Religious Pretenders in the Courts: Unmasking the Imposters

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ABSTRACT & OUTLINE

Abstract:

When courts decide First Amendment “Free Exercise” cases, they often are confronted with the daunting task of defining what exactly is a “religion.” This article examines how judicial definitions and interpretations of religious faith have evolved over many decades, including legal recognition of Wicca (modern day witchcraft) and Hare Krishna as “religions,” as well as courts steering clear of the issue whenever possible, for example, when faced with an adherent of the “Church of Body Modification” who claims her employer’s dress code violates her religion. It also explores how courts have sought to uncover deception and fraud hiding behind disingenuous invocations of religious belief, especially regarding marijuana use. Finally, it advances a definition of “religion” in the hope of advancing judicial appreciation and understanding of this age-old human phenomenon.

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First Amendment protection [can be denied] to so-called religions which tend
to mock established institutions and are obviously shams
and absurdities and whose members are patently devoid of religious sincerity.¹

I. INTRODUCTION

When courts decide First Amendment “Free Exercise” cases, they often are confronted with the
daunting task of defining what exactly is a “religion.” This article examines how judicial definitions
and interpretations of religious faith have evolved over many decades, including legal recognition of
Wicca (modern day witchcraft) and Hare Krishna as “religions,” ² as well as courts steering clear of the
issue whenever possible, for example, when faced with an adherent of the “Church of Body
Modification” who claims her employer’s dress code violates her religion.³ It also explores how courts
have sought to uncover deception and fraud hiding behind disingenuous invocations of religious belief,
especially regarding marijuana use.⁴ Finally, it advances a definition of “religion” in the hope of
advancing judicial appreciation and understanding of this age-old human phenomenon.

II. WHAT IS A “RELIGION”? ²

A. Definitional Difficulties

Defining “religion” is no easy matter. The word derives from the Latin religare [“to bind
fast”].⁵ Of course, one can always use the dictionary definition,⁶ but its utility is rather limited when
deciding Free Exercise cases. To give the reader a proper understanding of the profound implications of
the concept, it is worthwhile to recall the comments of a respected authority on the subject:

All religions say in one way or another that man does not, and cannot, stand alone. He is vitally related
with and even dependant on powers in Nature and Society external to himself. Dimly or clearly, he
knows that he is not an independent center of force capable of standing apart from the world.⁷

¹ Ainsworth, C.J., in Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974).
² See Dettmer v. Landon, 799 F. 2d 929 (4th Cir. 1986) (Wicca recognized as a “religion”); International Society for
Krishna Consciousness, 650 F.2d 430 (2nd Cir. 1981) (recognizing Hare Krishna as a “religion”). See infra Section II C.
Section III B.
⁴ See infra Section III A.
⁵ W. L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION, Eastern and Western Thought (1980) at 488.
⁶ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1971) 1099 defines “religion”
as “The expression of man’s belief in and reverence for a superhuman power recognized as the creator and governor
of the universe.”
Although belief in God in the higher religions has sometimes led men to think meanly of the world around them, in the faith that they are pilgrims and strangers here on earth, and heaven is their home, this belief is far from typical of men’s religions in general; it is in fact a special sort of belief produced under special conditions. The general attitude is that the relation between man and his world is organic and vital, not accidental and external. If the outer face of Nature is sometimes mistrusted, it is usually in the name of something deeper within that is assigned a higher degree of reality. 

As these excerpts illustrate, the existence of God or a Supernatural Being is not a requirement for a religion as the U.S. Supreme Court in *Torcaso v. Watkins* acknowledged, thereby seemingly repudiating Chief Justice Hughes in *United States v. Macintosh*. It has been argued that courts should not define religion and that any attempt to do so could violate religious freedom because it would dictate to religions what they must be. On the other hand, it has also been said that failing to define religion could violate the principle of the Free Exercise Clause. Nonetheless, the plain language of the First Amendment requires a definition of “religion” specific enough to allow courts to distinguish between religious belief and non-religious belief. But as Chief Justice Burger said in *Thomas v. Review Board*, “The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task …”

While definitions of religion vary, it is recognized that a common thread uniting all belief systems that can be termed “religious” is that they are in some way connected with “the eternal”, whether that is understood as an eternal Being outside man – God, or as the eternity of man’s own being – immortality. Again, it is possible for a religion to be strictly godless, as in the case of early Buddhism, which recognizes neither God nor Absolute, yet is nonetheless a religion and is acknowledged as such. In all religions there are, in different proportions, three main ingredients – faith, a desire to ‘belong’ and a desire for ‘escape’.

