American Indian Law Review

Volume 8 | Number 1

1-1-1980

Constitutional Law: Dubious Intrusions--Peynote, Drug Laws, and Religious Freedom

John T. Doyle

NOTES

CONSTITUTIONAL LAW: DUBIOUS INTRUSIONS— PEYOTE, DRUG LAWS, AND RELIGIOUS FREEDOM

John T. Doyle

On December 12, 1973, Roland Soto was driving an automobile through Tualatin, Oregon, when he was stopped by a deputy sheriff for a driver's license check. His license was found to be suspended and Soto was arrested and searched. Two small pieces of the peyote cactus were discovered. Soto was charged with knowingly and unlawfully possessing peyote.[1]

At his trial the defendant sought to offer evidence that he was, and had been for six years, a practicing member of the Native American Church (NAC), that peyote was an integral part of the church's religious ceremonies, that the peyote button in his possession on December 12 was sacred and carried only for its religious importance, and that he entertained a good faith belief and practice in the ways of the NAC.[2] The offer was refused and the defendant was convicted. The conviction was affirmed on appeal in *State v. Soto*.[3]

The *Soto* case identifies Oregon as one of the most restrictive jurisdictions in the country and provides a classic example of the difficulties encountered in basing an exemption to a criminal statute on the free exercise clause of the first amendment.[4] Several issues inevitably arise in the first amendment area. Can otherwise criminal activity be excused because it is claimed to be a religious practice? If so, what are the limits of such an exemption? Should the issue be approached from the other direction, with the question being: what are the limits of state intervention? When may the state intervene and to what extent? Can a useful definition of religion or religious practice be developed? If not, how do we distinguish a claim based on religion from one merely using religion as a shield? Does the first amendment offer protection

1. State v. Soto, 21 Or. App. 794, 798-99, 537 P.2d 142, 144 (1975). The relevant statutes are OR. REV. STAT. § 167.207 and § 475.010(1)(b), repealed and replaced in 1977 when Oregon adopted the Uniform Drug Act. *See* OR. REV. STAT. § 475.015(a) and § 475.992 (1979), and 21 U.S.C. § 812(c) (11-12) (1976).

2. State v. Soto, 21 Or. App. 794, 537 P.2d 142, 144-45 (1975).

3. See sources at note 1 *supra*.

4. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

only for familiar, conventional religions and religious practices? Are Native American beliefs and practices at a disadvantage?

As is normally the situation in constitutional law, case law provides the source of operative standards in this area. In examining the issues just mentioned, it is useful to begin with a review of United States Supreme Court cases.

A key dichotomy in free exercise analysis was established in 1872 in the case of *Reynolds v. United States.*[5] The defendant in *Reynolds* was charged with bigamy, a crime in the Utah Territory by act of Congress. Reynolds argued that he was a member of the Mormon Church, was following a religious doctrine of the church, and consequently was entitled to protection under the first amendment. The Supreme Court rejected his argument, saying: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices."[6]

The case of *Davis v. Beason,*[7] also involving bigamy and members of the Mormon Church, added specificity to this review:

> It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.[8]

This approach was reinforced many years later in *Cantwell v. Connecticut.*[9] The *Cantwell* case involved attempts by government authorities to control solicitation activities of Jehovah's Witnesses. Although deciding to protect the solicitation activities, the Court noted that:

> the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act

5. 98 U.S. 145 (1878).

6. *Id.* at 166.

7. 133 U.S. 333 (1890). *Davis* is virtually all dicta, but it nevertheless accurately describes the law.

8. *Id.* at 342-43.

9. 310 U.S. 296 (1940).

> must have appropriate definition to preserve the enforcement of that protection.[10]

However, the Court went on to say that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[11]

Five years later the Court was more precise about the kind of analysis required. In *Thomas v. Collins*[12] the Court declared that "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[13] Thus a balancing test is required, weighing individual freedom against state power.

Considerable authority supports the notion that in order for the state interest to prevail the transgression must be substantial. *Thomas* states that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[14] More recently Justice Brennan, writing for the majority in *Sherbert v. Verner,*[15] reviewed previous occasions in which religious practices were regulated and concluded that "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[16] A rational relation between the regulation and the activity to be regulated is not sufficient.[17]

As Chief Justice Burger wrote in 1972 in the case of *Wisconsin v. Yoder,*[18] "The essence of all that has been said and written on

10. *Id.* at 303-304.

