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NOTE

NATIVE AMERICAN INMATES AND PRISON GROOMING REGULATIONS: TODAY'S JUSTIFIED SCALPS: *IRON EYES V. HENRY*

*William Norman**

Introduction

With the rebirth of prisoners' rights over the past twenty-five years, prison grooming regulations frequently have been challenged in this nation's courts. Some cases have involved an inmate's right to privacy or the ability to control his own personal appearance. However, many adjudications have dealt with a prisoner's religious beliefs, more specifically the prisoner's constitutional right to exercise freely his religious beliefs while incarcerated.

Courts generally hold that a prisoner's rights are limited due to the nature of the penitentiary system as a place of confinement for persons who are unable to conform to society's laws.¹ Nevertheless, these same courts repeatedly confirm the notion that the inmate retains rights which are not inconsistent with a penitentiary's legitimate objectives of discipline, safety, security, and the person's status as an inmate.² Some religions deem grooming issues as a significant part of their faith. As a result, conflicts often arise between a prisoner's adherence to these religious practices and prison officials' concerns for discipline and security. Thus, the courts must determine whether to defer resolution of the conflict to the judgment of prison officials or intervene on behalf of an inmate.

Many Native American religions perceive a person's hair as a sacred part of the body. The hair links a person, through strength and communication, to the Great Spirit; therefore, Native American inmates often become the center of controversy in grooming regulation cases. Compounding the problem, several recent Supreme Court decisions have jeopardized the scope of constitutional rights retained by inmates.³ Since the mid- 1980s, district and appellate courts have turned

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1. See generally *Turner v. Safley*, 482 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Bell v. Wolfish*, 441 U.S. 520 (1979).

2. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

3. See cases cited *supra* note 1.

a deaf ear to complaints by Native American prisoners concerning hair length regulations.⁴ These factors combine to reduce the already limited religious freedoms of Native American inmates.

This note is divided into five sections. Section I begins with an overview of cases analyzing freedom of religion, encompassing the First⁵ and Fourteenth⁶ Amendments of the United States Constitution and the American Indian Religious Freedom Act (AIRFA).⁷ A discussion of the history and evolution of modern penitentiaries and prisoners' rights is presented in section II. Section III introduces the reader to Native American religious beliefs by discussing the importance of hair length within these beliefs, and summarizes the court's treatment of Native American religious beliefs. Next, section IV provides a summary of prison grooming regulation cases involving Native American inmates. *Iron Eyes v. Henry*,⁸ an Eighth Circuit Court of Appeals decision that denied a Native American his religious rights, is the most shocking example of prisoners' rights analysis manipulation. *Iron Eyes* is the focus of this note, and will be discussed and analyzed in the section V.

I. Free Exercise of Religion

The Constitution of the United States of America includes within its dimensions the protection of certain individual liberties, most of which are contained in the first ten amendments, known as the Bill of Rights.⁹ Among those amendments lie many fundamental rights founded in the principles and traditions of the people of this country. The First Amendment is indeed the epitome of an individual's rights and it proscribes unwarranted governmental intrusion of these rights.¹⁰ Stated in full, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."¹¹

In its first two clauses, the First Amendment reflects America's early effort to protect its citizens from what many immigrants had fled — religious persecution. The Establishment Clause prohibits government

4. See *infra* section IV for a summary of recent cases involving Native American inmates and grooming restrictions.

5. U.S. CONST. amend. I.

6. U.S. CONST. amend. XIV.

7. 42 U.S.C. § 1996 (1988).

8. 907 F.2d 810 (8th Cir. 1990).

9. U.S. CONST. amends. I-X.

10. U.S. CONST. amend. I.

11. *Id.*

support of religious institutions.¹² Generally, where a law has a secular purpose, a primarily secular effect, and involves no excessive entanglement between the government and religion, no Establishment Clause violation occurs.¹³ The second clause, known as the Free-Exercise Clause, prohibits the government from burdening an individual's free exercise of religion.¹⁴

Historically, persons claiming a free-exercise violation had to show that a substantial burden had been placed on the exercise of his religion.¹⁵ To overcome such a showing, the government had to articulate a compelling interest in the regulated activity which justified the burden.¹⁶ Courts used a strict scrutiny test and balanced the competing interests of the individual and the government by considering: first, whether the individual's belief was legitimately religious and sincerely held;¹⁷ second, whether the regulation coerced the individual to forego a religious practice derived from this belief;¹⁸ and third, whether a compelling government interest existed and whether the least restrictive means of protecting that interest is used.¹⁹

In *Employment Division, Department of Human Resources v. Smith*,²⁰ the Court severely limited the earlier First Amendment analysis. *Smith* involved a denial of unemployment compensation benefits to individuals who were discharged from their jobs as drug and alcohol rehabilitation counselors. The counselors were discharged for ingesting peyote during a religious ceremony of the Native American Church. Peyote is a hallucinogenic drug deemed illegal by Oregon state laws and participation in the peyote ceremony was deemed misconduct; therefore, the counselors were denied unemployment benefits by Oregon officials. According to *Smith*, an individual cannot avoid the requirements of a generally applicable law, even if the law's effect infringes on the individual's religious practice.²¹ The government may not compel or coerce a person to act in violation of his religious beliefs; however, the Free-Exercise Clause does not prohibit governmental action which has the "incidental effect" of burdening religious conduct — no matter how severe the burden.²²

The Due Process Clause of the Fourteenth Amendment incorporates the First Amendment's freedom of religion clauses, making the First

12. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

13. *Id.*; see also *Walz v. Tax Comm'n*, 397 U.S. 664, 664 (1970).

14. *Sherbert v. Verner*, 374 U.S. 398, 401 (1963).

15. *Id.* at 406.

16. *Id.*

17. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

18. *Id.* at 717-18.

19. *Id.* at 715-16.

20. 485 U.S. 660 (1988).

21. *Id.* at 669-72.

22. *Id.*

Amendment applicable to the states.²³ As a result, persons are now afforded the opportunity to assert a claim against a state actor or entity who has deprived them of their constitutional right to exercise freely their religion.

In *Monroe v. Pape*,²⁴ the Supreme Court held that persons could obtain relief if they were deprived of their rights by state officers acting under the color of law, regardless of whether the officer had actual authority to engage in such activity.²⁵ Congress codified this ruling in 1964 when it enacted the Federal Civil Rights Act.²⁶ The Act specifically provided redress for persons whose constitutional rights had been deprived by a state entity.²⁷ The *Monroe* holding coupled with Congress' Act opened the door to an era of civil rights litigation.

In 1978, Congress enacted the AIRFA²⁸ in an effort to preserve the inherent right of Native Americans to practice their traditional religions.²⁹ In 1988, the Supreme Court narrowed the scope of Native Americans' religious freedom when it held in *Lyng v. Northwest Indian Cemetery Protective Ass'n*³⁰ that the AIRFA had no real significant effect on the protection of Native American religious rights.³¹ Thus, Congress' latest attempt to furnish Native Americans greater protection has been usurped by the Supreme Court's last word.

23. U.S. CONST. amend. XIV. The amendment provides in pertinent part: "[N]or shall any State deprive a person of life, liberty, or property, without due process of law" *Id.*; see *Cantwell v. Connecticut*, 310 U.S. 296, 302 (1940) (holding that the Fourteenth Amendment incorporates the Free-Exercise Clause); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947), *reh'g denied*, 330 U.S. 855 (1947) (holding that the Fourteenth Amendment incorporates the Establishment Clause).

24. 365 U.S. 167 (1961).

25. *Id.*

26. 42 U.S.C. § 1983 (1964). The Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

27. *Id.*

28. 42 U.S.C. § 1996 (1988) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . .").

29. Christopher Vecsey, *Prologue*, in *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 7, 7 (Christopher Vecsey ed., 1991) [hereinafter *HANDBOOK*].

30. 485 U.S. 439 (1988).

31. *Id.* at 448.

II. *The Evolution of Prisoners' Rights*

The general concepts of law set forth in section I provide the groundwork from which prisoners' rights case law has evolved. Court decisions within recent years have marked a decrease in the amount of sensitivity felt towards persons accused or convicted of criminal conduct. A comparison of historical perspectives on inmates' rights and recent cases provides a sense of how the law is developing.

As early as 1871, the courts, as well as the general public, viewed criminals as evil by nature, thus relegating prisoners to the status of slaves of the state.³² During the early 1800s, criminologists persuaded society that strict discipline, labor, and the Bible were the proper tools for rehabilitation of prisoners.³³ The penitentiary was established to isolate the prisoners from society, reversing the bad upbringing or poor community influence which formed the criminal in the first place.³⁴ As prison populations increased, prison administrators changed their focus from rehabilitation to internal security.³⁵ As a result, today's prisons are less rehabilitative and more custodial in nature.³⁶

Although the scope of a prisoner's constitutional rights are limited, a prisoner does not forfeit all constitutional protections by reason of his incarceration.³⁷ Throughout the evolution of prisons in America, the judiciary has shown a reluctance to involve itself in issues pertaining to prisoners' rights.³⁸ First, the courts maintained that management and control of prisons were executive and legislative functions.³⁹ Second, the courts reasoned where there is state involvement, principles of federalism require deference to the state(s).⁴⁰ Finally, courts perceive themselves as lacking the skill and training necessary to override the expertise of prison officials,⁴¹ and, as a result, they cast their votes accordingly. These concepts combine to create a "hands-off" policy on the part of the judiciary during periods when society as a whole is unsympathetic towards those who disregard the law.⁴²

During the 1960s, the civil rights movement, coupled with the Supreme Court's sympathy towards the underprivileged, became the backdrop for the expansion of inmates' rights.⁴³ Black Muslim prisoners

32. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

33. JAMES T. GOBERT & NEIL P. COHEN, *RIGHTS OF PRISONERS* 4 (1981).

34. *Id.* at 4-5.

