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James M Donovan

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Paul Finkelman
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ACT UP

evidence in prosecuting the nonconfessing co-defendant. The confession is considered inadmissible hearsay violating the nonconfessing co-defendant's rights under the Sixth Amendment confrontation clause.

Accomplice confessions have long been an issue due to concern over how "voluntary" the confessions extracted by police really are, as well as the reliability of statements given by confessing co-defendants eager to shift blame for their criminal acts to others. The U.S. Supreme Court has addressed this issue in a number of important cases.

In *Delli Paoli v. United States* (352 U.S. 232, 1957), the Court held that a confession admitted by one defendant that also implicated a co-defendant was admissible if jurors were told to disregard that part of the confession. The *Delli Paoli* holding led the New Jersey Supreme Court Committee on Evidence to recommend that the law be changed to disallow defendant statements implicating a co-defendant, unless all references to the co-defendant could be eliminated. This recommendation was rejected and states were temporarily left to make their own decisions regarding the admissibility of such statements.

The Court readdressed the issue in *Bruton v. U.S.* (391 U.S. 123, 1968), where it overruled its holding in *Delli Paoli*. It held that jury instructions limiting the consideration of statements implicating co-defendants did not satisfy the Sixth Amendment confrontation clause. However, the Court soon relaxed its stance, finding that in certain circumstances, an error allowing such a statement (a *Bruton* error) could be deemed harmless and thus not amount to a breach of the Sixth Amendment's confrontation rights.

In 1970, the Court concluded that an exception to the rule against hearsay must be evaluated by the due-process standards of the Fifth and Fourteenth Amendments instead of the Sixth Amendment confrontation clause. Its reasoning was that the confrontation clause was not designed to cope with the many factors involved in passing evidentiary rules and ensuring the fairness of trials. (See *Dutton v. Evans*, 400 U.S. 74, 1970.)

One long-recognized exception to the hearsay rule was when the evidence established the existence of a conspiracy. In such cases, a statement by a co-conspirator made in furtherance of the conspiracy was admissible against other co-defendants and the declarant was not required to testify at trial. (See Rule 801 (d)(2)(E), Federal Rules of Evidence.) In *Bourjaily v. U.S.*, 483 U.S. 171 (1987), and *U.S. v. Inadi*, 475 U.S. 387 (1986), the Court held that this hearsay exception did not violate the confrontation clause. The Court later expanded this exception by allowing

defendant pleas establishing the existence of a conspiracy to be admissible at trial without the declarant testifying.

EZEKIEL E. CORTEZ

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- People v. Salko*, 47 NY2d 230 (1979)
- U.S. v. Inadi* (475 U.S. 387 (1986)
- United States Constitution, Fifth Amendment
- United States Constitution, Sixth Amendment
- United States Constitution, Fourteenth Amendment

See also *Confrontation and Compulsory Process*

ACT UP

ACT UP—the AIDS Coalition to Unleash Power—came together in March 1987 out of the charismatic exhortations of author and playwright Larry Kramer. Already central to the creation of the Gay Men's Health Crisis, Kramer had grown impatient with the responses by the government and pharmaceutical industry to the AIDS epidemic. No longer content simply to react to the crisis, ACT UP aspired to force change through direct action, confrontation, and media-savvy street theatre.

Central to the motivational ethos of the coalition was the conviction that persons living with AIDS (PWAs) were not passive victims of a disease, but individuals who must take control of their situations through self-empowerment, demanding that bureaucracies take the problem seriously. The *Denver Principles* announced this proactive stance. Framed in 1983, the *Principles* eschewed the labels "victim" and "patient" and enumerated the rights of PWAs along with recommendations and strategies to achieve those goals. ACT UP embraced the spirit of

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the *Principles* and gave flesh to what had been merely abstract ideas.

The group's first demonstration took place on March 24, 1987, when it staged a protest on Wall Street over the monopoly and profiteering by Burroughs Wellcome, the manufacturer of AZT. Of the two hundred fifty participants, seventeen were arrested, launching an innovative model for activist organizing.

Although all facets of the AIDS crisis fell within the group's mission, ACT UP came to be especially associated with three broad issues. First, it effectively pressured medical corporations to develop safe and effective drug treatments and offer them at affordable prices to those who needed them. Second, activists insisted that governmental agencies, such as the Food and Drug Administration, put new AIDS drugs on a fast-track for approval. Finally, any entity perceived to be complicating the lives and treatments of PWAs was singled out for public humiliation and embarrassing publicity.

Over the years ACT UP achieved astonishing successes. It shut down the FDA to international attention (October 11, 1988), convinced the government to adopt innovative drug testing procedures (June 4–9, 1989), and pressured Burroughs Wellcome to cut the price of AZT 20 percent by interfering with trading on the floor of the New York Stock Exchange (September 14, 1989).

ACT UP's singular success relied in part on its accurate sense of how to get its message out beyond its members. Its logo—the motto “Silence = Death” in front of a pink triangle—became one of the best known symbols of the period. From its inception the group valued praxis over theory. Going far beyond the traditional protest picket lines, its actions tended to be well-conceived, high-style mediagenic events designed for visual and symbolic impact, such as the “die in” on Wall Street.

A hallmark of an ACT UP action was an intrusion into “inappropriate” spaces. These actions were known as “zaps,” a term and strategy revived from earlier countercultural and gay liberationist campaigns. On the other hand, ACT UP rarely pursued its agenda in the courtroom. The few cases involving the organization more typically concerned its right to protest than AIDS issues per se.