11. *Id.* at 304.

12. 323 U.S. 516 (1945) (restraint of union organizer's free speech rights unjustifiable).

13. *Id.* at 529-30.

14. *Id.* at 530.

15. 374 U.S. 398 (1963).

16. *Id.* at 403. Justice Brennan specifically cited *Reynolds*, 98 U.S. (1878); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state regulation requiring smallpox vaccination upheld); Prince v. Massachusetts, 321 U.S. 158 (1943) (state regulation upheld in conflict between child labor laws and religious solicitation requirement); Cleveland v. United States, 329 U.S. 14 (1946) (Mann Act prohibition on transport of women across state lines for immoral purposes held to apply to religious polygamy).

17. Thomas v. Collins, 323 U.S. at 530. *See* West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943): "The right of a state to regulate, for example, a public utility may well include . . . power to impose all the restrictions which a legislature may have a 'rational basis' for adopting. But freedom . . . of worship may not be infringed on such slender grounds. . . . [It is] susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. . . ."

18. 406 U.S. 205 (1972).

the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[19]

Thus two fundamental doctrines emerge. First, regulation of religious belief is prohibited. Second, regulation of religious practice is possible, but only after one balances the importance of religious liberty against the importance of state regulation of an activity. Only the highest interests of society may overcome religious freedom and only by the least intrusive means.

Crucial issues remain, however. What constitutes a religious belief? Quite obviously the protection is only as broad as the definition. Equally obviously, legislative or judicial attempts to define religion are virtually per se violations of the establishment clause.[20] Also, what constitutes a religious practice? Again, the importance of the definition is profound. Finally, who determines what the "highest interests" of society are?

To explore these issues in the context of Native American religious beliefs and practices, it is necessary to consider (1) what a first amendment defendant has normally been required to show, and (2) how various jurisdictions have handled cases similar to *Soto*.

What must be shown when challenging a state restriction on the strength of the free exercise clause? First, one must show that the regulation "imposes a burden on the free exercise of religion."[21] Second, the plaintiff must show, not the truth of the religious precepts themselves, but his or her good faith and belief in those precepts. This requirement deserves more detailed examination.

19. *Id.* at 215. Of course, one can only speculate as to what the Chief Justice means by "legitimate."

20. *See* Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604, (1964): "Yet to define the limits of religious expression may be impossible if philosophically desirable. Moreover, any definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be: inability to give an authoritative definition is justified by the conjunction of the first amendment's two religious clauses. Read together, they define religious freedom but do not establish religion as a defined domain. That is, religious freedom is served by allowing a completely open realm for defining religion rather than by establishing a domain or definition in which religions can freely operate. Furthermore, an attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion."

21. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

In *United States v. Ballard*,[22] a case that arose in the 1940s, proponents of the "I Am" movement were convicted for using the mails to defraud. At trial the judge asked the jury to decide whether the defendants "honestly and in good faith" believed the religious representations they had made to others.[23] The circuit court reversed, saying the truth of the representations should also have been submitted to the jury.[24] The Supreme Court reversed the circuit court, approving the trial judge's approach and holding that the jury could not pass upon the truth of defendants' claims: "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[25]

Justice Jackson dissented, believing that even the majority's approach was too intrusive. He argued first that:

> [A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believeable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.[26]

Second, he argued that a jury will not find a defendant honestly believed something the jury itself finds unbelievable.[27] He concluded by pointing out the inevitable frustrations of protecting freedom of religion. Great restraint is required to keep from restricting or prohibiting that which is thought to be incredible or dangerous: "[T]he price of freedom of religion or of speech or of press is that we must put up with, and even pay for, a good deal of rubbish."[28]

Justice Jackson urged that the indictment be dismissed and that the Court "have done with this business of judicially examin-

22. 322 U.S. 78 (1944).
23. *Id.* at 81.
24. *Id.* at 83.
25. *Id.* at 86.
26. *Id.* at 92-93.
27. *Id.* at 93.
28. *Id.* at 95.

ing other people's faiths."[29] His concerns have received little judicial credence. The plaintiff is still required to show his good faith belief.