35. *Id.* at 5.

36. *Id.* at 6.

37. *Bell v. Wolfish*, 441 U.S. 520, 545-47 (1979).

38. GOBERT & COHEN, *supra* note 33, at 7.

39. *Id.*

40. *Id.*

41. *Id.*

42. GOBERT & COHEN, *supra* note 33, at 7-8.

43. *Id.*

challenged prison regulations, claiming they violated their First Amendment rights.⁴⁴ The claims were aimed at establishing that the Black Muslim faith was a legitimate religion which experienced more severe restrictions than traditional "Western" religions.⁴⁵ This barrage of First Amendment claims by inmates were facilitated by an influx of civil rights and civil liberties attorneys who forced courts to address claims on the merits and not simply dismiss the cases as frivolous *pro se* complaints.⁴⁶

In 1974, the Supreme Court articulated the standard for First Amendment challenges to prison regulations in *Procunier v. Martinez*.⁴⁷ In determining whether mail censorship regulations were valid, the Court considered whether the regulation involved a substantial government interest unrelated to the suppression of a First Amendment right, and whether the regulation was greater than necessary to protect that interest.⁴⁸ In other words, prison regulations burdening the First Amendment would be upheld to protect a substantial governmental interest, only if no other less restrictive means to protect that interest were available.

Recently, the Court partially overruled the *Martinez* strict-scrutiny test in favor of a test of reasonableness, which requires the state prison regulation in question to be reasonably related to penological interests.⁴⁹ Such legitimate regulations include those touching upon the maintenance and preservation of prison security and discipline.⁵⁰ It seems evident that the Court is regressing from the era of civil rights decisions in favor of allocating broad discretionary powers to prison officials.

In *Turner v. Safley*,⁵¹ the Court set out the modern standard of review for prison regulation cases. In *Turner*, inmates brought a class action suit against Missouri corrections officials challenging the validity of the officials' regulations on prison mail and prisoner marriages. The *Turner* Court formulated four factors to be used in determining whether a prison regulation is reasonably related to legitimate penological interests.⁵² The first factor asks whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest justifying the regulation.⁵³ Second, a court must deter-

44. See generally Lee P. Brown, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review*, 32 GEO. WASH. L. REV. 1124 (1964).

45. *Id.*

46. GOBERT & COHEN, *supra* note 33, at 8.

47. 416 U.S. 396 (1974).

48. *Id.* at 413.

49. *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989).

50. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

51. 482 U.S. 78 (1987).

52. *Id.* at 90.

53. *Id.* at 89-90.

mine whether alternative means exist for the prisoner to exercise his constitutional right at issue.⁵⁴ Third, a court must weigh the impact of accommodating the inmate's right against those of the guards, other inmates, and prison resources.⁵⁵ The Court emphasized that on this particular factor, great deference would be given to prison officials.⁵⁶ Finally, alternatives that would fully accommodate the inmate's rights at "*de minimis*" cost to penological interests should be taken into account.⁵⁷ The Court emphasized that this final factor does not require that the regulation be the least restrictive.⁵⁸ Justice Stevens, in his dissenting opinion, argued that the Court's test will permit abuse of an inmate's rights whenever a warden can come up with a rational security concern.⁵⁹

One week later, in *O'Lone v. Estate of Shabazz*,⁶⁰ the Supreme Court applied *Turner* to a situation where a prisoner was forbidden from leaving a work detail outside the prison walls in order to attend religious services within the facility. The Court held that the states' conduct was constitutional.⁶¹ In doing so, the Court reasoned that no easy alternative to the prison's policy existed.⁶² In a strong dissent, Justice Brennan argued that allowing such deference to prison officials is wrong.⁶³ Justice Brennan stated that the Constitution was not enacted to enhance governmental efficiency or reliance on administrative expertise.⁶⁴ Accordingly, Justice Brennan would have adopted the tripartite standard applied in *Abdul Wali v. Coughlin*,⁶⁵ which required a court to consider the following three factors when determining the amount of deference to be given the prison official: (1) the nature of the right asserted by the inmate; (2) the activity in which the inmate seeks to engage; and (3) whether the regulation is a deprivation of a right rather than a limitation on a right.⁶⁶ If the regulated activity is presumptively dangerous or restricted only in time, place, or manner, the "reasonable test" of *Turner* should apply.⁶⁷ If not "presumptively

54. *Id.* at 90.

55. *Turner v. Safley*, 482 U.S. 78, 87 (1987).

56. *Id.* at 89.

57. *Id.* at 90-91.

58. *Id.* at 90.

59. *Id.* at 100-01 (Stevens, J., dissenting in part and concurring in part).

60. 482 U.S. 342 (1987).

61. *Id.* at 349.

62. *Id.* at 352-53.

63. *Id.* at 356 (Brennan, J., dissenting).

64. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

65. 754 F.2d 1015, 1033 (2d Cir. 1985).

66. *Id.* at 1030-33.

67. *Id.* at 1033.

dangerous” or if restricted more broadly than time, place, or manner, the regulation must be the least restrictive means necessary.⁶⁸

Turner remains the standard by which courts judge the constitutionality of contested prison regulations. The courts seem willing to broaden prison authority even further than *Turner* when members of minority faiths contest prison regulations that impinge upon their religious rights.

III. *An Introduction to Native American Religious Concepts*

An understanding of Native American religious beliefs is as much, if not more, important than understanding an inmate’s First Amendment rights. America’s laws and court system have their foundation in Western Judeo-Christian concepts; therefore, the imposition of Christian standards and beliefs on Native Americans is inherently unjust. Religious practices among the various tribes are diverse, but the basic beliefs are remarkably similar.⁶⁹ One significant difference between most Native American faiths and Christian beliefs rests in the knowledge that religion among native peoples cannot be separated or distinguished from their tradition and culture; nor can their religion be separated from everyday life. One need only compare this concept to that of the United States’ dedication to the separation of church and state to see the difference in philosophies.

Native Americans consider nature and all living things interdependent. The Indians’ main role is to be the earth’s caretaker and not its developer.⁷⁰ Native Americans believe in sharing whatever wealth one may have with the less fortunate tribal members. One gains respect through giving — not through accumulating. An Indian community views itself as one, not merely as individuals with something in common. Often, the foundation of a particular tribe’s religious beliefs begins with its respect for and relation to the tribe’s immediate environment and natural surroundings. If these resources were to be altered or destroyed, nature’s significance would be trampled, eventually causing the death of the tradition and culture. Because religion is not just a “Sunday affair” for traditional Native Americans, the forced alteration of Native American tradition by others creates a serious burden on their religion.⁷¹ The underlying concept that the Creator made each component of nature in harmony with the other components prevails

68. *Id.*

69. See generally John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991).

70. *Id.* at 19-21.

71. *Id.* at 22-24.

among the tribes to this day. In order for the harmony to remain intact, the Indian must continue in the ways of his ancestors.⁷²

The basic belief is that everything the Creator gave the Indian remains sacred. For example, the body, along with nature and the earth, denotes spirituality. Hair is considered a gift from the Creator, and thus, is spiritual; hair embodies the strength needed to endure difficult times.⁷³ If an Indian's hair is removed, his life is drained of all energy.

Many Indians believe that removal of their hair results in a loss of communication with the Great Spirit.⁷⁴ The practice among many Indians is to allow their hair to grow until a loved one is lost, and then the hair is cut to signify the grief felt by the person mourning the death. Another traditional practice involves the deceased's family removing a lock of hair from the dead person soon after death.⁷⁵ The lock is wrapped in birch bark and, during the following year, cared for in the same manner as the individual from which it came would have been.⁷⁶ Food is left for the bundle, new articles of value are wrapped around the bundle, and the keeper of the bundle watches over it. The spirit bundle signifies the spirit of the dead relative, and after a year of mourning, the keeper of the bundle unwraps the articles from around the lock of hair and presents them to the other relatives of the deceased's family.⁷⁷ The surviving spouse is often the keeper of the bundle and receives new clothing and articles following the mourning period.⁷⁸ Finally, the lock, still wrapped in the birch bark, is buried beside the grave of the deceased.⁷⁹ Thus, even after death, hair plays an extraordinary role in the well-being of an individual's spirit.

These religious concepts have no counterpart in Western thought; therefore, laws derived from Western ideology constitute inherent discrimination by default when applied to traditional beliefs of Native Americans. Judges, with few exceptions, have yet to grasp the general concepts of the Indian peoples' beliefs, unless they are able to make an analogy between the belief at issue and one of Judeo-Christian importance. For instance, in *Reinert v. Haas*,⁸⁰ Native American inmates successfully convinced a court that prison regulations violated their First Amendment rights. The regulation prohibited the wearing of headbands. The inmates argued that because the headbands signify

72. *Id.*

73. *Iron Eyes v. Henry*, 907 F.2d 810, 811 (8th Cir. 1990).

74. *Mosier v. Maynard*, 937 F.2d 1521, 1523 (10th Cir. 1991).

75. *FRANCES DENSMORE, CHIPPEWA CUSTOMS* 38-39, 77-78 (1929).

76. *Id.* at 78.

77. *Id.* at 79.

78. *Id.*

79. *DENSMORE, supra* note 75; see also *RUTH MURRAY UNDERHILL, RED MAN'S RELIGION, BELIEFS, AND PRACTICES OF THE INDIANS NORTH OF MEXICO* 79 (1965).