At its height, ACT UP spawned more than seventy chapters around the country and the world. In addition, it spun off other, even more radical organizations such as Queer Nation, which fought against homophobia and assimilation of the gay community into heterosexual normalcy, and the Lesbian Avengers.

According to its own description, ACT UP is a group “united in anger.” Although that visceral

drive accounts for its great intensity, such emotional intensity could not be sustained over an extended period. By the 1990s, ACT UP was in decline, and today comparatively few chapters remain active. AIDS claimed many of its early charismatic leaders, and others left to pursue AIDS-related causes in more professional roles. As better drugs made AIDS more manageable for many PWAs, there was less “anger” for ACT UP to draw upon. Finally, ACT UP chapters suffered internal dissensions over whether the organization should remain with its single focus or branch out into wider issues of social justice.

Whatever the fortunes of the organization, ACT UP has an enduring legacy in its achievements to improve the lives of PWAs—in terms of quantity, through the demand for new drugs made rapidly available at affordable prices, and quality, by confronting AIDS-negative policies wherever found. Its refreshingly uninhibited and creative protests have had an enduring impact on the way ordinary citizens come together to demand recognition of their civil liberties.

JAMES M. DONOVAN

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See also **Demonstrations and Sit-ins; Gay and Lesbian Rights**

ACTON, LORD JOHN (1834–1902)

Lord John Acton, the great liberal academic who dominated the field of history during the latter part of the Victorian Age, was born into a family of the upper echelon of society in Italy and moved to England at the age of three. There, Acton faced persecution for his Catholic religious beliefs. Lord Acton went on to become a member of the first Vatican Council, where he advocated for political and religious freedom. At times throughout his career, he was highly critical of the Vatican for intolerance and persecution. He attended university in Germany, was elected a member of the House of Commons in 1859, and acquired and was the editor of the periodical the *Rambler*, which he shaped into a liberal journal of Catholicism. In 1895, Acton was appointed the Regius Professor of Modern History at Cambridge University. He began work on a universal history that

BRYAN, WILLIAM JENNINGS (1860–1925)

that parents, not state legislatures, should decide what their children were taught in school.

Often remembered without sufficient nuance, Bryan deserves to be remembered as a defender of American civil liberties. He championed several reforms that were only accomplished after his death, and he represented the under-franchised in America.

JAMES HALABUK, JR.

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BRYANT, ANITA (1940–)

If the Stonewall riot was the event that galvanized the movement for gays' civil rights, Anita Bryant was the personality that first embodied at the national level the opposition to those rights. Her successful campaign to repeal the gay rights ordinance in Dade County, Florida, not only inflicted an enduring setback for that state and ignited copycat referenda throughout the nation, but also set the negative terms of that debate for years to come.

Born on March 25, 1940, Bryant early achieved national attention when she represented Oklahoma in the 1959 Miss America pageant. Second runner-up in that competition, she parlayed the attention into a successful recording career. Bryant would become particularly known for her rendition of the *Battle Hymn of the Republic*, a patriotic association that she would effectively exploit during later antigay campaigns. To most households, however, Anita Bryant was known simply as the Florida orange juice lady, serving for many years as the national spokeswoman for the Florida Citrus Commission. Bryant wed Bob Green in 1969, a Miami disc jockey who then served as her manager, and went on to raise four children.

On January 18, 1977, the Miami Dade Metro Commission voted to include protections for gay men and lesbians in its human rights ordinance. The amendment to Chapter 11A of the Dade County Code would have prohibited discrimination in the areas of housing, public accommodation, and employment. Bryant founded the Save Our Children, Inc. organization to spearhead a petition drive to put the ordinance on the June 7 ballot for repeal by popular vote. An overwhelming majority rejected the ordinance, setting the stage for similar repeals in

Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon.

The unprecedented battle inflicted long-term consequences on all parties. At the local level, the non-discrimination provisions were not reinstated until 1997 (Ord. 97-17, February 25, 1997). The Christian right again forced a referendum vote on September 10, 2002, which this time failed. More enduring fallout, however, includes a state law enacted in the 1977 aftermath that bans adoptions by gay persons. This policy survived a challenge in 2005 when the U.S. Supreme Court refused an appeal from the Eleventh Circuit upholding its constitutionality against equal protection claims (*Lofton v. Secretary of Dept. of Children and Family Services* [2005]).

More generally, the Dade County fight significantly altered the terms of discourse concerning gay rights. Where before the predominant stereotype had been the ineffectual poof, Bryant popularized the image of the gay "militant" bent on converting others into homosexuality, largely through child molestation. This new characterization would help give rise to the favorite myth of the right of a literal "homosexual agenda" that explicitly targets the seduction of young children.

Although her antigay movement enjoyed considerable success, Bryant herself did not. Having built her reputation on defending the family, her conservative supporters rejected her after a 1980 divorce from Green. Permanently estranged from her base, she quickly lost her association with the Citrus Commission, initiating a series of financial setbacks that included bankruptcies in 1997 and 2001. Despite the personal costs incurred by her spearheading this early campaign, recent interviews at the time of this writing have indicated no softening of her antigay position.

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Miami-Dade County Ordinance Chapter 11A

See also *Christian Coalition; Gay and Lesbian Rights; Falwell, Jerry; Family Values Movement*

DRUGS, RELIGION, AND LAW

can prove that a very serious safety issue exists. A few states, such as Alaska and Massachusetts, have declared all random, suspicionless drug testing to be in violation of state constitutions.