Before reaching the so-called peyote cases, a number of cases warrant discussion because they help to outline the context in which Native American religious freedom cases are often considered. In 1972 three Pawnee children were suspended from an Oklahoma public school for wearing long braided hair in violation of the school dress code.[30] The children sought injunctive relief in federal court, arguing, among other claims, that the hair regulation violated their free exercise rights. Their claim was dismissed in *New Rider v. Board of Education*[31] for lack of a "substantial Constitutional question cognizable in the federal courts."[32]

A concurring opinion by the Chief Justice explains the dismissal:

> The Pawnee are near-pantheists, their every act having religious significance in their basic desire to live in harmony with the Universe. Hair styles . . . have traditional but variable significance to the Pawnee according to the trend of modern custom or a desire to renew or popularize the style of their forefathers.[33]

The same circuit reached the same result again a year later in *Hatch v. Goerke*,[34] a similar case involving an Arapaho student. In both these cases the plaintiffs apparently failed to convince the court that a substantial burden had been placed on a religious practice. In essence the court saw only a secular, not a religious, issue.

Interestingly enough, just a few years earlier a comparable issue had come before the Supreme Court in *Wisconsin v. Yoder*[35]: that is, how can we separate true religious beliefs or practices from "mere" life-style? Chief Justice Burger's struggle is worth reprinting:

29. *Id.*

30. New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied* 414 U.S. 1097 (1973).

31. *Id.*

32. *Id.* at 695.

33. *Id.* at 700.

34. 502 F.2d 1189 (10th Cir. 1974).

35. 406 U.S. 205 (1972).

> In evaluating those claims we must be careful to determine whether the Amish religious faith and their modes of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religious Clauses, the claims must be rooted in religious belief.[36]

The Court, although obviously uncomfortable with a situation where religious values could not be separated from everyday life, found enough of the familiar to overcome the state interest in education on religious grounds. An organized religious group was involved whose "deep religious convictions" were based on the Bible.[37] The *Yoder* plaintiffs were allowed to take their children out of school at age 14 instead of the statutorily required age 16.

No such religious respect was shown the plaintiffs in *New Rider* and *Hatch*. The integration of religion with life-style creates more intense definitional difficulties when the court has nothing familiar to which it can relate.[38] The strange and different simply fall outside court concepts of the religious. As one well-known commentator points out: "[T]he struggle to categorize neatly what Indians are moved to do by their traditions . . . illustrates the difficulty our legal system has in applying constitutional protections to a strange culture's value system and spiritual life."[39]

Nevertheless, the same year *Hatch* was decided, a different federal court reached a very different result in an analogous situation. In *Teterud v. Gillman*[40] the request of a Cree inmate of the Iowa State Penitentiary to wear long braided hair was denied by the warden. Teterud appealed the decision to the federal district court and the warden's decision was reversed. The court found that hair length was a "tenet of the Indian religion,"[41] that Teterud's religious beliefs were sincere,[42] that the hair regulation

36. *Id.* at 215.

37. *Id.*

38. *See* V. DELORIA, JR., GOD IS RED 82 (1973).

39. D. GETCHES, D. ROSENFELT, C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 507-508 (1979).

40. 385 F. Supp. 153 (S.D. Iowa 1974).

41. *Id.* at 156.

42. *Id.* at 157. The court's test was not strict. The evidence was viewed as contradictory and Teterud's attitude was seen as being "of very recent vintage." Yet defendants failed to show that Teterud's beliefs were not "in good faith." *Id.*

was "unnecessarily broad in its sweep,"[43] and that there were "viable alternatives capable of protecting the particular governmental interest involved"[44] without infringing on the plaintiff's free exercise rights. Consequently the hair regulation was held unconstitutional.