80. 585 F. Supp. 477 (S.D. Iowa 1984).

the sacred circle, the regulation prevented the free exercise of their religion. The court agreed with the inmates and found that the First Amendment protects all legitimate religions regardless of origin.⁸¹ Analogizing headbands to the Christian cross, the court ruled that the public interest was best served by protecting these inmates' constitutional rights.⁸²

In *Frank v. Alaska*,⁸³ the significance of moose meat was compared with "the wine and wafer in Christianity." In *Frank*, an Indian had been arrested for killing moose out of season. The Indian contended, however, that the meat was for a funeral ceremony. After analogizing this with Christian beliefs, the court held the arrest was an abridgement of the Indian's First Amendment rights.⁸⁴ However, where no analogy to Christianity is readily available, Native American beliefs are downplayed as secondary or expendable to the religion as a whole.⁸⁵ Where Native American First Amendment rights are implicated, the courts have required a direct, severe impediment on the religious practices before protecting the parties' religious customs.⁸⁶

When the courts have balanced Indian rights against a state's interest in regulation, courts have held that tourism, water development, and commercial development outweigh the Indians' First Amendment rights.⁸⁷ Therefore, one cannot be surprised by the near non-existence of religious rights of Native American inmates. Native religions rarely receive as much court protection as Judeo-Christian religions, and any attempt by governmental entities to raise the level of protection for Native religions is met with the argument that such an effort is an Establishment Clause violation.⁸⁸

IV. *Historical Summary of Grooming Regulation Cases Involving Native Americans*

Since the early 1970s, several federal cases involving Native American inmates and prison grooming regulations have surfaced. During the same period, the Supreme Court has rewritten the law on the constitutional rights of incarcerated persons. As a result of the Supreme Court developments, analysis by lower courts across the country varies. The following discussion presents a fairly comprehensive picture of

81. *Id.* at 478.

82. *Id.* at 479.

83. 604 P.2d 1068 (Alaska 1979).

84. *Id.* at 1075.

85. See generally Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in HANDBOOK, *supra* note 29, at 27, 27-43.

86. *Id.* at 42.

87. *Id.*

88. *Id.*

cases addressing the conflict between Native American religions and prison grooming regulations over the past twenty years.

A. Goings v. Aaron

Beginning in 1971, the evidence became clear that courts would misunderstand an Indian inmate's religious beliefs in the same manner that courts misunderstood Native American religion and culture in general. In *Goings v. Aaron*,⁸⁹ a district court in Minnesota rejected a prisoner's contention that the prison's hair length regulation deprived him of his constitutional right to exercise his religion.⁹⁰ Prison officials granted Goings furlough to attend his father's funeral on the condition that he obtain a haircut while on leave from the facility. At the officials' request, Goings had his hair cut before returning. The inmate, an Oglala Sioux, made a solemn vow on his father's grave to return to traditional Indian ways, including wearing his hair long in the traditional Oglala manner.

In the months that followed, his hair grew beyond the length allowed, and officials asked him to cut his hair again. This time Goings refused, believing that a haircut would break his sacred vow. A broken vow by Goings would place him in a precarious relationship with the Great Spirit and jeopardize Goings' reliance on his faith for rehabilitation. Prison officials placed him in solitary confinement for disobeying their request; he challenged their action in court.

At trial, the court evaluated evidence that Goings could not speak his native language and had begun only recently to follow his native religion. The court also heard testimony from experts, explaining that breaking a vow is a serious infraction against the Creator in the minds of Native Americans. Other evidence included the separate and distinct hair regulation for black inmates within the prison. Further, Goings explained that he lost fifty dollars a month and merits for "good" time served as a result of his punishment.

Ultimately, the court's decision illustrated the judge's insensitivity towards Goings' beliefs. The court rejected the argument that the regulation violated Goings' constitutional rights.⁹¹ Instead, Goings' beliefs became the focal point of the court's decision. The court held that the inmate's beliefs were insincere.⁹² He had lived nearly twenty-seven years without following the tenets of his native faith, and could not become devoutly religious in such a short period of time.⁹³ Additionally, only fifty-five days of his sentence remained, and according

89. 350 F. Supp. 1 (D. Minn. 1972).

90. *Id.*

91. *Id.* at 4.

92. *Id.* at 5.

93. *Id.*

to the testimony of a Jewish rabbi, Goings could renew his vow when he was released and suffer no ill-effects.⁹⁴ Finally, the court determined that freedom of religion does not encompass the flagrant disregard of rules of conduct, either in or out of prison.⁹⁵

At the least, the judge's decision is puzzling. The judge chose the testimony of a rabbi over the testimony of Indian experts who possess personal knowledge and experience regarding the importance of Goings' vow. Possibly, the judge did not believe Goings' testimony; however, one must question any judge's ability to determine the subjective religious beliefs of a party before him. Even so, the decision goes beyond Goings' believability. The judge maintained that, even if Goings was sincere, his constitutional rights were not violated.⁹⁶ Clearly, this court would never have considered waiving the regulation for the inmate during his final fifty-five days in prison. According to *Goings*, a reasonable rule of conduct overrides a person's freedom of religion — whether the person resides in or out of prison.

B. Teterud v. Burns

The next significant case emerging in the area of prisoners' rights involved a Cree Indian at the Iowa State Penitentiary who challenged the prisons' hair regulation as a violation of his civil rights. In *Teterud v. Burns*,⁹⁷ prison officials posted a hair-length regulation allowing for hair growth to the top of the shirt collar in the back, and the bottom of the ears on the sides. Teterud, a Cree inmate, contacted prison administrators requesting a religious exemption from the new regulation. The request was denied and, shortly thereafter, Teterud filed suit.

As articulated by several witnesses at the lower court level, Cree Indians perceive the Great Spirit as a being with long, natural hair; therefore, believing they were created in the image of the Great Spirit, the Crees consider their long hair spiritual in nature. Teterud testified that if he cut his hair he would die spiritually, while suffering physically and emotionally.⁹⁸

The psychiatrist who routinely recommended treatment for inmates provided further important testimony. The psychiatrist observed Teterud's passive-aggressive behavior. He concluded that the behavior resulted from Teterud's clashing feelings of unworthiness as an Indian and insignificance as "just another . . . Indian kid."⁹⁹ The psychiatrist

94. *Id.*

95. *Id.*

96. *Id.*

97. 522 F.2d 357 (8th Cir. 1975).

98. *Id.* at 361.

99. *Teterud v. Gillman*, 385 F. Supp. 153, 155 (S.D. Iowa 1974).

suggested that providing Teterud an exemption under the regulation would raise the prisoner's self-esteem through instilling pride in his heritage and religion.¹⁰⁰ In addition to the psychiatrist, a former corrections official agreed that allowing Teterud to grow his hair would be a determinative factor in his rehabilitation.¹⁰¹

Prison officials argued that Teterud's beliefs were insincere because he had only recently begun practicing them. However, the district court was not persuaded by that argument.¹⁰² The court pointed out that Teterud spent much of his life in orphanages and other institutions not readily open to the practice of traditional Indian customs.¹⁰³ Next, the court determined that, although some Native Americans choose not to wear their hair in the traditional fashion, one should be allowed to follow the tenets of his religion where the beliefs are in good faith, and honestly and sincerely held.¹⁰⁴

Alternatively, officials at the penitentiary argued that the regulation was necessary, regardless of whether Teterud's belief was a sincerely held tenet of his religion. They asserted that long hair creates problems for sanitary food preparation, safe machine operation, quick inmate identification, contraband security, and personal hygiene.¹⁰⁵ Keeping in mind the prisoner's rights at all times, the district court refuted these contentions. The penitentiary could easily curb the problems if the prison required inmates with long hair to wear hair nets while performing those duties.¹⁰⁶ Likewise, the penitentiary could rephotograph inmates with long hair to facilitate their quick identification by officials.¹⁰⁷ And finally, the assertion that long-haired inmates could not keep their hair clean was an argument without substance.¹⁰⁸ The district court rejected *Goings* and determined that penal interests could be obtained by less restrictive means.¹⁰⁹

The Eighth Circuit Court of Appeals affirmed the district court's decision.¹¹⁰ The court stated that a practice deeply rooted in religious beliefs is sufficiently sincere to invoke free-exercise scrutiny.¹¹¹ Furthermore, the practice need not be an absolute tenet of the religion in question.¹¹² The court further noted that, unlike Christian religions,

100. *Id.*

101. *Id.*

102. *Id.* at 157.

103. *Id.*

104. *Id.*

105. *Teterud v. Burns*, 522 F.2d 357, 361 (8th Cir. 1975).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Teterud v. Gillman*, 385 F. Supp. 153, 157 (S.D. Iowa 1974).

110. *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975).

111. *Id.* at 362.

112. *Id.* at 361.

followers of Native American religions can participate in other faiths without contradiction.¹¹³ The record showed no increased burden on prison administrators if Teterud's constitutional rights were exercised.¹¹⁴ Twenty percent of the prison population had not complied with the regulation, and after five months of noncompliance, no conflicts resulted.¹¹⁵ Rights asserted under the First Amendment are not overcome by justifications founded on fear and apprehension.¹¹⁶ Finding that the hair regulation infringed on Teterud's constitutional rights, the court struck down the regulation as unconstitutional.¹¹⁷

Teterud is important for several reasons. First, the district and appellate courts analyzed the Native American inmate's religious beliefs in an unbiased fashion. Any preconceptions about the prisoner's beliefs were well hidden, and appeared not to influence the decision maker. A cultural gap is bridged when any one person can completely respect the "foreign" beliefs of another. This decision was a victory not only for Native Americans, but for all minority persons whose cultures and beliefs remain substantially different from those of the majority of the population.