**Faith** – This means either belief in the ‘mission’ of a certain individual or group – prophet, incarnate god or church – or assent to a particular interpretation of existence, which enjoys the

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8 *Id.*
10 283 U.S. 605 (1931). “The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.” *Id* at 633-34.
14 450 U.S. 707 (1981)
15 *Id.* at 714.
17 *Id.*
authority of antiquity or of human sages of proved experience. Faith in a personal god expresses itself in practical worship. Faith in a given interpretation of existence finds its practical application in the schooling of the mind and body in an effort to realize the spiritual state that this interpretation of existence claims is man’s spiritual goal.19

Desire to ‘belong’ – While this is not a specifically religious phenomenon, it is present, to a greater or lesser degree, in all religions and can manifest itself in many ways. At its simplest it is the desire to be incorporated into a spiritual society and to become integrated within it, as a part of the body is in the body itself. Alternatively, as in nature mysticism, it may express itself as a merging in the ‘all’. In its extreme form, this merging in the ‘all’ is transcended, and the individual, by the act of casting off individuality, becomes, or believes he becomes, identical with the ‘all’.20

Desire to ‘escape’ – While present in all religions, it is on the matter of that from which escape is sought that religions so profoundly disagree. The Christian seeks release from the bondage of sin; the Buddhist seeks release from human existence as such. Islam, on the other hand, accepts this world as God’s creation and field of operation, but nevertheless has been unable wholly to resist the pressure of its own mystics who turned their backs on this world entirely.21

One commentator, writing mainly of the Abrahamic traditions of the West, but with perceptive comparisons to Buddhism, explains religion in terms of belief in an agency or power that transcends the immanent order – by which he means the operations of the natural world.22 For this observer, religion relates to “the beyond,” to an otherworldly order of things, but not in just any way. He posits three specific dimensions. First, religion asserts that there is some higher good or ultimate end beyond ordinary human flourishing. Second, it includes the possibility of personal transformation, to insure that the higher good is achieved. This, in turn, involves the existence of a transformative and transcendent power. Third, the religious account of our possible transformation involves a sense of human life extending beyond “this life.”23

In summary, this furnishes us a useful framework to interpret religious beliefs for Free Exercise cases. Namely, an otherworldly order of things and an otherworldly dimension to human lives; an ultimate good that transcends worldly kinds of flourishing; the possibility of spiritual transformation, and the existence of transcendent and transformative powers.

B. Judicial Interpretations of Religion

Before we turn to how American courts have wrestled with defining religion (or avoiding defining it), it would be instructive to note how the High Court of Australia dealt with the issue in a case involving whether Scientology was a “religion.”24 In Church of the New Faith v. Commissioner of Pay-Roll Tax (VIC),25 five members of the court considered whether the Church of the New Faith, i.e.

19 Id.
20 Id.
21 Id. at 393-94.
23 Blackford, supra note 22, at 6 (citing Taylor at 15-20).
24 Id. at 7-10.
Scientology, was a “religious institution” exempt from payroll taxes in the state of Victoria. To do so required the justices to determine whether the beliefs, practices and observances could properly be described as a “religion”. All five concluded that indeed Scientology was a religion, though for different reasons.\(^{26}\) Two of the justices based their decision on two criteria: a belief in a supernatural Being, Thing or Principle and the acceptance of cannons of conduct that gave effect to that belief.\(^{27}\) Another justice held that the organization was “religious” if (1) its beliefs or practices revived or resembled those of earlier cults; (2) it claimed belief in a supernatural being or beings, such as gods or spirits, whether they were visible, invisible, or abstract; or (3) it offered a way to find meaning and purpose in life.\(^{28}\) The remaining two justices developed a conception of religion from empirical observation of accepted religions. They identified several indicia that they considered helpful in deciding whether a set of ideas or practices amounted to a “religion” for purposes of the law: (1) ideas and/or practices involving belief in the supernatural (a reality extending beyond what can be perceived by the senses); (2) ideas relating to humanity’s nature and place in the universe, and its relationship to the supernatural reality; (3) acceptance by the adherents that the ideas require or encourage them to observe standards or codes of conduct, or to participate in practices with supernatural significance; (4) the adherents forming an identifiable group or groups; and possibly, (5) their perception of the collection of ideas and/or practices as constituting a religion.\(^{29}\) These definitions are rather conventional and, it can be argued, lack theological depth and breath.