In doing so the court explicitly rejected the result in *New Rider*.[45] The defendants appealed but were unsuccessful.[46] The circuit court rebuffed appellant's argument that long hair must be shown to be "an absolute tenet of the Indian religion practiced by all Indians."[47] The court held that "[p]roof that the practice is deeply rooted in religious belief is sufficient."[48] The court also spoke to the state interest involved: "Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment."[49]

Thus the *Teterud* cases indicate that (1) beliefs need to be "deep rooted" but not "absolute"; (2) sincerity need only be asserted, not proved beyond contradiction;[50] (3) regulations must not sweep so broadly that religious freedoms are unnecessarily compromised; and (4) viable regulatory alternatives that do not infringe on religious liberties must be pursued when they exist.

These cases form a basis for a consideration of the use of the religious freedom defense by Native Americans charged with violating state drug control laws. The dispute over a religious freedom defense goes back many years, as shown by the early case of *State v. Big Sheep*.[51] Big Sheep, a Crow, was arrested in November, 1924, for possessing peyote. He protested that he was a member of the Native American Church (NAC) and that his possession was related to his religion and therefore protected by Montana constitutional guarantees of free exercise of religion. Although the case was remanded on a jurisdictional issue, the court stated that the issue of conflict between free exercise and

43. *Id.* at 159.

44. *Id.*

45. The court also rejected the result in Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972) (court rebuffed habeas corpus action by penitentiary inmate who had been placed in isolation for religiously based noncompliance with penitentiary hair regulation).

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

47. *Id.* at 360.

48. *Id.* The court did not address the obvious racism of requiring a showing that *all* Indians hold long hair as an absolute regligious tenet.

49. *Id.* at 361-62.

50. See note 42 *supra*.

51. 75 Mont. 219, 342 P. 1067 (1926).

state order, peace, and safety was for the legislature to decide under Montana's constitution.[52]

The next case of note was the landmark case in this area of law. The 1964 case of *People v. Woody*[53] has had a dramatic impact. In *Woody* the California Supreme Court was presented with a religious defense to the arrest of NAC members for using peyote. The defendants were arrested during a police raid on a hogan in the desert near Needles, California.

The case was decided by employing a balancing test. The court framed the issue as a conflict between the exercise of a highly regarded constitutional right, freedom of religion, and the enforcement of narcotics laws, considered to be a "compelling state interest." Refusing to recognize a presumption in favor of the statute, the court declared that the state's claim could not lie in "untested assertions."[54] Specifically, the state failed to show harmful consequences to peyote users[55] or excessive difficulties enforcing the statute against nonexempt persons.[56] In addition, the existence in other states of exemption laws for NAC members contradicted the state's scenarios of disaster.[57]

In contrast, the court found that the weight on the side of religious freedom was substantial because the practice involved was fundamental to the NAC.[58] The court also recognized that:

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.[59]

The result was heartening for those concerned with protecting the free exercise rights of Native Americans in general and members of the NAC in particular. Also encouraging in *Woody* was the court's avoidance of a potentially major pitfall. The court assumed that a religion was involved. Nowhere in the opin-

52. *Id.* at 238-39, 243 P. at 1073.
53. 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).
54. *Id.* at 724, 40 Cal. Rptr. at 75, 394 P.2d at 819.
55. *Id.* at 722-23, 40 Cal. Rptr. at 74, 394 P.2d at 818.
56. *Id.* at 727, 40 Cal. Rptr. at 77, 394 P.2d at 821.
57. *Id.* at 723-24, 40 Cal. Rptr. at 75, 394 P.2d at 819.
58. *Id.* at 727, 40 Cal. Rptr. at 77, 394 P.2d at 821.
59. *Id.*

ion did the court review facts and decide that a religion was involved.

However, the *Woody* court did commit some important errors. In analyzing the case the court sought to determine whether the criminal statute imposed any burdens on the free exercise of religion. As noted above, this showing is commonly required. Yet the inquiry that resulted included a thorough history of the NAC and its predecessors, how long it had been in existence, how many members it had, what the nature of its teachings and beliefs were, how peyote is viewed and used, and how its practices compare with Christian practices.[60] The court concluded that peyote is the essence of the religion.[61]

This process is disturbing for two reasons. First, whether intended or not, the description of peyotism, with its references to a long history, many members, and Christian parallels, reads like a litany of what the court considers to be religious characteristics. The court seems to say, "You can tell by all these characteristics that this really is a religion. We simply haven't noticed it before." It is a subtle way of gaining support for what the court probably felt would be viewed as a radical result.