Second, the author of the appellate opinion here became the lone dissenter fifteen years later in *Iron Eyes v. Henry*.¹¹⁸ Contrary to *Goings*, which held that the hair regulation did not violate the prisoner's constitutional rights,¹¹⁹ *Teterud* demonstrates the importance with which constitutional rights should be regarded, even where inmates are involved. In *Teterud*, the court never lost sight of the positive impact that Teterud's religion might have on his promise for rehabilitation and productivity as a citizen.

C. *Gallahan v. Hollyfield*

In a 1982 decision, the Fourth Circuit reinforced *Teterud*. *Gallahan v. Hollyfield*¹²⁰ involved a half-blooded Cherokee prisoner who subscribed to his traditional religion. The inmate's beliefs included the understanding that hair is a sensory organ similar to a person's eyes or ears. One's hair symbolizes growth of the being and manifests living. When asked to conform with prison regulations, Gallahan explained these beliefs to the prison officials. The State of Virginia allowed no exemptions to the hair regulation for Native Americans. Subsequently, Gallahan's hair was forcibly cut twice. Gallahan re-

113. *Id.*

114. *Id.* at 360.

115. *Id.* at 361.

116. *Id.*

117. *Id.* at 360.

118. 907 F.2d 810 (8th Cir. 1990).

119. *Goings v. Aaron*, 350 F. Supp. 1, 5 (D. Minn. 1972).

120. 516 F. Supp. 1004 (E.D. Va. 1981), *aff'd*, 670 F.2d 1345 (4th Cir. 1982).

sponded by filing suit, alleging that his civil rights had been violated.

Gallahan testified in a deposition under oath about his religion and the sincerity with which he practiced it.¹²¹ In an attempt to refute his testimony, counsel for the prison officials asked Gallahan to "reveal the religious name of his God or Supreme Being and [his] Indian name."¹²² The inmate refused to answer. The officials justified their hair regulation based on the often-asserted fears of difficulty in identification, easily hidden contraband, and sanitary problems within the prison.

The trial court held that the officials had not presented enough evidence to justify limiting the inmate's constitutional rights.¹²³ There was no evidence to dispute the fact that Gallahan's beliefs were sincere. Similarly, officials offered no proof to demonstrate the need for such regulation.¹²⁴

After the court denied the prison officials' motion to reconsider,¹²⁵ the officials appealed. On appeal, the Fourth Circuit Court of Appeals determined that the alleged justifications for such a regulation were either overly broad or lacking in substance.¹²⁶

Even if the justification was valid and legitimate, other less restrictive means remained available to meet administrative objectives.¹²⁷ Officials could require inmates to keep their hair pulled back so that the inmates would be more identifiable.¹²⁸ Hair searches would eliminate the possibility of contraband smuggling.¹²⁹ Finally, a "neat and clean" grooming requirement would force long-haired inmates to be sanitary.¹³⁰

Gallahan is another rare case where a court refused the prison officials' unjustified limitations on an inmate's constitutional rights. Even if a person is incarcerated, his First Amendment rights should not live and die by the breath of a prison official. If such is the case, then it is a fallacy to say that prisoners retain any constitutional rights while imprisoned.

D. *Weaver v. Jago*

In the 1982 case of *Weaver v. Jago*,¹³¹ the Sixth Circuit Court of Appeals reiterated prison officials' need for more than unsubstantiated

121. *Id.* at 1007.

122. *Id.*

123. *Id.* at 1006-07.

124. *Id.*

125. *Gallahan v. Hollyfield*, 516 F. Supp. 1004, 1008 (E.D. Va. 1981), *aff'd*, 670 F.2d 1345 (4th Cir. 1982).

126. *Gallahan v. Hollyfield*, 670 F.2d 1345, 1346 (4th Cir. 1982).

127. *Id.* at 1346-47.

128. *Id.*

129. *Id.*

130. *Id.* at 1347.

131. 675 F.2d 116 (6th Cir. 1982).

justifications, especially if the penitentiary expected regulations limiting constitutional rights to be upheld.¹³² At the lower court level, the prison administrators' affidavit in support of their motion for summary judgment alleged that a hair regulation furthered the security, health, and safety of all persons within the prison.¹³³ The prison had subjected an inmate to several disciplinary actions for refusing to cut his hair.

The prisoner, Don Weaver, continued to ignore the regulation because, as a Cherokee, he believed short hair was contrary to the image of the Great Spirit. Weaver believed haircutting signified disgrace and humiliation — a state of mourning. Thus, he challenged the regulation as a violation of his civil rights. According to the Sixth Circuit's opinion, the district court granted the penitentiary's motion for summary judgment on the ground that the court would not substitute its judgment for that of the prison officials.¹³⁴ Based on Weaver's appeal from summary judgment, the case made its way to the Sixth Circuit Court of Appeals.

On appeal, the Sixth Circuit Court of Appeals held that the hair regulation implicated the prisoner's First Amendment rights.¹³⁵ Therefore, the lower court should have considered and balanced the inmate's rights along with the interests of the officials.¹³⁶ The court held on remand that officials must do more than just offer conclusory statements that a regulation is necessary before the court will allow a limitation on religious freedom.¹³⁷

Weaver, however, would be the last refreshing piece of judicial analysis involving Native Americans and prison grooming regulations for quite some time. Over the next nine years, courts allowed prison officials to dictate the scope of Native American prisoners' religious rights.

E. Griffin v. Duggar

*Griffin v. Duggar*¹³⁸ involved a member of the Blackfoot Nation who brought a civil rights action seeking an injunction to prevent prison officials from cutting his hair. The inmate testified that when

132. *Id.* at 119.

133. *Id.* at 118.

134. *Id.* at 117.

135. *Id.* at 118.

136. *Id.* at 119.

137. *Id.*

138. Case No. 79-758-Civ-J-B (M.D. Fla. Sept. 25, 1984). The magistrate report and recommendation in *Griffin*, entered July 14, 1983, is reproduced as appendix 1 in *Shabazz v. Burnauskas*, 600 F. Supp. 712, 716-29 (M.D. Fla. 1985), *aff'd*, 790 F.2d 1536 (11th Cir.), *cert. denied*, 479 U.S. 1011 (1986). The district court's order in *Griffin* is reproduced as appendix 2 in *Shabazz*, 600 F. Supp. at 729-31.

his hair was cut, he felt his soul had been shaved.¹³⁹ Earlier in his life, the prisoner chose not to enlist in the Armed Forces because the military required haircuts.

Other Indian inmates testified about the religious connotations of a haircut. Their testimony indicated that to cut an inmates' hair would be like cutting an Indian's flesh.¹⁴⁰ Hair is natural and places a person in harmony with the earth. Unless an Indian lives his religion, he has none. When asked where long hair ranked among the tenets of the religion, one inmate responded that each tenet of an inmate's religion ranks equally in importance with another; the presence of one tenet does not make up for the lack of another.¹⁴¹

The prisoner argued that cutting an Indian's hair was similar to taking the Bible away from a Christian. Moreover, the prison allowed death row inmates to wear beards and long hair, and allowed members of other religions to wear symbols of their respective religions such as the Christian Cross or the Jewish Star of David.¹⁴²

Prison officials attacked the inmate's sincerity. The prisoner also had a Catholic background and had attended services of other religions; therefore, prison officials asserted that he could not simultaneously practice his people's traditional religion. They proffered a prison chaplain with no understanding of Native American religions who testified that the inmate's traditional religion was incompatible with Catholicism.¹⁴³

Officials also contended that the regulation was necessary, whether or not the inmate's beliefs were sincere. The officials argued that the restriction furthered identification of inmates and promoted discipline through conformity. Health and sanitary conditions were emphasized as additional reasons for the requirement. The officials argued that rephotographing inmates was not a feasible alternative to the regulation because of the time and money required.

The magistrate court determined that the inmate's beliefs in Native American religion were sincere, despite his Catholic upbringing.¹⁴⁴ However, the court also said that it must give prison officials great deference with policies impacting on the administration of penal institutions.¹⁴⁵ The court balanced the prison's interest in discipline, health, sanitation, and security against the possibility of accommodating the

139. *Shabazz*, 600 F. Supp. at 718 (reproducing magistrate report and recommendation in *Griffin*).

140. *Id.* at 716.

141. *Id.* at 717.

142. *Id.* at 716-17.

143. *Id.* at 719-20.

144. *Id.* at 728.

145. *Id.* at 727.

inmate by rephotographing him instead of cutting his hair.¹⁴⁶ The magistrate held that the penitentiary's justifications were reasonable.¹⁴⁷ The district court affirmed the magistrate's decision, reasoning that, no matter what balancing tests were employed, no less restrictive means were available.¹⁴⁸

On appeal, the Eleventh Circuit Court of Appeals affirmed the *Griffin* holding that a hair regulation was the least restrictive means of protecting penitentiary interests; therefore, it outweighed a prisoner's First Amendment rights.¹⁴⁹ *Griffin* foreshadowed the future for Native American prisoners. The *Griffin* court disregarded the less restrictive means of rephotographing inmates. Instead, the *Griffin* court deemed a prison official's opinion, supported by unsubstantiated justifications, more important than a prisoner's religious rights.

