motivated Indian users, concludes a recent law journal article. In a 34-page Note, a law student at St. John's School of Law, argues that AIRFA and RFRA, read together, "provide the means for expanding Indian liberty to similarly situated non-Indians." While the Note contains some inaccuracies regarding peyote, overall it presents a decent argument in support of its conclusion. Francis X. Santangelo, "A Proposal For The Equal Protection Of Non-Indians Practicing Native American Religions" 69 *St. John's Law Review* 255-290 (1995).

Arrests In The News

Domestic Arrests

ARIZONA

Three Arizona men were caught with 20,000 doses of LSD after a patrol airplane spotted the men's car weaving on Interstate 71 near Medina, Arizona. A drug-sniffing dog alerted to 2.2 pounds of marijuana in the car's trunk, leading to a thorough search which uncovered the LSD hidden under carpeting in the trunk. The search also uncovered over $75,000 in currency. The men were indicted on June 11, 1996 in federal court.

FLORIDA

Sheriff's deputies in Hardee County, Florida arrested two men, both age 25, for possessing over 200 *Psilocybe* mushrooms. The men were arrested after an owner of a mobile home, which was unoccupied at the time, noticed signs that someone had been inside, and notified the sheriff's office. Deputies went to the mobile home and entered it pursuant to the owner's report. Inside, they found over 2000 mushrooms and two gallons of what the deputies described as "mushroom juice."

Deputies then staked out the mobile home and waited until two men arrived and went inside. The two men were arrested and charged with burglary, and possession of psilocybin with intent to sell. There was no evidence that the men had cultivated the mushrooms, leading prosecutors to believe that the men picked them from local pastures.

NEVADA

On September 25, 1996, two men, one of whom was a former University of Nevada geophysics professor, pled guilty to trafficking "hallucinogenic mushrooms." The men face maximum sentences of 15 years in state prison, but the District Attorney has agreed to a seven-year lid. In addition, as part of his plea bargain, the former professor will forfeit $60,000. (For a few more details on this case see 11 TELR 105.)

NEW YORK

According to an article in the August 20, 1996, *New York Times*, federal prosecutors have widened the criminal case against New York nightclub mogul Peter Gatien (See, "Entheogen-related Arrests in the News" 11 TELR 105.)

In addition to charges of possession, distribution, and conspiracy to distribute MDMA, the prosecutors have added similar charges pertaining to cocaine. Prosecutors also extended the time-frame of the alleged conspiracy which they now say went on since January 1995.

The *Times* article reported assistant U.S. attorney, Michele Adelman, as saying that the cocaine charges and the lengthened conspiracy charges were based on new information uncovered by a continuing investigation by

(Continued on page 116)

News of Arrests

(Continued from page 115)

the Drug Enforcement Administration. The investigation has been aided by several defendants who pled guilty and agreed to cooperate with prosecutors in return for reduced charges.

Mr. Gatien, who is represented by attorney Benjamin Brafman, has denied all of the charges against him and is currently free on $1 million bail. In an interview held on Monday, August 19, 1996, Mr. Brafman, told reporters: "We do not believe that the new indictment adds anything to the government's case at all. We are confident that once all of the facts are disclosed in a public courtroom that Mr. Gatien will be completely exonerated. Mr. Gatien had absolutely nothing to do with the distribution of MDMA as they originally charged."

Mr. Brafman accused the government's investigators of fabricating evidence, saying that the new indictment indicated the government's intent to get Gatien "at all costs."

UTAH

Game Wardens in Utah perched on high ridges above popular fishing rivers and armed with high-powered spotting scopes have been arresting fishing enthusiasts found possessing controlled substances.[2] Designed to catch people violating the area's fishing regulations, the wardens have also been catching people lighting up marijuana joints and, in at least one case, possessing psilocybin mushrooms.

Many Utah conservation officers drive unmarked vehicles and conduct surveillance on anglers and hunters from afar. An article in *The Salt Lake Tribune*, reported the following two scenarios as common occurrences:

Anglers tell a patrolling DWR officer that they believe a fisherman around the river bend is using bait, because he is having great luck and they are not. The officer stakes out the suspected baitfisher, watching through binoculars or a spotting scope, to see if he yanks a worm out of his creel. Oblivious to the surveillance, the angler pulls out a marijuana joint.

Or, in some cases, conservation officers have approached suspected baitfishers and inquired if they can inspect tackle boxes or fishing vests. Among hooks and leaders, DWR officers frequently find a bag of marijuana.