Second, the court, in probing the burden, seeks to show that peyote is indeed used religiously. Admittedly it is more convenient to show that a religious practice is being inhibited by first showing what the practice is, but *Woody* goes beyond that. *Woody* seeks to show that this is indeed a religious practice by pointing to accoutrements common in conventional religions. In fact, *Woody* declares the use of peyote is a religious practice in this context.[62] This is precisely the kind of interference the first amendment establishment clause sought to avoid.

Equally unfortunate, the court leaves the impression that the peyote use has priority over only the statute because the use is the "theological heart"[63] of the religion. As *Teterud* has since shown, this is not the correct legal standard. If it is, then government is given license to determine what is important to a religion and what is not, with the result that certain practices are approved, others are prohibited, and free exercise is hopelessly compromised.

Woody should therefore be respected for its unusually clear

60. *Id.* at 720-22, 40 Cal. Rptr. at 72-74, 394 P.2d at 816-18.
61. *Id.* at 727, 40 Cal. Rptr. at 77, 394 P.2d at 821.
62. *Id.* at 720-21, 40 Cal. Rptr. at 73-74, 394 P.2d at 817-18.
63. *Id.* at 722, 40 Cal. Rptr. at 74, 394 P.2d at 818.

and forthright discussion of its balancing process, its ability to avoid defining religion, and its willingness to probe governmental assertions of "compelling interest." *Woody* should not, however, be regarded as authority that only central, essential religious practices can hope to avoid state regulation. Nor should *Woody*'s nervous listing of conventional religious characteristics serve as a guide. Finally, the approach in *Woody* of conferring recognition on a particular practice as essential to the religion as a whole should be avoided lest the court become a certification board for religions and religious practices.

Some of the inadequacies of *Woody* revealed themselves immediately. The same day the California Supreme Court decided *Woody*, it also decided *In re Grady*.[64] Grady had been imprisoned for possessing peyote and petitioned the court for a writ of habeas corpus. Grady made no showing of any connection with an organized religion. He did, however, assert that his use of peyote was religious. The court accepted this assertion but found that a factual issue remained as to whether Grady "actually engaged in good faith in the practice of a religion."[65]

This is the issue decided over Justice Jackson's dissent in *United States v. Ballard*.[66] *Woody* followed the lead of the *Ballard* majority. The potential for abuse under this approach is clearly exposed in *Grady*. The court seeks to probe the belief and life-style of Grady in order to determine if he is sincere enough to be granted recognition by the court. His task is difficult. He has no organized, familiar church he can utilize to "prove" his sincerity. He is engaging in activity viewed as very suspicious, if not criminal, by the government.

Grady's situation is not unique. A federal court muddled through the area in the renowned case of *Leary v. United States*.[67] Timothy Leary was charged with violating laws controlling the use of marijuana and other psychedelic drugs. The court, in language that would be echoed several years later in *New Rider*, complained that Leary drew "no distinction between his religious beliefs and his scientific experimentation."[68] Once again, a court was uncomfortable with integrated life-styles, with acts done for more than one purpose.

64. 61 Cal. 2d 887, 39 Cal. Rptr. 912, 394 P.2d 728 (1964).

65. *Id.* at 888, 39 Cal. Rptr. at 913, 394 P.2d at 729.

66. 322 U.S. 78 (1944).

67. 383 F.2d 851 (5th Cir. 1967), *reh. denied*, 392 F.2d 220 (1968), *rev'd on other grounds*, 395 U.S. 6 (1969).

68. *Id.* at 857.

Despite testimony that marijuana played an important part in the rituals of the Hindu sect with which Leary was associated,[69] the court found "no evidence in this case that the use of marijuana is a formal requisite of the practice of Hinduism."[70] As noted above in the *Teterud* discussion, this cannot be the proper test, but the Fifth Circuit employed it in 1967. Indeed, the court also used it to distinguish *Woody*, claiming that the *Woody* standard required the practice to be central to the religion.[71] Thus *Woody*'s overstatement allowed the court to evade the issue in *Leary*.