F. Capoeman v. Reed

*Capoeman v. Reed*¹⁵⁰ involved a Native American confined for a period of time in a Washington State penitentiary. Prison officials ordered the inmate to cut his hair so they could take "before and after" photographs for identification purposes. The prisoner objected on religious grounds, and offered instead to pull his hair back. Capoeman continued resisting for a week, and even requested disciplinary segregation until the matter could be resolved.

Shortly thereafter, Capoeman was taken from his cell and the officials forcibly cut his hair. Fourteen months later, the prison implemented an exemption for the grooming regulation for Native Americans. The court subsequently overturned the inmate's conviction and he was released. However, Capoeman filed a civil rights action against prison officials for the haircutting incident.

The Ninth Circuit Court of Appeals upheld the district court's conclusion that, although the incident appeared to be a serious constitutional violation, under current law state officials were immune from damages.¹⁵¹ The court found that officials could not be sued because their conduct did not violate "clearly established" constitutional rights which a reasonable person would have known.¹⁵² Although there were no controlling cases in the Ninth Circuit at the time, the weight of relevant cases in other circuits were in Capoeman's favor. However, the Ninth Circuit refused to charge the officials with knowledge that their conduct violated clearly established law.

146. See *id.* at 728-29.

147. *Id.* at 729.

148. *Id.* at 730 (reproducing district court's order in *Griffin*).

149. 790 F.2d 1536 (11th Cir. 1986).

150. 754 F.2d 1512 (9th Cir. 1985).

151. *Id.* at 1515-16.

152. *Id.*

Surely the prison officials had knowledge of the prisoner's religious rights, especially given the fact that this was not a case or situation of first impression within the prison context. Prison administration is a job which requires knowledge of prisoner's rights. Maybe Capoe-man's prison administrators did not consider Capoe-man's beliefs sincere, or maybe they considered the prison's interests to be more important. Nevertheless, prison officials knew (or should have known) that an inmate's constitutional rights were implicated although they chose to disregard them. This type of state action should never be protected from redress.

G. Cole v. Flick

In *Cole v. Flick*,¹⁵³ a half-blood Cherokee, Cole, was ordered to have his hair cut to conform with prison regulations. Cole refused on religious grounds. As a result, officials filed a misconduct report. Officials then provided Cole with a hearing in front of a committee so that he could explain his refusal and the beliefs. Ultimately, the committee found Cole guilty of refusing to obey an order and sentenced him to thirty days of disciplinary confinement. To escape further punishment, Cole allowed prison officials to cut his hair. Cole then filed suit against the prison, challenging its regulation.

Prison officials listed five main reasons for the hair regulation. First, the regulation promoted identification throughout the prison. Second, short hair prevented the concealment of contraband. Third, short hair reduced an inmate's attractiveness to predatory homosexuals, and generally reduced the incidents of homosexuality. Fourth, long hair created safety problems for inmates working with machinery and sanitation problems for those in food service. Hats and hair nets did not adequately cure these problems. Fifth, if officials permitted long hair, inmates would lose respect for prison rules and the authorities that enforce them. Further, inmates would become jealous of one another.

The district court rejected the reasoning of the officials and enjoined the prison from continued enforcement of the regulation against the inmate.¹⁵⁴ As to the officials' first justification for the regulation, the court pointed out that the prison ran photographic identification operations haphazardly.¹⁵⁵ Thus, cutting the inmate's hair in violation of his rights for identification purposes was pretextual. Next, strip searches were already routine for inmates in contact with visitors, and these searches included hair inspections; therefore, any heightened risk of concealed contraband was minimal.¹⁵⁶ Third, the officials presented no

153. 758 F.2d 124 (3d Cir.), cert. denied, 474 U.S. 921 (1985).

154. *Id.* at 124.

155. *Id.* at 126.

156. *Id.* at 127.

evidence that long hair would create problems with predatory homosexuals or encourage homosexuality.¹⁵⁷ The court further refused to believe that hats and hair nets would not adequately solve problems with machinery and food.¹⁵⁸ Finally, the court found the officials' argument that inmates would become disrespectful towards guards and prison regulations unreasonable, in light of the fact that some groups, such as the Muslim prisoners, were currently receiving different treatment without such a result.¹⁵⁹

On appeal, the Third Circuit Court of Appeals had its own ideas concerning the validity of such regulations against Native American prisoners. The Third Circuit held that the district court erred by not relying on the testimony of four expert witnesses.¹⁶⁰ The experts, who were all wardens, testified that the regulation was necessary for the same reasons asserted by prison officials.¹⁶¹ The court distinguished *Cole* from *Gallahan* and *Teterud* because neither one involved the "predatory homosexuality" justification that was asserted in *Cole*.¹⁶² Similarly, both cases required a "least restrictive means" test which was not followed by the Third Circuit.¹⁶³

The test in *Cole* required a Native American prisoner to show by substantial evidence that the prison officials' reasons for the regulation were unreasonable or exaggerated.¹⁶⁴ This created a much higher burden for *Cole* than the "least restrictive means" test would have required. The officials' beliefs concerning the need for regulation were "sincere" and "arguably correct"; therefore, the Third Circuit Court of Appeals reversed the district court's decision and entered judgment for the officials.¹⁶⁵

The *Cole* decision was more than a shocking setback for Native American prisoners. When the Supreme Court refused to review the case,¹⁶⁶ the Court sent a signal to all prison administrators that religious rights of inmates could be restricted with little more than imaginative justifications.

H. *Pollock v. Marshall*

The next significant case, *Pollock v. Marshall*,¹⁶⁷ involved a Native American who adhered to the Lakota religion. The inmate sought an

157. *Id.*

158. *Id.*

159. *Id.* at 127-28.

160. *Id.* at 128-29.

161. *Id.* at 129.

162. *Id.* at 131 n.9 (citing *Gallahan v. Hollyfield*, 670 F.2d 1345, 1346-47 (4th Cir. 1982); *Teterud v. Burns*, 522 F.2d 357, 362 (8th Cir. 1975)).

163. *Id.*

164. *Id.* at 131-32.

165. *Id.* at 132.

166. 474 U.S. 921 (1985).

167. 656 F. Supp. 957 (S.D. Ohio), *aff'd*, 845 F.2d 656 (6th Cir. 1987), *cert. denied*, 488 U.S. 987 (1988).

injunction that would prohibit prison officials from cutting his hair. The prisoner contended that he was entitled to keep his hair long, pursuant to a section of the Ohio Administrative Code.¹⁶⁸ The code allowed prison officials to modify hair length regulations upon an inmate's showing a sincerely held belief that was rooted in religion and that conflicted with the restriction.¹⁶⁹

Prison officials made two motions for summary judgment, and listed fourteen justifications for regulating hair length within the prison environment. Among those justifications were quick identification of inmates within the prison or after escape, reduction in the ability of inmates to smuggle contraband, reduced tension among inmates and guards by reduction in contact between them, reduced homosexual attacks and activity, machine safety, and sanitation concerns. The inmate argued that the sincerity of his beliefs remained in controversy and was an issue of material fact; therefore, motion for summary judgment was not proper.

The district court granted the prison's motion for summary judgment.¹⁷⁰ The officials had not disputed the sincerity of the inmate's beliefs; therefore, sincerity was not at issue.¹⁷¹ Second, the inmate's sincerity was not the sole determinative issue because sincerity does not automatically render the regulation unconstitutional.¹⁷² Officials made reasonable and substantial justifications for the limitation which the court determined would have passed a higher standard of scrutiny than required.¹⁷³ The court refused to second guess officials on matters concerning prison security, even where the regulation affected constitutional rights in a "discomforting" manner.¹⁷⁴ Prison officials needed to show only that a "potential danger" existed.¹⁷⁵ Finally, if the inmate was permitted to wear his hair long, the prison would be drawing distinctions between prisoners, instead of viewing all inmates from a neutral, objective standard.¹⁷⁶

Subsequently, the Sixth Circuit reviewed the case under *Turner v. Safley*,¹⁷⁷ which had recently been decided by the Supreme Court. Relying on the factors used in *Turner* to determine whether a prison

168. OHIO ADMIN. CODE § 5120-9-25(F) (1983), noted in *Pollock*, 656 F. Supp. at 958. The language discussed by the court was deleted by amendment effective Aug. 26, 1991.

169. *Id.*

170. *Pollock*, 656 F. Supp. at 963.

171. *Id.* at 959.

172. *Id.*

173. *Id.* at 962-63.

174. *Id.* at 961.

175. *Id.* at 163.

176. *Id.* at 962.

177. 482 U.S. 73 (1987).

regulation is valid, the Sixth Circuit blindly accepted the prison officials' justifications for the regulation.¹⁷⁸ The inmate had not refuted each and every reason for the regulation; therefore, the officials' motion for summary judgment was affirmed.¹⁷⁹

In *Pollock*, the courts refused to accept their responsibility to uphold the Constitution. They shrugged off the penitentiary's action as if no First Amendment rights had been implicated. The courts forced the inmate to prove that his case would be wholly successful on the merits before the courts would allow the prisoner any opportunity to address the merits of the case. Evidenced by the "Court of last resort's" denial of certiorari, either the inmate in *Pollock* suffered no violation of his rights, or the Supreme Court refused to accept its responsibility to uphold a prisoner's limited rights under the Constitution.