Early U.S. Supreme Court cases attempting to define religion usually did so very narrowly in terms of a God or Creator.\(^{30}\) For example, in 1890 the Court stated that “[t]he term ‘religion’ has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”\(^{31}\) But as was mentioned earlier, in *Torcaso v. Watkins*\(^{32}\) the Supreme Court abandoned faith in God as the touchstone for religious belief,\(^{33}\) remarking that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."\(^{34}\)

Perhaps the most wide-ranging deliberations on the meaning of religion courts have ever provided are in cases interpreting the conscientious objector exemption from military service. In *United States v. Seeger*,\(^{35}\) the Court interpreted the Universal Military Training and Service Act\(^{36}\) that

\(^{26}\) Blackford, *supra* note 22, at 8.

\(^{27}\) *Id.* 9.

\(^{28}\) *Id.*

\(^{29}\) *Id.* 9-10.

\(^{30}\) Clements, *supra* note 11, at 536-537.

\(^{31}\) *Davis v. Beason*, 133 U.S. 333, 342 (1890). *See also* United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation").


\(^{33}\) Earlier the Court had suggested a less rigid approach to the concept of religion when, in *United States v. Ballard*, 322 U.S. 78 (1944), it observed that "freedom of religious belief . . . embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." *Id.* at 86-87.

\(^{34}\) 367 U.S. at 495 fn.11.

exempted from combat persons who objected to participation "by reason of religious training and belief." The Act defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [excluding] essentially political, sociological or philosophical views or a merely personal moral code." 37 Despite Congress' apparent intent to limit the exemption to objections based on traditional religious beliefs, the Court held that this definition applied to Seeger who had stated that "he preferred to leave the question as to his belief in a Supreme Being open," and that his objection was based on a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 38 The Court held that "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views." 39 The Court then held that the test for "belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 40 The Court offered no insight as to the meaning of "occupying a place in the life of the possessor parallel to that filled by the orthodox belief in God" especially given the differences in content and strength of various religious convictions. The Court expanded Seeger in Welsh v. United States, 41 where a plurality of the Justices ruled that:

> if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons. 42

In Wisconsin v. Yoder 43 the Court made a distinction between philosophical beliefs and religious ones. In Yoder, the Court held that a group of Amish plaintiffs, who claimed that the state's requirement of compulsory education beyond the eighth grade violated their religion, were entitled to a religious exemption. They Justices remarked that "to have the protection of the Religion Clauses, the claims

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37 *Id.* Compare Blackford, *supra* note 22, at 109-114 (arguing that religiously-based conscientious objector status for health care workers should be limited and narrowly construed).
38 380 U.S. at 166.
39 *Id.* at 165.
40 *Id.* at 165-66. See Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring). Relying on Seeger, Judge Adams concludes that "the modern approach looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.' " *Id.* at 207. See also Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981); Greenawalt, *supra* note 32, at 760-61 ("the Supreme Court's broad statutory construction of religion [in Seeger and Welsh] . . . has led other courts and scholars to assume that the constitutional definition of religion is now much more extensive than it once appeared to be").
42 *Id.* at 340.
must be rooted in religious belief," and then they stressed the religious nature of the Amish beliefs, by contrasting these beliefs with philosophical beliefs:

[If the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.][44]

In Yoder the definition of “religion” was not an issue, since the state agreed that the nature of the Amish’s practices were religious.45

C. Religious Inclusiveness

Not only are courts called upon to define religion, but also from time to time they are asked to decide whether particular practices constitute a “religion” for purposes of the Free Exercise Clause.46 Two prominent and highly instructive cases in this regard are Dettmer v. Landon47 and International Society for Krishna Consciousness, Inc. v. Barber.48 The first involved the Church of Wicca (contemporary witchcraft)49 and the second a group popularly known as the “Hare Krishnas.” The decisions may startle and surprise some, but they stand as a testament to religious tolerance and diversity.