Finally, in a disingenuous balancing procedure, in *Leary*, the court purported to weigh the competing interests of religious freedom and governmental regulation. The court ignored the special nature and status of free exercise claims and instead concentrated on "the broad power to legislate vested in Congress by the Constitution."[72] Having given short shrift to the importance of the practice in Leary's religion, the court laid out the horrors of marijuana: "It would be difficult to imagine the harm which would result if the criminal statutes against marijuana were nullified as to those who claim the right to possess . . . this drug for religious purposes. . . . The danger is too great, especially to the youth of the nation . . . ."[73] In the words of *Woody*, these are merely "untested assertions" that do not justify inhibition of religious freedom.

Leary was followed a year later by another federal court case, *United States v. Kuch*.[74] In *Kuch* the defendant, charged with violating certain laws pertaining to LSD and marijuana, asserted she was an ordained minister of the Neo-American Church. She did not give "subjective evidence as to her personal beliefs," but rather chose to rely on her church position and church doctrine.[75] The court rejected the defendant's use of the first amendment as a shield, arguing that the church and its members lacked "any common religious concern . . . [or] . . . any solid evidence of a belief in a supreme being, a religious discipline, a ritual or tenets

69. *Id.*

70. *Id.* at 860.

71. *Id.* at 861.

72. *Id.* at 859 n.9, referring to U.S. CONST. art. I, § 8.

73. *Id.* at 861.

74. 288 F. Supp. 439 (D.D.C. 1968). *See also* State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967) (unlawful possession of marijuana and peyote by Neo-American Church member; conviction upheld).

75. United States v. Kuch, 288 F. Supp. at 442-43.

to guide one's daily existence."[76] The group was formed, said the court, merely to use and enjoy drugs.[77] Its principles were "agnostic,"[78] and the entire scheme was designed to mock established institutions.[79]

Admittedly, the church in *Kuch*, with its members called "Boo Hoos,"[80] its theme song of "Puff, the Magic Dragon,"[81] and its motto of "Victory over Horseshit,"[82] is less than reverent, but this does not justify a judicial overreaction that dispenses with the constitutional guarantee of free exercise. The court assumed that no religion or religious beliefs are involved. Yet certainly considerable religious feeling is encompassed in the church's dissent against traditional religious institutions. The presence of abundant sarcasm is only an issue of style. Surely the right to practice agnosticism is protected by the free exercise clause. Equally clearly, a position based on opposition to established religion is not necessarily a-religious. Nor is an unsolidified religious attitude any less noteworthy, constitutionally, than the *Summa Theologica* of Thomas Aquinas. In any event, a broad concept of religious freedom includes what some might wish to call "no religion."

The court in *Kuch* was offended. It reacted unfortunately, seeking to crush the dissent, and thereby did a grave disservice to the very religious pluralism it professed to honor.

Particularly disturbing in *Kuch* is the court's recital of the factors found lacking in the Neo-American Church. Rituals, tenets, disciplines, and supreme beings do not exhaust the components of a possible religion. In theory, a religion can be a religion of nothing, or beyond. Judge Gesell's narrow-minded definition asserts there are absolutes in religion, certain mental structures and no others. He has missed the entire point of the first amendment.

The failure of *Woody* to influence either *Kuch* or *Leary* is an unfortunate indication of its limited applicability. *Woody* only seems capable of strong guidance in cases directly involving peyote and members of the NAC. A case in point is *State v.*

76. *Id.* at 444.
77. *Id.*
78. *Id.* at 445.
79. *Id.* at 444.
80. *Id.* at 443.
81. *Id.* at 444.
82. *Id.* at 445.

Whittingham.[83] In this case the Arizona Court of Appeals followed *Woody* in exempting peyote-using members of the NAC from prosecution under Arizona drug laws. The court, like the court in *Woody*, recognized the priority position of free exercise claims and looked to ascertain the importance of the state's interest. Because the evidence showed that "peyote is not a narcotic substance and is not habit-forming," no compelling interest existed sufficient to justify inhibition of defendants' free exercise of religion.[84]

However, in 1974, the California case of *Golden Eagle v. Johnson*[85] again exposed the shortcomings of *Woody*. The plaintiff in *Golden Eagle* was arrested for possession of peyote. Despite statements to arresting officers that he was an NAC member, he was imprisoned for 31 days pending a hearing on his good faith belief. Under the *Woody* scheme, good faith is ascertained on a case-by-case basis. Thus any NAC members who practice their religion are subject to indeterminate prison terms.