V. Discussion and Analysis of *Iron Eyes v. Henry*

A. *Iron Eyes v. Henry*

Robert Iron Eyes, an enrolled member of the Standing Rock Sioux, was born on the Standing Rock Reservation in North Dakota. As a Native American born and raised in the traditions of the Sioux, he practices the pipe religion. Following the custom of his peoples' rich culture, Iron Eyes wears his hair naturally and refrains from cutting it, except as a symbol of grief for the loss of a loved one. According to his heritage and religion, the cutting of his hair offends the Great Spirit, unless done so in mourning because hair is a gift from the Creator. In twenty-seven years, his hair was cut just five times; three of those times he was in mourning. Twice, however, corrections officials at the Farmington Correctional Center in Farmington, Missouri, forcibly cut Iron Eyes' hair.

At the beginning of his incarceration, which began in October 1987,¹⁸⁰ the Farmington corrections supervisor directed Iron Eyes to cut his hair in compliance with prison grooming regulations. Iron Eyes informed the official of his Native American heritage and religious beliefs against interference with hair growth. The supervisor allegedly reviewed Iron Eyes' file for proof of his Native American heritage, but found no information that was indicative of "Indianness."¹⁸¹

178. *Pollock v. Marshall*, 845 F.2d 656, 658-59 (6th Cir. 1987), cert. denied, 488 U.S. 987 (1988).

179. *Id.* at 659-60.

180. Iron Eyes was imprisoned from July 1986 to July 1987 at another facility. No attempt was made to cut his hair at that time. See *Iron Eyes v. Henry*, 907 F.2d 810, 812 n.4 (8th Cir. 1990).

181. This fact was disputed at the district court level by the testimony of a prison barber. The barber described that, at the time of the first haircut, prison officials possessed proof of Iron Eyes' Native American heritage. See *id.* at 818 n.6.

In December 1987, the issue arose again. Prison officials ordered Iron Eyes to either conform to prison grooming standards or be segregated from the general prison population. Iron Eyes refused on the basis of his religious tenets. As a consequence, he was placed in isolation. Four days later, officials handcuffed and shackled the inmate while a prison barber forcibly cut his hair. As a result, Iron Eyes filed a *pro se* complaint under the Civil Rights Act.¹⁸²

The following September, officials again ordered Iron Eyes to cut his hair. Iron Eyes obtained a temporary restraining order prohibiting the cutting of his hair. Nonetheless, he was disciplined by prison officials for disobeying their order. In October, Iron Eyes amended his complaint and requested injunctive relief, as well as damages for the previous incident. The court granted him a preliminary injunction, and recommended that he seek an exemption to the grooming regulation through the prison officials.¹⁸³

Iron Eyes submitted proof of enrollment in his tribe to the superintendent at Farmington, who forwarded the information with Iron Eyes' request for exemption to the zone director of adult institutions in Missouri. The regulation required that hair be no longer than the base of an inmate's shirt collar.¹⁸⁴ However, pursuant to a court order or decision by the zone director, Native Americans were permitted to grow their hair beyond such length.¹⁸⁵ The zone director denied Iron Eyes' request without explanation. Subsequently, Iron Eyes was cited for failure to cut his hair. Prison officials had interpreted the inmate's preliminary injunction as merely prohibiting *them* from forcibly cutting it.

According to the Eighth Circuit, after a bench trial regarding the merits of the complaint, the district court ruled in favor of Farmington administrators.¹⁸⁶ While a corresponding request for a temporary restraining order awaited determination at the appellate level, prison administrators presented Iron Eyes with the choice again of cutting his hair or being segregated in disciplinary isolation. Iron Eyes allowed them to cut his hair and avoided disciplinary isolation. After the Eighth Circuit Court of Appeals took the case under submission,¹⁸⁷ Missouri's Department of Corrections and Human Resources removed the exemption possibility for inmates.¹⁸⁸

182. 42 U.S.C. § 1983 (1988).

183. *Iron Eyes*, 907 F.2d at 812 n.24.

184. Div. Rule 116.050(3), Mo. ADMIN. CODE tit. 14, div. 20, ch. 16, *quoted in Iron Eyes*, 907 F.2d at 811 n.3.

185. *Id.*

186. *Iron Eyes*, 907 F.2d at 811. Because Iron Eyes had been released from prison during the pendency of the appeal, the issue of injunctive relief was no longer relevant. *Id.* at 812 n.

187. *Id.*

188. *Id.* at 818 n.8.

The appellate court began its review by stating that courts of law are particularly ill-equipped to second guess prison officials and administrators in areas where the court's lack of expertise may result in incompetency.¹⁸⁹ The court suggested, nonetheless, that inmates retain some constitutional rights, including the right to exercise freely one's religion under the First Amendment.¹⁹⁰

Next, the court rejected Iron Eyes' reliance on *Teterud* as relevant precedent.¹⁹¹ Although the *Teterud* case involved a Native American inmate's noncompliance with grooming regulations and the decision was favorable for inmates, more recent inmate cases in the Eighth Circuit and the Supreme Court limited *Teterud* severely.¹⁹² The determinative factor was no longer whether legitimate penological interests could be served by less restrictive means, but instead, whether the prison regulation was reasonably related to legitimate penological interests.¹⁹³

Next, the court examined the Farmington officials' contention that Iron Eyes' beliefs were not sincerely held and that the beliefs were not an essential tenet of his religion. The appellate court examined the district court's finding that Iron Eyes genuinely possessed his beliefs, as illustrated by continued adherence to the beliefs and practices throughout his life, but the court refused to conclude that the district court's holding was clearly erroneous.¹⁹⁴

The court then analyzed the prison restrictions under the four factors set forth by the Supreme Court in *Turner*. The first component requires a neutral and legitimate objective behind the regulation at issue, and a rational relationship between the objective and the regulation. Prison officials maintained that the restriction facilitated identification of inmates and prevented concealment of contraband in lengthy hair. Both factors underlying the objective of the regulation involved security affairs within the prison walls; therefore, the courts deemed the regulation legitimate.¹⁹⁵

The court found the regulation was nondiscriminatory and neutral in nature because the regulation included an "exception to the regulation" for Native Americans.¹⁹⁶ Although the prison denied Iron Eyes the right to fall within the exception, the court refused to consider the denial and focused on the presence of an exemption policy.¹⁹⁷ Iron

189. *Id.* at 812.

190. *Id.*

191. *Id.* at 813 (noting *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975)).

192. *Id.*

193. *Id.*

194. *Id.* at 814.

195. *Id.* at 815.

196. *Id.*

197. *Id.*

Eyes also contended there was no logical connection between the objectives and the restriction because numerous options remained for inmates wishing to smuggle contraband. The court, however, was unpersuaded that the availability of other options for smuggling contraband reduced the connection between the officials' objectives and the hair regulation.¹⁹⁸

Additionally, Iron Eyes argued that Farmington's identification concerns were pretextual in nature. The officials forcibly cut his hair twice but never photographed him with short hair. Furthermore, an extra photograph of an inmate with his hair pulled back alleviates the possibility that upon escape the inmate could quickly shear his hair and become instantly unidentifiable to law enforcement officials. Nevertheless, the court noted that long hair and possible quick alteration of appearance "could conceivably" hinder the identification of an inmate.¹⁹⁹ Thus, Farmington's hair restriction passed the legitimate and neutral standard. The court deemed that the regulation was rationally related to security concerns, which satisfied the first prong of *Turner*.²⁰⁰

The second *Turner* factor involves the question of whether alternative means of exercising the restricted right remain available for the inmate. The majority rejected Iron Eyes' contention that the right at issue was his religious need to grow his hair. Instead, the court examined Iron Eyes' right broadly, stating the issue as whether Iron Eyes could freely practice his religion.²⁰¹

Farmington restricted hair growth and prohibited the ghost dance and sweat lodge ceremonies, which were necessary tenets of Iron Eyes' religion. Officials did allow the pipe ceremony and sun dance, so Iron Eyes was not totally foreclosed from practicing his religion.²⁰² The restrictions were considered to be a result of Iron Eyes' breaking the law. These restrictions were brought on by Iron Eyes and the restrictions were not so wide-ranging as to completely prohibit the exercise of his rights.²⁰³

Next, the court turned to *Turner's* third factor concerning the impact that accommodating Iron Eyes would have on prison guards, fellow inmates, and prison resources. Farmington set forth several reasons why accommodation for inmates was inappropriate. Searches of long-haired inmates would take longer and be required more often as a result of the hair length. The attention that would have to be focused on these inmates would create animosity between guards and inmates,

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

while overextending already limited resources. Likewise, granting an exemption to Iron Eyes would create the appearance that prison officials were granting special privileges to him and others similarly situated; this would generate jealousy among the prisoners. The court deferred its own judgment to the prison officials' judgment and accepted Farmington's arguments.²⁰⁴

Under the third prong of *Turner*, the court ascertained whether any alternatives to the regulation existed that would fully accommodate the Indian prisoner's religious beliefs at little cost to the prison's objectives. The court focused its analysis on the fact that an exemption existed for Native Americans.²⁰⁵ Iron Eyes and all other Native Americans who sought the exemption had been unsuccessful in their attempts at securing permission to grow their hair. Not only were the prison officials the ones who made the rules, but also, ironically, they were the proper authorities for determining when an exemption could be granted.²⁰⁵

It is interesting to note that the process for obtaining an exemption to Farmington's regulation was removed before the court of appeals heard the case. The court acknowledged the extraction of the exemption process from the regulation, yet had the audacity to hold that the existence of an exemption policy was the only viable way of accommodating Native American inmates.²⁰⁷ It is paradoxical that the court determined that the prison officials had accommodated Iron Eyes' religious beliefs because of the existence of an exemption to the regulation; in fact, the court knew the exemption was no longer in existence. Nonetheless, the court explained that anything more would result in more than a "*de minimis*" cost to the prison's valid interests.²⁰⁸ Thus, the hair restriction passed *Turner's* final factor.²⁰⁹

In conclusion, the court admonished the Farmington officials for requiring Iron Eyes to submit proof of his obvious Native American heritage.²¹⁰ The court of appeals also stated that, under certain circumstances, the court might have sanctioned the officials for cutting Iron Eyes' hair while he awaited the court's determination of his motion for a temporary injunction.²¹¹ Nevertheless, the court held in favor of the officials, and found Iron Eyes' right to exercise his religion was outweighed by penological interests.²¹²

204. *Id.* at 816.