Later, the Supreme Court heard two cases relating to random, suspicionless testing of public high school students: *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Education of Independent School District of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). In *Veronia*, the Court upheld the random, suspicionless drug testing of high school athletes, holding the deterrence of student drug use to be at least as important as the schemes in *Skinner* and *Von Raab*, particularly since high school athletes faced potential physical injury during sports activities. The Court also noted that children entrusted to the care of public schools had lesser expectations of privacy than adults, a holding the Court relied on in *Earls* as well. There, the Court upheld the random, suspicionless drug testing of public high school students who participated in any extracurricular activity, even those that would pose no danger to the children, such as choir.

The Court's lone invalidation of a drug testing scheme occurred in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court invalidated Georgia's requirement that all candidates for state office must submit to a drug test. Georgia made no showing of any concrete threat that would serve to show a special need for the test. Also, the Court noted that the test would not serve to deter illicit drug use because the test was not a secret and drug abusers could abstain for a sufficient time period before the test.

Public opinion about drug testing shifted dramatically after President Reagan's drug war declaration in 1982. Private employers and landlords began drug testing employees and tenants. State and federal public housing authorities began to require tenants to consent to drug tests as a condition of residence. Many state government and private employers require a pre-employment drug screen as a condition of employment. Federal and state agencies sometimes require organizations that receive grants to adopt drug testing policies. Finally, and perhaps most pervasively, individuals convicted of crimes and placed on probation or released on parole are usually subjected to random drug tests as a condition of their release from detention.

Scholars disagree as to the efficacy and constitutionality of drug testing. The magnitude of false positives and negatives detracts from the usefulness of drug testing as a deterrent to drug abuse. Anecdotal evidence suggests that, for example, marijuana users switched to cocaine when their employers began random drug testing because traces of cocaine use leave

the body much more quickly. Moreover, an entire industry of manufacturing chemicals that disguise drug abuse has arisen. Recent scientific evidence suggests that expert testimony in criminal cases about the accuracy of drug tests is deeply flawed.

MATTHEW L. M. FLETCHER

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- See also *Chandler v. Miller*, 520 U.S. 305 (1997) (candidates); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995); War on Drugs

DRUGS, RELIGION, AND LAW

Law on many levels regulates access to drugs, complicating any incorporation of an interdicted substance within religious ceremonies. Arguments to obtain that liberty implicate issues on at least three levels. Drug restrictions exist on federal and state levels, and thus the religiously motivated drug users must confront the impediments at both levels.

DRUGS, RELIGION, AND LAW

Previously, an obvious source of support would have been the free exercise clause of the Constitution's First Amendment. As explained later, after the ruling in *Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990), that line of reasoning today offers little solace. The best option remains explicit legislative exemptions for the religious use of drugs, specifically (for example, the American Indian Religious Freedom Act) or through the judicial interpretation of more general statutes that command respect for religious practices.

Free Exercise Protections of Religious Practices

Religious liberty in the United States has never been absolute, despite its place as a preferred liberty in law and in the national imagination. The limited scope of the protection of religion was driven home during the anti-Mormon hysteria of the late nineteenth century and the line of polygamy cases that began with *Reynolds v. U.S.*, 98 U.S. 145 (1878). *Reynolds* announced a belief/action dichotomy, holding that the former was absolutely protected, but the latter was not. The government remained "free to reach" actions "in violation of social duties or subversive of good order," regardless of any religious command.

Thereafter, it would become a matter of dispute about which religious practices the state needed to allow, by refraining from passing some laws altogether or by granting exemptions from general laws that would otherwise conflict with religious beliefs and practices. Cases would address whether the state's justification for any imposed burden need be only rational, or compelling, for interfering with this First Amendment right.

On no topic has this context been more enduring than the use of drugs within religious ritual. Although the conflict could arise, at least in theory, over any controlled substance, sustained litigation has primarily targeted peyote and marijuana.

The Peyote Cases

Peyote use is regulated by federal and state governments, requiring the religiously motivated person wishing to ingest peyote to seek exemption from both. One such group that occasionally incorporates peyote use into its ritual practices is the Native American Church (NAC). Although peyote is a controlled substance under federal law, since 1971 the Church

has been granted an exemption (21 C.F.R. 1307.31). Linger issues concern peyote use by persons who are not members of the NAC and peyote use that is illegal under state laws that do not grant an exemption similar to the federal regulations. For example, in *Peyote Way Church of God, Inc., v. Thornburgh*, 922 F.2d 1210 (5th Cir., 1991), it was unsuccessfully argued that limiting the peyote exemption to only one religion violated the Establishment Clause. Courts have also been unwilling to allow peyote use by NAC members who are not Native Americans (*U.S. v. Warner*, 595 F.Supp. 595, D.C.N.D., 1984).

Although some states had offered religious exemptions for peyote use—most notably in *People v. Woody*, 394 P.2d 813 (Cal. 1964)—many did not. The illegality of religious peyote in Oregon occasioned the litigation of *Employment Div. v. Smith (II)*, which held that the free exercise clause alone does not require exemption from a generally applicable law, including those proscribing a certain class of drugs. As part of the reaction against this drastic curtailment of religious freedom, Congress enacted Public Law 103-344 (108 Stat. 3125, October 6, 1994), which amended the American Indian Religious Freedom Act to grant a religious exemption for peyote at state and federal levels. Significantly, this new exemption is not limited only to the Native American Church, but extends to peyote use "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."