Golden Eagle sought to have a hearing on good faith inserted into the procedures before arrest. This idea suffers, however, from difficulties involved in compelling a hearing before a would-be defendant is taken into custody. The practical solution would seem to be the abandonment of peyote prosecutions in general.[86] As *Woody* and *Whittingham* both noted, society is not significantly endangered, if at all, by peyote's use.

After *Golden Eagle* came the Oregon decision in *State v. Soto*,[87] in which the conviction of the defendant for possessing peyote was affirmed by a 2-1 vote. The majority avoided the heart of the matter by framing the issues prejudicially. Like the court in *Leary*, the *Soto* majority concentrated not on the esteemed position of free exercise rights but rather on the alleged broad sweep of legislative police power. The court in fact created a presumption in favor of the legislature.[88] This was done despite the principles identified earlier in *Thomas v. Collins*[89] to the effect that in first amendment situations no presumption exists on

83. 19 Ariz. App. 27, 504 P.2d 950 (1973).

84. *Id.* at 30, 504 P.2d at 953.

85. 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

86. This could be done either through (1) exercising police and prosecutorial discretion in not arresting or prosecuting peyote users, or (2) declaring the law controlling peyote to be unconstitutional.

87. *See* 21 Or. App. 794, 537 P.2d 142 (1975).

88. *Id.* at 798, 537 P.2d at 144.

89. 323 U.S. 516, 529-30 (1945).

the side of legislation. The court quotes *Thomas* but overlooks this key aspect of that case.[90]

Curiously, the court seeks to support its ruling by citations to *City of Portland v. Thornton*[91] and *Baer v. City of Bend*.[92] Both involved regulations implemented to promote the health of children.[93] The peyote laws are aimed at a far vaster audience, including all age groups. *Thornton* and *Baer* are only tangentially related, if at all, to the situation in *Soto*. On the basis of these inadequate authorities, and without mentioning *Woody* or *Whittingham*, the court affirmed Soto's conviction.

It is likely that part of the court's resistance can be explained by the nature of the particular religious practices at issue. The use of peyote lacks any clear, or at least any acknowledged, counterpart in conventional American religions. Kathleen McLaughlin has observed a

> desire for transformative ecstatic experience which has either been ignored, rejected or relegated to third or fourth place by traditional church organizations in this country. Churches have tended to focus more on doctrine or on ethical behavior and community service rather than on the individual's interior experience of the divine presence.[94]

In short, the Western compulsion for rational, scientific process and thought has extended into concepts of what is properly religious, denying the validity of altered states of consciousness and the means, such as ingesting peyote, of achieving them.[95]

Judge Fort wrote a lengthy dissent in *Soto*,[96] tracing the Supreme Court standards on freedom of religion and quoting extensively from *Woody* and *Whittingham*. He took special issue with the majority's presumption in favor of the legislative measure.[97]

90. State v. Soto, 21 Or. App. 794, 797, 537 P.2d 142, 143 (1975).

91. 174 Or. 508, 149 P.2d 972, *cert. denied*, 323 U.S. 770 (1944).

92. 206 Or. 221, 292 P.2d 134 (1956).

93. *Thornton* concerned solicitation by a nine-year-old girl on behalf of Jehovah's Witnesses' periodicals in violation of a regulation prohibiting employment of children so young. *Baer* was concerned with a fluoridation law passed "for the purpose of reducing dental caries, that is, decay of the teeth, among children." Baer v. City of Bend, 206 Or. at 223, 292 P.2d at 135.

94. Address by Dr. Kathleen McLaughlin, Lewis and Clark College Winter Forum Series: "The Challenge of the Cults" (Mar. 3, 1980).

95. *See* A. WEIL, THE NATURAL MIND (1972).

96. 21 Or. App. 794, 798-806, 537 P.2d 142, 144-47 (1975).