205. *Id.*

206. *Id.* at 815.

207. *Id.* at 815-16.

208. *Id.*

209. *Id.* at 816.

210. *Id.*

211. *Id.*

212. *Id.*

Senior Circuit Judge Heaney, author of the *Teterud* decision, filed a lengthy dissent.²¹³ Judge Heaney analyzed the facts under the *Turner* criteria, but emphasized that the Supreme Court's recent decision in *Thornburgh v. Abbot*²¹⁴ required the standard of review to be more than a "toothless" inquiry into the prison policy.²¹⁵ Judge Heaney also noted a recent Eighth Circuit decision which held that a court should only defer to prison officials' judgment concerning reasonable policies, and not the prison's justifications for the policies.²¹⁶ Next, Judge Heaney noted that *Turner* did not require courts to uphold restrictions that were broader than necessary nor did it require policy alternatives to be entirely cost-free.²¹⁷

Under the first *Turner* factor, Judge Heaney insisted that the explanations set forth by prison officials in 1990 mirrored the justifications that were deemed pretextual in *Teterud*; *Teterud* rejected identification and contraband smuggling as valid justifications.²¹⁸ In *Teterud*, a large portion of inmates were in noncompliance with the hair regulation, but they were not involved in any misconduct as a result of their noncompliance.²¹⁹

Judge Heaney also took issue with the Missouri officials' failure to present sufficient evidence to support their arguments.²²⁰ These officials presented no evidence of identification difficulties, even though the prison's enforcement of the grooming code had been much less than strict.²²¹ Secondly, officials admitted that the prison had never discovered contraband in long hair, despite the careless way in which the regulation was enforced. Thus, the officials' statements that long hair caused identification problems and promoted the smuggling of contraband were not supported by the evidence.²²²

The dissent rebutted the identification justification even further. Only a handful of Native Americans resided at the Farmington Correctional Facility, although the prison population was 1700. Inmates exempted from the hair regulation would have been instantly identifiable due to the distinguishing feature of long hair.²²³ Iron Eyes was distinctively Native American in appearance, which further facilitated his identification.²²⁴ Finally, if long hair caused such a difficult iden-

213. *Id.* (Heaney, J., dissenting).

214. 490 U.S. 401 (1989).

215. *Iron Eyes*, 907 F.2d at 819 (Heaney, J., dissenting).

216. *Id.* (quoting *Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir. 1991)).

217. *Id.* at 819.

218. *Teterud v. Burns*, 522 F.2d 357, 361 (8th Cir. 1975).

219. *Id.*

220. *Iron Eyes*, 907 F.2d at 820 (Heaney, J., dissenting).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

tification problem, why did officials choose not to rephotograph him, since Iron Eyes' prison admission photo showed him with long hair? The dissent argued that the idea that short hair facilitates easy identification was pretextual in nature.²²⁵ Likewise, where the facility produced no evidence that long hair caused security problems, a regulation requiring short hair in order to reduce security problems was overbroad.²²⁵

Astoundingly, rephotographing four inmates out of 1700 required no more than "*de minimis*" cost to prison officials.²²⁷ Moreover, officials searched prisoners on a regular basis regardless of the length of their hair. The additional time required for guards to check on inmates lengthy hair would have been, at most, ten seconds.²²⁸ The prison allowed long hair before, and presented no evidence that inmates resented the additional search time, or that it caused confrontations between guards and inmates.²²⁹ Accommodation (differential treatment based on an inmate's beliefs) does not become unreasonable merely because a potential for misbehavior might exist;²³⁰ therefore, the impact from the officials' accommodation of Iron Eyes would have been minimal.

The dissent urged that the argument that special privileges bestowed upon certain inmates would create jealousy among all inmates was overbroad.²³¹ Such an argument, if true, would eliminate the ability of officials to treat any inmate different than another because jealousies might arise. If inmates were treated exactly the same, no inmates could retain any religious freedom inconsistent with the treatment of all inmates. Moreover, treating all inmates in the same manner conflicted with *Turner's* fourth factor, which requires courts to consider the available alternatives to accommodating prisoners.²³² The regulations would disproportionately impact on minority religions, whose practices were unfamiliar to most. Finally, when prison officials rewarded inmates for "good behavior," they would be generating inmate jealousy. There is no reason why constitutional rights should be any different from the good behavior perks, which reap the benefits of differential treatment, despite jealousy among inmates.²³³

Judge Heaney's last attack on justifications set forth by the Farm-

225. *Id.*

226. *Id.* at 821.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 820-22 (Heaney, J., dissenting).

233. *Id.* at 822.

ington officials related to colleagues' policies within the Eighth Circuit; Missouri was the only jurisdiction within that circuit which regulated hair length.²³⁴ Other jurisdictions either had no hair length limit or accommodated prisoners by rephotographing those with long hair.²³⁵ According to Judge Heaney, such evidence was persuasive in showing that officials had exaggerated their predicament.²³⁶

Finally, Judge Heaney disagreed with the majority's disposal of the case as a facially valid and reasonable hair length regulation containing a religious exemption.²³⁷ Heaney pointed out that the court relied on the existence of an exemption when they deemed the regulation neutral.²³⁸ Likewise, the majority asserted that the availability of the exemption was the only viable alternative under the fourth factor of *Turner*.²³⁹ However, the State discarded the exemption before the court heard the case.²⁴⁰ Iron Eyes' complaint not only challenged the validity of the regulation, but the way in which the regulation was applied. The court ignored this, and based its decision on the facial validity of the regulation containing an exemption, thus, refusing to remand the case to the district court for a determination of how the officials enforced (applied) the regulation against Iron Eyes personally.²⁴¹

B. Analysis of Iron Eyes v. Henry

The majority not only erred in their judgment, they perverted their analysis to the point that questions concerning this decision must be raised. The prison officials' justifications might well have passed a test of strict scrutiny in the presence of the court of appeals. Although inquiry into the motivations behind the judgment would only be speculative, the court's analysis speaks for itself.

First of all, the majority relied heavily on a fact they knew no longer existed. They deemed the grooming regulation neutral and nondiscriminatory, due solely to the fact that an exemption existed. No exemption existed at the time of the decision. Indeed, no Native American prisoner had ever been successful in obtaining such an exemption. This lends credence to the fact that the exemption's "formal" existence was pretextual.

The court agreed with officials who justified the refusal of Iron Eyes' request by asserting that other inmates would become jealous.²⁴² The majority ignored the fact that inmates were already treated dif-

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 818 n.8.

239. *Id.* at 818.

240. *Id.* at 818 n.8.

241. *Id.* at 822-23.

242. *Id.* at 815.

ferently from each other for several reasons, including religion. In addition, the court was required under *Turner v. Safley*²⁴³ to consider whether accommodation was viable. The court ignored the fact that prisoners cannot retain most constitutional rights if the system treats them exactly alike.

The court relied again on the existence of a regulatory exemption for religious beliefs when the court determined that any other viable alternative for Iron Eyes would cause more than "*de minimis*" costs to the penitentiary.²⁴⁴ The exemption did not exist; therefore, there was no other "easy" means of respecting Iron Eyes' rights.²⁴⁵

Throughout the proceedings, prison officials at Farmington stressed the importance of the regulation for the purpose of rapid inmate identification. The court knew the prison's photograph procedures were haphazard. The court knew that the officials had not photographed Iron Eyes with short hair after they had forcibly cut his hair. The court held that the regulation outweighed Iron Eyes' religious rights because long hair "could conceivably" hinder the identification of inmates.²⁴⁶

Although the court found in favor of prison officials, the officials presented no evidence tending to legitimize the hair regulation. As noted above, officials were not too concerned with identification problems as demonstrated by their own inaction. In addition, the officials presented no evidence showing their alleged identification difficulties. The prison admitted that they had never seized contraband from the long hair of an inmate. There was no evidence that searches of prisoners with long hair produced conflicts between the prisoners and the guards. Yet, the court chose to imagine the presence of evidence justifying the regulations.

Some of the blame for the court's discouraging decision belongs to the Supreme Court. The *Turner* decision significantly lowered the hurdle that prison officials must jump when restricting constitutional rights. Interpreted as broadly as the analysis in *Iron Eyes*, *Turner* could facilitate the abolishment of all prisoners' rights.

As a short analogy, a restriction against the possession of a Bible within prison walls could be construed as rationally related to legitimate penological interests. An opinion from the court that decided *Iron Eyes* might look something like the following: Although possession of the Bible inside prison walls is prohibited, such a regulation is constitutional. Pages of the Bible "could conceivably" be crumpled up and swallowed, endangering the lives of inmates. Paper cuts might become

243. 482 U.S. 78 (1987).

244. *Iron Eyes*, 907 F.2d at 816 (Heaney, J. dissenting).