Dettmer v. Landon - In 1982 Herbert Dettmer, a prisoner in a Virginia Correctional Facility, began studying witchcraft in a correspondence course provided by the Church of Wicca. Within a year he started meditating, following ceremonies for private meditation described in the correspondence course and in other writings that he had gathered. Dettmer decided that he needed the following items to aid and protect him while meditating: a white robe with a hood, sea salt or sulfur to draw a protective circle on the floor around him, candles and incense to focus his thoughts, a kitchen timer to awaken him from short trances, and a small, hollow statue of "one of the gods or goddesses of the deity," to store spiritual power called down during meditation.50 Prison officials denied his request. He sued in federal district court to obtain them. The court properly considered whether the Church occupies a place in the lives of its members "parallel to that filled by the orthodox belief in God" in religions more widely accepted in the United States (citing Seeger). It found that members of the Church of Wicca "adhere to a fairly complex set of doctrines relating to the spiritual aspect of their lives." These doctrines concern ultimate questions of human life, as do the doctrines of recognized religions [citations omitted].51 The court remarked that the contents of many of these doctrines parallel those of more conventional religions. The Church of Wicca, the court said, believes in another world and has a "broad concern for improving the quality of life for others." Dettmer testified to his belief in a "supreme being."52

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44 Id. at 216.
45 Id. at 219.
46 Major world religions include Judaism, Christianity, Protestantism, Islam, Zoroastrianism, Hinduism, Jainism, Buddhism, Shinto, Confucianism, Taoism, and Sikhism. See R.C. Zaehner, supra note 16.
47 799 F. 2d 929, 932 (4th Cir. 1986).
48 650 F.2d 430 (2nd Cir. 1981).
50 799 F.2d at 930.
51 Id.
52 Id.
The district court also noted that the Church’s doctrines teach ceremonies parallel to those of recognized religions. Members of the Church of Wicca worship both individually and corporately. Members also follow spiritual leaders. Dettmer testified that he planned to conduct ceremonies privately and hoped to have the aid of a spiritual leader from the outside community in conducting ceremonies for other inmates. The record showed that he had sought guidance from Wiccan leaders and for several years had been studying the doctrines of the Church of Wicca as expressed by these leaders in books, pamphlets, and a correspondence course of study. Another objective criterion showing the Church of Wicca to be parallel to recognized religions is witchcraft’s long history [citation omitted]. Dettmer’s evidence included a handbook for chaplains published by the United States, which states that witchcraft enjoyed a following in Northern Europe during the Middle Ages as an ancient pagan faith, losing public expression when systematic persecution began in the fifteenth century. It regained some popularity after repeal of English witchcraft laws, and the handbook estimates that there are between 10,000 and 100,000 adherents in America. Based on this information, the district court held that the Church of Wicca is a religion, and entered an order allowing Dettmer to have the items he requested.

On appeal, the appellate court upheld the district court’s determination that the Church of Wicca was a religion but denied him access to the materials he sought on the grounds that no other prisoner is allowed to have such items and that they could impair institutional security. It held prison officials afforded him a reasonable opportunity to practice his faith comparable to that offered to adherents of other religions.