Nonpeyote Cases

On the surface, marijuana might appear to offer many of the same features as peyote: traditional use of a proscribed substance by an identifiable religious and ethnic minority, Rastafarians. Thus far that analogy has not succeeded. *State v. McBride*, 955 P.2d 133 (Kan. 1998), ruled that Rastafarians are not "similarly situated" to Native Americans because: "(1) Peyote is consumed by the NAC members only at specific and infrequent religious ceremonies, whereas Rastafarians may consume marijuana in any quantity at any time; (2) peyote generally is not abused at the same rate as marijuana; and (3) the Kansas and federal NAC exemptions were passed under the ambit of the federal trust responsibility, which seeks to preserve the cultural and political integrity of Native American tribes."

The third prong particularly, should it continue to be relevant, would permanently prevent the peyote exemption from serving as a precedent for the creation of a religious exemption of any other controlled

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substances. Other religious groups less favorably situated have also failed in their claims for religious marijuana use, including Hindus (*Leary v. U.S.*, 383 F.2d 851, 5th Cir., 1967), Black Muslims (*U.S. v. Spears*, 443 F.2d 895, 5th Cir., 1971), and members of the Ethiopian Zion Coptic Church (*Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, D.C.C., 1989).

As an alternative to explaining why drug-ingestion rituals fall outside the protections of the Free Exercise Clause, courts have occasionally attempted to circumvent the religious liberty claim altogether by denying that the practice at issue qualifies as "religious" in the constitutional context. For example, in *U.S. v. Koch*, 288 F.Supp. 439 (D.C.D.C. 1968), the federal district court denied the use of LSD (lysergic acid diethylamide) by the Neo-American Church in part because the organization failed to satisfy the judges that it was a genuine religion. Yet, even when that hurdle is surmounted, if it can be shown that other adherents freely practice the religion without resort to the illegal drug, the ritual may fail to qualify as "intrinsic" to the faith, minimizing the burden imposed by a ban on its use.

Conclusions

The lessons from this thick body of jurisprudence are fairly straightforward. At the federal level, the likelihood of winning a free exercise claim to use a controlled substance in religious rituals is minute. This tactic rarely succeeded in the best-case scenario—peyote use by Native Americans—and was categorically rejected by the U.S. Supreme Court. While the special relationship between Native Americans and the federal government secured for them a legislative exemption, no other group can count on similar largesse.

In contexts in which a balancing test will still be applied, the state's interest in controlling access to mind-altering substances can be expected to continue to be deemed compelling. This interest will trump any burden on the religious practice inflicted by an inability to perform its sacred rituals.

Nonetheless, this area of the law continually evolves, as religious organizations initiate further suits in hopes of securing a right to worship in their chosen manner. Most recently, the Supreme Court has agreed to hear *Gonzales v. Centro Espirita Beneficente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004), cert. granted Apr. 18, 2005, to decide whether the Religious Freedom Restoration Act of 1993 should allow the church access to hoasca, an hallucinogenic tea. As one line of argument is closed, new ones may be asserted, such as Renteln's (2004)

argument that criminalizing substances unfamiliar to our culture under an unproven presumption that they are necessarily harmful can violate the right to culture recognized in international law. These efforts represent an ongoing effort to forge a balance between the well-intentioned secular needs of society and the religious spirit of its multicultural citizens.

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Special Exempt Persons: Native American Church, 21 C.F.R. 1307.31

See also Accommodation of Religion; Exemptions for Religion Contained in Regulatory Statutes; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause (I): History, Background Framing; Native Americans and Religious Liberty; War on Drugs

DUAL CITIZENSHIP

Long disfavored though never formally unlawful, dual citizenship is now completely tolerated under U.S. law and practice. Many nineteenth-century immigrants to the United States technically held the status of dual nationals because their countries of origin refused to recognize the transfer of allegiance to their new homeland. However, active dual citizenship was policed by expatriation measures providing

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Paul Finkelman
Editor

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LA FOLLETTE, ROBERT MARION, SR. (1855–1925)

due to his opposition to Wilson's involvement in World affairs and his emphasis on domestic policies. He even entertained the notion for running for Governor of Wisconsin again. Unfortunately, the hard pace of his style of politics was bringing even more bouts of sickness, which was concerning his wife and his supporters. La Follette fought hard to repair the damage that his antiwar stance had caused him and his allies back in Wisconsin. He, again, focused his energies on monitoring the railroad and oil companies. His belief was that it was his duty to protect the common laborer against the sins of capitalism. He helped to initiate the investigation on leasing of public oil fields to private companies. His work led to the discovery of leasing of the Teapot Dome oil field to Monmouth Oil Company and the discovery of corruption in the Harding administration.

In preparation for a future run for the presidency in 1924, La Follette toured Europe and made an extended visit to the Soviet Union with Lincoln Steffens and Jo Davidson. With the rejection of progressive planks from both Democratic and Republican platforms, La Follette created the Progressive Party in 1924 to support his run for the Presidency. His efforts served only to pull votes away from the Democratic challenger, and Calvin Coolidge easily won re-election in 1924. "The Little Lion of the Northwest" found himself completely exhausted and weak from the constant campaigning. La Follette had been bothered by heart problems before World War I and suffered a series of heart attacks in the spring of 1925. Surrounded by his family, Robert La Follette passed away on June 19, 1925.