97. *Id.* at 805-806, 537 P.2d at 147.

Although his argument is persuasive and legally superior to the majority's, Judge Fort uses certain suspect arguments—suspect, that is, from a broader view of first amendment principles. First, he limits his advocacy to members of the NAC only. For purposes of deciding the case, this is, of course, legally proper. In terms of constitutional justification, however, as has been mentioned above, it is ultimately dangerous and incorrect. The NAC becomes a recognized state religion in violation of the establishment clause.

Second, Fort, like the *Woody* and *Whittingham* judges before him, seeks to buttress his exemption for NAC peyote users with federal regulations and state statute exemptions for the NAC.[98] This only gives support to the establishment clause issue just mentioned.

Finally, Fort is not able to dispense with the need for a showing of good faith by the defendant. As long as such a showing is required, free exercise will be frustrated by the task of making nonbelievers believe that which is to them unbelievable.

Two years after *Sota*, in 1977, Oklahoma came to the opposite conclusion in a very similar case. In *Whitehorn v. State*[99] the defendant was arrested for driving with a suspended driver's license. When he was searched, peyote was discovered. He was convicted of unlawful possession.

The appellate court reversed, finding that Whitehorn was a member of the NAC and entitled to exemption from criminal statutes. The court reasoned that his use of peyote did not subvert a compelling state interest.

Although not requiring them, the court suggested that membership lists and cards would ease enforcement difficulties for the state.[100] This frightening suggestion is the logical result of extending constitutional protection to NAC members only.

The court's ruling under the facts extended to carrying peyote as well as ingesting it. One law review article[101] makes much of this, and perhaps it should. It certainly makes the Oregon court's approach in *Soto* that much less tenable. However, we are still laboring in a framework that allows religious freedom only to

98. *Id.* at 803, 537 P.2d at 146.

99. 561 P.2d 539 (Okla. Cr. 1977).

100. *Id.* at 546, 548.

101. Note, *Constitutional Law: Whitehorn v. State: Peyote and Religious Freedom in Oklahoma,* 5 AM. IND. L. REV. 229 (1977).

members of an old, populous, established religion with at least partially familiar origins.

That even the present changes have occurred is quite remarkable, and belittlement of the advances is not intended. The dangers of the current approach, however, are substantial. *Woody* and its progeny threaten to be only dead end, effective only for very limited fact situations but frustrating, and even prohibiting, additional gains. This is disturbing because the particular issues addressed here are not the only current issues that impact Native American religious practice. Other issues with religious implications include land claims,[102] hunting practices,[103] and control of sacred objects.[104]

The cultural context for further progress is not propitious. This has, of course, often been the case in the past. Supreme Court Justice Brewer baldly asserted in 1892 that "this is a Christian nation."[105] The same is true today. Understanding and respect for native religions is warped by this orientation and serves to vitiate constitutional protections: "[N]on-Indians can comprehend worship in a church or synagogue, but not on a mountaintop or with an eagle feather."[106]

Such attitudes, along with the seemingly intense need to separate religion from cultural traditions and daily life, do not herald increased respect for Indian beliefs. Nor do narrow case decisions gaining limited freedom for a particular class of Indians.

Taken together, present attitudes and legal standards constitute a distortion of first amendment religious liberties. They combine to support interventions in religious life and freedom. Countering and reversing these interventions will require more complete dedication to constitutional religious freedom than has been demonstrated to date.

Freedom of religion is more than just a legal guideline. As a nation we have proclaimed it to be basic to our way of life. But ideals have faded into rhetoric. It is time to hearken back to Justice Jackson and have done with this business of examining

102. This is true for claims involving Pyramid Lake, Blue Lake, and the Black Hills, among others.

103. This is true for the fishing rights controversy in the Pacific Northwest.

104. *See* Blair, *American Indians vs. American Museums: A Matter of Religous Freedom*, 5 AM. IND. J. 13 (May 1979).

105. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

106. Harris, *The American Indian Religious Freedom Act and Its Promise*, 5 AM. IND. J. 7 (June 1979).

other people's faiths. It is time to recognize that "priority gives [religious] liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice."[107]

107. Thomas v. Collins, 323 U.S. 516, 530 (1945).