245. *Id.*

246. *Id.* at 814.

rampant. Contraband could be smuggled or weapons hidden between pages. Bible-carriers are subject to random homosexual assaults because they are perceived as too sensitive or feminine. These problems raise security concerns. Prisoners could continue to pray in secret; therefore, Christians are not completely foreclosed from practicing their religion. Additionally, the exemption to the Bible prohibition that once existed for true Christians is the only viable means of accommodating the prisoners. (Although the exemption no longer exists, and although no inmates ever successfully obtained exemption status, this analogy will only consider the Bible restriction with the Christian exemption.) Allowing certain prisoners the privilege of possessing a Bible might create hostility among members of minority faiths unable to maintain "mementos" of their religion. An inmate's possession of a Bible for any length of time creates many problems and no "easy" alternative exists for accommodating the prisoners that would be at "*de minimis*" cost to the penitentiary.

The reasoning in this analogy may seem ridiculous at first glance. If it does, one should review the holdings in *Iron Eyes*. Of course, the courts would never allow such Bible restrictions to occur, and for good reason. Narrow-mindedness, stereotypical viewpoints, and an inherent misunderstanding of Native American religions are the only reasons for courts to view the two situations differently. One must ask whether judges with such a limited capacity in acknowledging the differences among cultures should be permitted to determine the rights of persons unlike themselves.

Since *Iron Eyes*, four more cases have found their way to courts because grooming regulations limit the rights of Native American inmates. Although the cases are not as discouraging as *Iron Eyes*, each one is important in its own right and will be summarized here.

C. *Escalanti v. Lewis*

In a recent, unpublished opinion, the Ninth Circuit Court of Appeals refused in *Escalanti v. Lewis*²⁴⁷ to apply the AIRFA²⁴⁸ to the Arizona Department of Corrections.²⁴⁹ The Native American inmate argued that the prison's grooming regulations were a violation of AIRFA. The court reasoned that because the prison was not a federal agency, the prison officials were not obligated under the statute in any way.²⁵⁰ Even if AIRFA did apply, the inmate would have no real cause of action as a result of *Lyng v. Northwest Indian Cemetery Protective*

247. No. 89-16598, 1991 WL 83900 (9th Cir. May 22, 1991). This unpublished disposition was listed in a table at 933 F.2d 1013.

248. 42 U.S.C. § 1996 (1988).

249. *Escalanti*, No. 89-16598, 1991 WL 83900, at *1.

250. *Id.*

Ass'n,²⁵¹ which held that AIRFA is only a general policy statement.²⁵² The court's analysis was deemed complete because Arizona's interests in prisoner identification were reasonably related to the regulation and the prisoner suggested no alternatives.²⁵³

D. *Hall v. Bellmon*

In *Hall v. Bellmon*,²⁵⁴ the Lexington Assessment and Reception Center (LARC) required all new inmates to have their hair cut upon arrival. Officials urged that the policy prevented the inmates from hiding weapons and easily changing their appearance upon escape, and it also facilitated good hygiene. LARC had not enacted an exemption policy for religious beliefs because the center is a holding facility. The average stay for inmates was allegedly only ten days.

The inmate argued that while he was at LARC, the average stay for inmates equalled thirty-one days. For this reason, the facility needed an exemption policy for Native American inmates and others whose religious beliefs conflicted with the regulation.

The district court dismissed the inmate's complaint for failure to state a claim upon which relief could be granted.²⁵⁵ The prisoner appealed, but the Tenth Circuit Court of Appeals affirmed the district court's decision.²⁵⁶ The court held the difference in average stay between ten and thirty-one days was legally insignificant to require the implementation of an exemption policy.²⁵⁷

E. *Mosier v. Maynard*

*Mosier v. Maynard*²⁵⁸ is another recent Tenth Circuit decision involving a Native American inmate. In *Mosier*, the prison exempted the inmate, a one-quarter degree Cherokee, from hair length regulations under an earlier policy. The previous policy focused on whether the prisoner was Indian, but the new policy focused on whether the prisoner practiced his beliefs. The inmate applied for an exemption under the new policy, arguing the importance of his hair to his religion. The principal chief of the Cherokee Nation articulated the significance of hair in the Cherokee faith by explaining that the body is an extension of the Great Spirit, and thus, hair is an integral part of the body. When the hair is cut, the person's soul is severed from the Creator.²⁵⁹

251. 485 U.S. 439 (1988).

252. *Id.* at 455.

253. *Escalanti*, No. 89-16598, 1991 WL 83900, at *2.

254. 935 F.2d 1106 (10th Cir. 1991).

255. *See* FED. R. CIV. P. 12(b)(6).

256. *Hall*, 935 F.2d at 1112.

257. *Id.* at 1114.

258. 937 F.2d 1521 (10th Cir. 1991).

259. *Id.* at 1523.

The prison chaplain recommended that the prison deny the exemption for the inmate because, even though the inmate's beliefs may have been true, there was no evidence that he practiced these beliefs. The officials agreed and denied the prisoner's request. The prisoner appealed the decision to the warden unsuccessfully. The inmate next sought relief from the district court, which granted summary judgment in favor of the officials.²⁶⁰ The court explained why the Cherokee inmate failed to fall within the exemption.²⁶¹ First, the inmate had not supplied prison officials with names, addresses, and telephone numbers of reputable, nonfamily members who could vouch for his sincerity, as required by the exemption policy.²⁶² Second, the court accepted the officials' argument that the regulation promoted pride and discipline while ensuring the health, safety, and welfare of the inmates.²⁶³ The regulation was, therefore, a valid means by which to accomplish such objectives.²⁶⁴

In a somewhat surprising opinion, the Tenth Circuit saw the fallacy in the district court's reasoning. The officials had provided no evidence at the lower court level justifying the regulation.²⁶⁵ Additionally, the inmate's sincerity in his beliefs was still a material fact at issue.²⁶⁶ Thus, until the sincerity issue was resolved, the court could make no determination on the exemption argument.²⁶⁷ The court subsequently reversed the judgment for the prison officials.²⁶⁸

In September 1991, officials removed the exemption procedure from prison regulations, thus requiring all inmates to comply with hair length provisions. Mosier sought injunctive relief at the trial court level but was unsuccessful due to the new "no exemption" policy.

Mosier appealed the decision and requested interlocutory relief against the cutting of his hair until challenges to the grooming regulations were heard.²⁶⁹ Meanwhile, the Department of Corrections reinstated an exemption policy in January 1992. According to the Tenth Circuit Court of Appeals, Mosier satisfied all but one requirement necessary to a grant of injunctive relief — the substantial likelihood that Mosier would eventually prevail on the merits.²⁷⁰ Mosier had shown that without the injunction, irreparable harm would occur, and the injury

260. *Id.* at 1524.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 1526-27.

267. *Id.*

268. *Id.*

269. *Longstreth v. Maynard*, 961 F.2d 895 (10th Cir. 1992).

270. *Id.* at 903.

to Mosier would outweigh any damage the penal institution would endure.²⁷¹ Likewise, if injunctive relief was granted, the public's interest would not be offended.²⁷² The Court, therefore, relaxed the "substantial likelihood of success" standard.²⁷³ The prison regulation potentially had a negative impact on Mosier's religious freedom; therefore, serious and substantial questions arose requiring a more deliberate inquiry into the matter.²⁷⁴ Thus, a preliminary injunction was granted pending the outcome of Mosier's litigation.²⁷⁵

F. *Kemp v. Moore*

Recently, the Eighth Circuit Court of Appeals was confronted with *Kemp v. Moore*,²⁷⁶ a case brought by a Chickasaw inmate housed at Farmington, Missouri. Citing *Iron Eyes* as controlling precedent, the district court granted summary judgment against the inmate who was requesting injunctive protection from the prison's hair regulation.²⁷⁷ The Eighth Circuit Court of Appeals affirmed the holding.²⁷⁸ Judge Heaney, the author of *Teterud* and the lone dissenter in *Iron Eyes*, concurred in the judgment only because of the precedent set by *Iron Eyes*.²⁷⁹ Judge Heaney explained that Kemp was allowed to grow his hair at a more secure Missouri penitentiary.²⁸⁰ However, when transferred, the prison forced Kemp to conform to Farmington's regulation. Still in disagreement with the *Iron Eyes* opinion, Judge Heaney stated, "This case smacks of harassment and religious persecution."²⁸¹

Conclusion

The four opinions since *Iron Eyes* involve summary judgments or dismissals against the Native American prisoners at some point in each case's procedural history. The effects of *Iron Eyes* are obvious. Few courts, if any, look past the prison officials' briefs or answers for evidence supporting justification. The religious importance of hair to Native American inmates is irrelevant now, as it has been since the early 1980s. These prisoners, members of a misunderstood culture, will continue to be denied the right to exercise their religion as long as judges defer judgment to prison officials and/or turn a deaf ear to the inmates' explanations.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. 946 F.2d 588 (8th Cir. 1991).

277. *Id.* at 588.

278. *Id.*

279. *Id.* at 588-89 (Heaney, J., concurring).

280. *Id.*

281. *Id.* at 589.

The majority's opinion in *Iron Eyes* exemplifies the continued Native American struggle with the institutions of justice in this country. It not only signifies the plight of Indian prisoners wishing to practice their religion, but it also signifies the conflicts faced by Native Americans in the general population who seek to assert their right to religious freedom. *Iron Eyes* separates the interrelated factors of prison regulation analysis. The case distorts and twists the significance of some facts, and ignores the indispensability of others. The opinion dismisses blatant persecution by prison officials with scarcely articulated disapproval, and ultimately authorizes brutality. Iron Eyes' body and faith were violated in a cruel manner on the basis of unsubstantiated justifications by prison officials, and the availability of an exemption not in existence. *Iron Eyes* is not a change from the past, but merely a revisit to government-sanctioned scalping of Native Americans.

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