WILLIAM H. BROWN

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See also **National Security and Freedom of Speech; State Constitutions and Civil Liberties**

LABOR PICKETING

See *Picketing*

LAMBDA LEGAL DEFENSE AND EDUCATION FUND

Lambda was the first, and remains the primary, legal advocacy group championing, according to its mission statement, the "full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV." This task began immediately, when the group's 1973 application for state recognition as a public interest law firm was unanimously denied. Lambda became its own first client, challenging the court's denial of its right to exist.

Winning its appeal, Lambda became authorized to practice on October 18, 1973. Lambda's organizational highlights include a move from its original location in the Manhattan apartment of founder Bill Thom into shared offices with the New York American Civil Liberties Union (ACLU) in 1979—an association that prompted the ACLU to create its Lesbian and Gay Rights Project—and finally into its own offices in 1987. An initial satellite branch in Los Angeles opened its doors in 1990, with more to follow in Chicago, Dallas, and Atlanta. Lambda ceased to be a purely volunteer organization in 1978 when it created its first paid staff position; a managing attorney was added to the roster in 1983. Whereas at its founding Lambda functioned "more or less on the edge of insolvency," for the 2004 fiscal year it reported income in excess of \$11.6 million.

The talent of the organization to devise and implement a legal strategy over the long term is best evidenced through its attack on sodomy laws. From its inception Lambda had challenged the constitutionality of sodomy laws, scoring the occasional win such as that in *People v. Onofre*, 424 N.Y.S.2d 566 (1980), which struck down the New York sodomy statute. These early victories encouraged Lambda to support challenges in federal courts on privacy grounds, an argument that was rejected by the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Lambda persevered in its strategy, however, and, in a round of courtroom brinkmanship, won the reversal of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003).

The cumulative impact of Lambda's courtroom challenges has secured greater recognition of civil liberties for its constituents outside the arena of sodomy legislation. For example, its arguments in *Romer v. Evans*, 517 U.S. 620 (1996), persuaded the Court to overturn Colorado's Amendment 2, which would

have excluded gay men and lesbians from the legislative process.

Beyond the issues of sodomy laws and political participation amendments, the range of cases confronted by Lambda attorneys has been wide, whether in cases initiated by the organization or when working with others such as the Gay and Lesbian Advocates and Defenders (GLAD). Topics include the stunning victory in securing same-sex marriage in Massachusetts (*Goodridge v. Dept. of Public Health*, 440 Mass. 309 [2003]), to recognizing second-parent adoptions, protection of students from harassment, as well as asylum and immigration problems. In short, practically every significant legal case advocating the rights of sexual minorities—both won and lost—has benefited from the active participation of Lambda.

JAMES M. DONOVAN

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See also *Bowers v. Hardwick*, 478 U.S. 186 (1996); *Gay and Lesbian Rights*; *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Same-Sex Marriage Legalization*; *Sodomy Laws*

LAMBERT v. CALIFORNIA, 355 U.S. 225 (1957)

Lambert v. California is one of the Supreme Court's most fundamental decisions in support of civil liberties, but also one of its most poorly understood. Virginia Lambert had been living continuously in California for seven and one-half years when she was arrested and charged under an ordinance that made it unlawful for a person with a felony conviction to be in Los Angeles for more than five days without registering with the police. The trial judge instructed the jury that Lambert's complete ignorance of the registration requirement was no defense, and she was convicted. The Supreme Court overturned her conviction in ringing language: "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe

LAMBERT v. WICKLUND, 520 U.S. 292 (1997)

for that community to bear." *Id.* at 229 (quoting Oliver Wendell Holmes, Jr., *The Common Law* 50 (1981)) (internal quotation marks omitted).

Most observers have agreed that the Court rightly overturned a profoundly unjust conviction. The puzzle, though, which the opinion did not answer, is why Lambert's conviction was unconstitutional. Was it because she did not realize what she did was wrong? Was it that, rather than doing something, she was being punished for failing to do something? Was it that her conduct was too "innocent?" Each of these principles has its defenders, but they share a common problem: taken seriously, each of these principles would eliminate a large number of crimes and conflict with a substantial body of law. For this reason, the dissent charged that *Lambert* would turn into "a derelict on the waters of the law." *Id.* at 232 (Frankfurter, J., dissenting).

One possible answer, a novel one but one consistent with other Supreme Court cases, is that the statute in *Lambert* essentially punished a protected constitutional right—in this case the right to travel. In this view, assuming it would be unconstitutional for Los Angeles to bar convicted felons from the city entirely, it cannot make a crime simply by adding an element (failing to register), unless the defendant has some culpability (such as purpose or knowledge) with regard to that additional element.

ALAN C. MICHAELS

See also *Due Process*; *Ex Post Facto*; *Right to Travel*

LAMBERT v. WICKLUND, 520 U.S. 292 (1997)

Lambert v. Wicklund is one of a long line of abortion cases handed down by the U.S. Supreme Court. In the historic case of *Roe v. Wade*, the Supreme Court determined that a woman has a right to an abortion, subject to some limitations. The question remained, however, as to whether a minor had the same right to an abortion as an adult woman. In *Planned Parenthood of Central Missouri v. Danforth*, the Court recognized that a minor has a right to an abortion, but that the right is subject to more limitations than the right of an adult woman. The question remained as to what form these additional limitations could take. The case of *Ohio v. Akron Center for Reproductive Health* provided a partial answer. There the Court upheld as constitutional an Ohio statute that required a minor to notify one of her parents before obtaining an abortion. However, a minor could avoid the notification requirement through use of the statute's

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Paul Finkelman
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RIGHT TO REPLY AND RIGHT OF THE PRESS

Although it has never been the First Amendment's concern that the press be fair, that issue has emerged as a serious concern with the increased monopolization of newspapers in their circulation areas. If the injured person cannot respond to an editorial's personal accusations in another paper of equal stature and audience, does the editorializing newspaper's refusal to print the response in its own pages undermine the purposes of the free press clause's protections?