Brent Johnson, head of law enforcement for the Utah Department of Natural Resources, was quoted in the article as saying, "This is not something we want to do. But, if a game warden rolls into a hunting camp and they're doing dope, we're going to deal with it. We're coming face-to-face with this all the time now."

International Arrests

CHINA

In early September 1996, agents of the Chinese Narcotics Bureau arrested two foreign men in their mid-20s and seized 820 MDMA tablets, 560 LSD tablets, and 2 kilograms of *Cannabis*. Other details are unavailable.[3]

MALAYSIA

The director of the Federal Police Narcotics Department in Kuala Lumpur, Malaysia, has warned that police are cracking down on people found distributing and possessing MDMA. Those convicted of trafficking MDMA, said the director, would be placed in detention camps for two years, pursuant to the Dangerous Special Preventive Measures Act of 1985. Recently, the Health Minister of Malaysia said persons caught trafficking MDMA under section 39B of the Dangerous Drugs Act of 1952, are subject to a *mandatory* death sentence.[4]

Two Singaporians were arrested on September 15, 1996, after police caught them in possession of over 11,000 MDMA pills. The Director of Malaysia's National Narcotics Agency reported that grant money from the U.S. State Department was being used to purchase a "vapour detector and analyser" which would be employed at the international airport in Subang and used to detect drugs smuggled in traveler's suitcases.[5]

SINGAPORE

Since March of this year, Singapore authorities have been cracking down on MDMA use and distribution. Undercover agents of the Central Narcotics Bureau (CNB) have been visiting local nightclubs seeking to purchase MDMA. An article in the *Singapore Straits Times* of August 31, 1996[6] reported that the CNB was "monitoring all clubs and had intensified its anti-Ecstasy operations." The clubs under particular focus are Sparks, Studebaker's and Europa Ridley's. A CNB spokesperson was quoted as saying, "The message is clear. Stay off Ecstasy."

An August 15th raid on the Cabana Executive Club netted 50 people, 31 of whom tested positive for MDMA use. On August 29, 1996, CNB agents raided three different nightclubs arresting a total of 70 people, 18 of whom later tested positive for MDMA use.

Those convicted of possessing even personal use amounts of MDMA face up to ten years in jail and a $20,000 fine. Additionally, after serving their prison term they will have to submit to urine tests three times a week for two years.

Notes

[1] "Two Arrested For Possessing 2,000 Illegal Mushrooms," *The Tampa Tribune*, June 27, 1996.

[2] "Drug-Using Anglers Becoming Catch of the Day for DWR," *The Salt Lake Tribune*, June 16, 1996.

[3] "Alleged Mr. Bigs of Expat. Drug World Seized," *South China Morning Post*, September 2, 1996.

[4] "Over RM 40 Mil. Assets Seized Since 1988 From Dadah Traffickers," *The New Straits Times*, June 18, 1996.

[5] "New Device To Detect Dadah and Explosives," *Singapore Straits Times*, Sept. 25, 1996.

[6] "370 Held in Crackdown Test Positive for Ecstasy," *Singapore Straits Times*, August 31, 1996.

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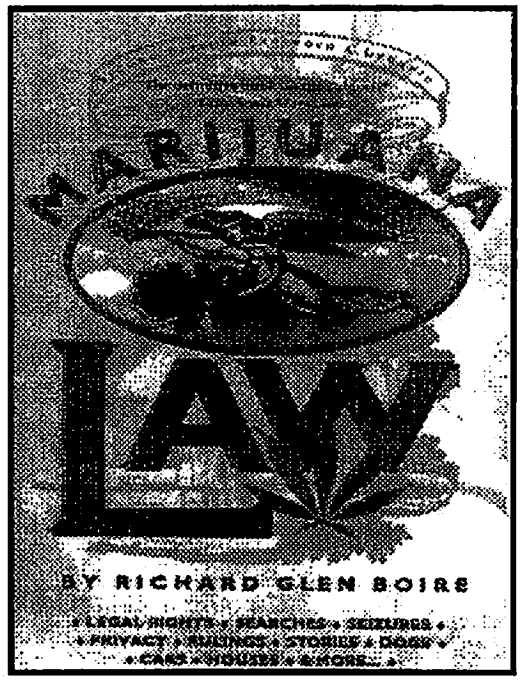

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Don't go back to sleep.
You must ask for what you really want.
Don't go back to sleep.
People are going back and forth across the doorsill
where the two worlds touch.
The door is round and open.
Don't go back to sleep.
-- Rumi

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