This was the question considered by the U.S. Supreme Court in *Miami Publishing Co. v. Tornillo* (1974). In *Tornillo*, a Florida political candidate invoked a state right-to-reply law after the *Miami Herald* editorialized against his election. The *Herald's* refusal was taken to the Supreme Court, which ruled against *Tornillo*. In its decision, the Court held the right-to-reply law unconstitutional for three reasons.

First, reply rights of candidates would impose costs on newspapers. To make room for the reply, the paper might forgo publishing other content, or incur expenses to publish the added content. Second, reply rights would chill editorial speech. If an editor knew that the newspaper would be required to publish a response, he or she might decide to forgo the critical editorial completely.

Most importantly, a mandated right to reply intrudes on editorial autonomy. Although the parameters of constitutionally protected "editorial judgment" were left unelaborated by the Court, it relied on broad principles. The First Amendment on its face proscribes state action, but does not require press responsibility. In other words, the free press clause means that the press must be free, not fair.

Two contradictory justifications for the press's constitutional protections collide in this decision. On the one hand, it is common to hear that the press guarantees are designed to foster vibrant political debate. In the airing of different positions on matters of public concern, citizens become informed on important questions, and thus better prepared to make wise decisions regarding public policy. From this

perspective, the intentions of the First Amendment are furthered, not hindered, by a right-to-reply statute.

Alternatively, the Constitution envisions the press serving as a "check" on the abuses of government, earning the press the sobriquet of the "Fourth Estate." This was the face of the press most famously on display during the Watergate investigations. This function would be seriously compromised if the government could control content in the press, and thus a right-of-reply statute must fall.

The Court implicitly found in *Tornillo* that the balance favored the checking function over the informed debate function. Because conditions have changed since 1974, however, it should not be presumed that the balance today favors the same outcome.

The reluctance to impose a fairness requirement on the press made more sense when alternative outlets were easily available. Few markets today have more than one newspaper, and thus a refusal to publish a reply is tantamount to preventing an alternative viewpoint from becoming known to the public. Similar limited accessibility allowed the Supreme Court, in *Red Lion Broadcasting Co. v. FCC* (1969), to uphold a fairness rule imposed on broadcast media. (This rule was repealed administratively in 1987.) As print outlets approach the scarcity of broadcast frequencies, the *Tornillo* rationale to reject right-to-reply statutes might require rethinking.

JAMES M. DONOVAN

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Miami Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)

See also *Freedom of Speech and Press: Nineteenth Century; Press Clause (I): Framing and History from Colonial Period up to Early National Period*

RIGHT TO TRAVEL

Some cherished individual rights do not appear in the U.S. Constitution. One prominent example is the right of privacy; another is the right to travel. Former U.S. Supreme Court Justice William Douglas observed, "[f]reedom of movement is the very essence

conviction because it was impossible to determine on which grounds the Appeal Board rejected his claim, especially where two were admittedly invalid.

DOMINIC DEBRINCAT

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Clay v. United States, 403 U.S. 698 (1971)

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See also Clark, Tom Cambell; Conscientious Objection, the Free Exercise Clause; Jehovah's Witnesses and Religious Liberty

SIMOPOULOS v. VIRGINIA, 462 U.S. 506 (1983)

In 1973, the United States Supreme Court (the Court) handed down its landmark decision in *Roe v. Wade*, 410 U.S. 113 (1973), holding that the right of privacy, guaranteed by the U.S. Constitution, encompasses a woman's decision whether or not to terminate her pregnancy. The affirmed abortion right, however, never ended the abortion debate. In the next twenty years, for example, the Court had to make twenty-one more abortion decisions, and *Simopoulos* is one of them.

In *Simopoulos*, the appellant was an obstetrician-gynecologist who practiced in Virginia. In November 1979, P.M., a seventeen-year-old high school student, approached the appellant at his unlicensed clinic and requested an abortion. P.M. was five months pregnant (well into the second trimester) and never advised her parents of her decision despite the appellant's advice. After an injection of saline solution by the appellant at the clinic, P.M. aborted her fetus in a motel bathroom, and the police found the fetus later on the same day. As a result, the appellant was indicted for unlawfully performing an abortion during the second trimester of pregnancy outside of a licensed hospital and was convicted by Virginia courts.

On appeal, the Court affirmed the conviction. In its majority opinion, five justices held that Virginia's requirement that the second trimester abortion be performed in licensed hospitals was constitutional. The Court reaffirmed that a state has an "important and legitimate interest in the health of the mother," and it becomes compelling at approximately the end of the first trimester. Such interest allows the state to regulate the facilities and circumstances in which abortions are performed. Distinguishing from its decision in *Akron v. Akron Center for Reproductive*

Health, 462 U.S. 416 (1983), the Court pointed out that the term "hospital," defined by the Virginia Code (not by the Virginia abortion statute itself), was broad enough to include "outpatient hospitals." Unlike provisions in *Akron*, the Virginia regulations did not require that "the patient be hospitalized as an inpatient or that the abortion be performed in a full-service, acute-care hospital." Rather, these regulations seemed to be generally compatible with accepted medical standards, and the Virginia's requirement was not an unreasonable means of furthering the state's compelling interest in protecting women's health and safety. Three more justices also concurred that the Virginia's requirement was not an undue burden on a woman's decision to undergo an abortion and argued that the mandatory hospitalization requirement need not be contingent on the trimester. Justice Stevens dissented and believed that the exact meaning of the Virginia Code was ambiguous and that it requires further clarification.

Handed down along with *Akron* and *Planned Parenthood v. Ashcroft*, 463 U.S. 506 (1983), *Simopoulos* shows once again how the Court has been carefully balancing an individual's rights with the state's legitimate rights, especially in such a delicate abortion issue. Nevertheless, *Simopoulos* and other 1983 abortion decisions unequivocally reaffirmed women's abortion right in *Roe v. Wade*.

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SINCERITY OF RELIGIOUS BELIEF

The category of "religion" has presented particularly thorny legal problems for the last century. The intellectual difficulty arises from the fact that religion triggers heightened constitutional (and more recently, statutory) protections, while at the same time the specific referent of the word is vague and elastic. To fully allow the term's full scope risks paralyzing

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government with unending exceptions under the free exercise clause, whereas recognizing only a few threatens not only the principle of religious liberty but also runs afoul of the establishment clause.

The search for a balance initiated at least two discernible responses. First, the Supreme Court tried to define the term according to substantive elements, thereby removing some of its inherent vagueness; and second, it isolated the psychological dimensions of religiosity to be afforded special deference.

"Sincerity of religious belief" belongs to the second phase, during which the Court attempted to fashion a useful standard to identify religion worthy of these legal benefits, and refers to the holding of *U.S. v. Ballard*, 322 U.S. 78 (1944). To place that rule into jurisprudential context, however, it is necessary to know what came before.

The Path to *Ballard*

Before *Ballard*, the definition of religion had been notoriously both ethnocentric and substantive. In general, the successful religious claimant represented majority congregations that espoused specific tenets of faith such as a belief in the Judeo-Christian deity. In the heyday of the anti-Mormon fervor, the Supreme Court announced ever-narrower restrictions on the kinds of activities that could be "religious" and thereby trigger protections under the free exercise clause. *Reynolds v. U.S.*, 98 U.S. 145 (1878), began by emphasizing the idea of one's duty to the Supreme Being, implying that religion was necessarily theistic or including as a tenet of orthodoxy a belief in a nonmaterial, supernatural entity. Only those beliefs should receive constitutional deference.

Davis v. Beason, 133 U.S. 333 (1880), took the criterion of theism from *Reynolds* and raised it to the sine qua non to find religion and the heightened protections it was promised. Furthermore, whereas *Reynolds* had bifurcated religion into two elements of protected belief and unprotected action, *Davis* restricted religion to only the former ("views and obligations"). In contrast, the actions of ritual and behavior were glossed as "cults." This step greatly eased the legal task of identifying what was protected, because the free exercise clause expressly extended only to religion (belief) and excluded all cultic behavior in which those beliefs might find expression.

Finally, *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890), required religion not only to be theistic, but

also "enlightened," necessarily diminishing any expectations of protection by minority sects.

Ballard and Sincerity

A definition of religion that essentially protected only Christianity, or religions structurally and theologically analogous to it, became unwieldy as American society became more multicultural and less parochial. Consequently, a new constitutional direction was taken in 1944 when the Court decided *Ballard*. Guy Ballard represented himself to be "a divine messenger," medium for the "ascended masters" Saint Germain, Jesus, George Washington, and Godfre Ray King. The communicated teachings received through this spiritual mediumship formed the foundation for the "I Am" movement. The Ballards were charged and convicted of mail fraud, accused of soliciting funds "by means of false and fraudulent representations, pretenses and promises" by claiming ability to cure ailments.

The charge hinged on the assertion that the respondents "well knew" that their claimed spiritual powers were false. At trial, the jury charge set aside the question of the truth of the Ballards' religious beliefs; instead, the "issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted."

The Ninth Circuit reversed the conviction and ordered a new trial, concluding that "the restriction of the issue in question to that of good faith was error," and should have reached to the truth or falsity of the disputed religious tenets. In this, it was imposing a standard that could fit comfortably with *Late Corporation's* dicta that religion must be "enlightened," a finding that entails an evaluative judgment on the religious beliefs claiming resort to First Amendment protections.

The U.S. Supreme Court, however, now repudiated that line of reasoning. Religious truth could not be adjudicated, because "Heresy trials are foreign to our constitution If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."

The *Ballard* Court found the pivotal distinction between protected religious practice and unprotected fraud to reside not in the truth of the content of the claims, which would forever be beyond the jurisdiction of the courts, but in the defendant's internal, psychological condition when asserting them. Religions did not have to be empirically true but only sincerely believed.

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Sincerity's Post-*Ballard* Elaboration

An immediate implication of this stance is that religion need no longer "look like" Christianity to be protected. This culturally sensitive position, unfortunately, did not resolve the Court's difficulties with religion but only shifted the field of contest. By what standard could a trier of fact determine whether a party's religious beliefs were "sincere"? Were such claims even to be adjudicated?

Outside the constitutional context, lower courts grappled with these issues, most significantly in a series of conscientious objector cases from 1943 to 1969. Although decided one year before *Ballard*, *U.S. v. Kauten*, 133 F.2d 703 (2d Cir. 1943), seemed to operationalized the sincerity standard when it defined a religious belief as one "finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."

When the U.S. Supreme Court tried its hand to construe "religion" in this same statutory context in *U.S. v. Seeger*, 380 U.S. 163 (1965), it reiterated the holding of *Ballard* and held that "the test of belief 'in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.'" While stopping short of the "martyrdom" standard of *Kauten*, the Court cited the Protestant theologian Paul Tillich's standard of "ultimate concern" as a tool to find a parallel belief-set to more traditional religious systems. Nothing in this approach, however, required the belief system to focus on traditional theistic spiritual entities, leading the Court to eliminate this criterion in *Welsh v. U.S.*, 398 U.S. 333 (1970).

The other body of judicial decisions occurs in the context of unemployment compensation cases and traces a similarly decreasing reliance on organizational affiliation to find protected beliefs so long as the claims are sincere. Highlights include *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), which held that a person's protected beliefs were not limited to those shared by the other members of the religious organization. Thomas, a Jehovah's Witness, had been denied benefits after he refused a work assignment that contributed to weapons manufacturing. The lower court, to characterize his position as a personal philosophy rather than a religious belief and therefore unprotected by the free exercise clause, relied heavily on the fact that other Jehovah's Witnesses did not object to this work and that Thomas admitted to be struggling

over his beliefs. The U.S. Supreme Court rejected the relevance of those facts in terms reminiscent of *Ballard*:

the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989), took this process another step forward. Whereas Thomas had been a member of a recognized church, William Frazee acknowledged membership in no specific denomination. The lower court denied Frazee unemployment benefits after he refused to accept a job that required him to work on Sundays. While acknowledging that his convictions were sincere, the Illinois Appellate Court held that constitutional protections required the tenet to be associated with an "established religious sect" rather than a personal commitment. The U.S. Supreme Court disagreed, ruling that any such requirement violated the free exercise clause. *Frazee* and *Thomas* (as well as *Seeger* and *Welsh*) seemed to firmly establish the principle that sincere belief alone could trigger constitutional analysis rather than organizational membership or any specific constellation of beliefs, including Christian-like theisms.

Fallout from *Ballard*

After the dust settled, protected religion had seemingly come to refer to beliefs in which one sincerely believed, with the test of that sincerity being whether the belief occupied a place within the party's interior life analogous to that held by unquestionably protected beliefs (that is, Christianity). The specific content of the beliefs, and their presumed truth or falsity, and whether they were shared by others, were not to be part of the inquiry. Under this standard, "religion" had moved from a mere synonym for Christianity to a concept of considerable, even infinite, breadth. Concern over precisely this condition had ironically motivated the *Reynolds* Court to articulate the original belief/action dichotomy that had initiated this line of reasoning that brought about the feared result.

Although the sincerity standard may be satisfactory when using religion as a shield, it creates problems when wielding it as a sword. In other words, this test to find a religious safe harbor works better when hoping to stop the state from requiring the citizen to

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act against his or her religious beliefs than it does when the party wishes to do something that the government forbids but that is mandated by a sincerely held religious belief. Public order can better tolerate a broad extension of religion in the former context than the latter. This division, rather than a coarse belief/action distinction, may be the better line to draw.

The Supreme Court, however, perhaps despairing that the confusion could ever be satisfactorily resolved, essentially washed its hands of the matter in *Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990). In *Smith*, Justice Scalia drastically curtailed the scope of the free exercise clause by writing that, unless the religious practice had been explicitly targeted by the governmental action, Free Exercise claims would in the future only be successful if coupled with other constitutional provisions (his "hybrid rights cases"). That rule would most likely have required different outcomes in both the conscientious objector and unemployment compensation cases. Legislatures rather than courts, Scalia argued, would be a better venue for the protection of minority religious beliefs, however sincerely they may be held.

JAMES M. DONOVAN

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See also Conscientious Objection, The Free Exercise Clause; Defining Religion; Free Exercise Clause: History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence

SINGER v. UNITED STATES, 380 U.S. 24 (1965)

A federal criminal defendant sought to waive a jury trial and be tried before the judge alone. The applicable rule of procedure permitted a waiver only with the approval of the trial court and consent of the prosecutor. Although the trial court was willing to approve the waiver, the prosecutor refused to consent, and the defendant was tried and convicted by a jury.

In *Singer v. United States*, the U.S. Supreme Court held that although the Constitution grants criminal defendants the right to a jury trial, it neither confers nor recognizes a right of defendants to have their cases decided by a judge alone. It acknowledged that the Constitution does not prohibit defendants from waiving their jury trial right, but noted that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." It then upheld the applicable procedural rule, finding no constitutional impediment to conditioning a waiver of the jury trial right on the consent of the prosecutor and the trial judge, because "if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." The Court cautioned, however, that cases may exist in which a defendant's reasons for wanting to be tried before a judge alone are so compelling that the prosecutor's insistence on a jury trial would result in the denial to the defendant of an impartial trial.

DAVID S. RUDSTEIN

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See also Jury Trial; Jury Trial Right

SKINNER v. OKLAHOMA, 316 U.S. 535 (1942)

In *Skinner v. Oklahoma*, the Supreme Court considered the constitutionality of a state statute that provided for sterilization of "habitual criminals." The statute defined a habitual criminal as any person who has been convicted two or more times of felonies of "moral turpitude" either in Oklahoma or any other