International Society for Krishna Consciousness, Inc. v. Barber – In this case the U.S. Court of Appeals for the Second Circuit engaged in a detailed, conscientious and thoughtful legal analysis when asked to decide if the organization Krishna Consciousness was a “religion.” The dispute involved whether a district court’s total ban on their solicitation activities, which they alleged was a “religious activity,” violated their First Amendment Free Exercise rights. The court began by extolling the virtues of religious tolerance and diversity, to wit:

Tolerance of the unorthodox and unpopular is the bellwether of a society's spiritual strength. A community sufficiently confident of its moral and political underpinnings trusts its members to employ reasoned and considered judgment in evaluating novel theories that seek to explain the meaning and purpose of life. The coercive mechanisms of restraint, violence, and suppression are not required to confront strange ideologies and unfamiliar rituals, however obnoxious they may be. This freedom to explore diverse political and religious doctrines, derived from the establishment and free exercise clauses of the First Amendment, permits our citizens to follow the dictates of conscience. By fostering this voluntarism, our nation is strengthened, for the people respect a government that treats its charges as free-willed, discerning moral beings. Our republic prides itself on the enormous diversity of religious and political beliefs which have been able to find acceptance and toleration on our shores.

53 Id.
54 See generally WITCHCRAFT (1969) EDITED by BARBARA ROSEN describing the trials, experience, interpretation and punishment of witchcraft in Elizabethan and Jacobean England.
55 799 F.2d at 932.
56 Id. at 931.
58 Id. at 933.
59 Id. (citing Cruz v. Beto, 405 U.S. 319, 322 (1972)).
60 Id. at 432.
61 Id. (citing Seeger, 380 U.S. 163 (1965)).
Disavowing the competence of a court of law to inquire into spiritual matters (“Courts temporal are not ideally suited to resolve problems that originate in the spiritual realm”)\textsuperscript{62}, the court nevertheless declared that such an inquiry is unavoidable.\textsuperscript{63} After a rather lengthy review of the history, beliefs and background of the International Society for Krishna Consciousness (ISKCON),\textsuperscript{64} the court addressed its requirement that an essential part of their faith is solicitation [“Sankirtan”]. To quote:

Sankirtan is also an essential part of the Krishna faith. Under the Chaitanya tradition, the goal of this practice is to invoke the community in worship, carrying the name of God to as many people as possible. The solicitation of contributions and the distribution of literature is permitted, but, in doing so, the devotees are supposed to use "true and gentle speech," first identifying their religious order and spiritual leader. Moreover, devotees cannot touch potential donors without their consent.\textsuperscript{65}

The court continued its inquiry by declaring that to determine whether the Krishna beliefs and credo as well as the particular practice of sankirtan, were sufficiently "religious" in nature to warrant the protection of the Free Exercise guarantee, they needed to look at its underlying purposes.\textsuperscript{66} They commented that is seeks to “promote the inviolability of individual conscience and voluntarism, recognizing that private choice, not official coercion, should form the basis for religious conduct and belief.”\textsuperscript{67} The court then declared that if any belief is "arguably religious," it should be considered "religious" for the sake of the Free Exercise analysis.\textsuperscript{68}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 432-33.
\item Id. at 433.
\item Id. To quote:
\begin{quote}
The International Society for Krishna Consciousness (ISKCON), plaintiff in this case, is a not-for-profit New York corporation, one of many worldwide Krishna Consciousness associations. The Krishna movement in this country was founded in the mid-1960s, when A.C. Bhaktivedanta Swami Prabhupada left India at the behest of his Spiritual Master to open a religious center in New York City. Krishna Consciousness falls under the broad theological umbrella of the Vaishnava Tradition of Bhakti Hinduism, formalized in the ninth century in Southern India. The canonical sources for the Hindu faith are the Vedic scriptures, and all practicing Hindus believe in their authenticity. The Veda consists of two parts: Samhita, which deals with ritual and contains the incantations directed to the Vedic deities; and the Upanishadas, which is the metaphysical interpretation of the ritualistic scripture.\textsuperscript{1} Secondary texts and commentaries, known as smriti, include the Bhagavad-gita and Srimad Bhagavatam, compiled 500 and 1500 years after the Vedic scriptures, respectively.

Hinduism is an extraordinarily diverse tradition; embracing many sects and movements. The Bhakti movement, based on devotion to a personally chosen deity, can be traced to the times of the Bhagavad-gita. Sankirtan, an aspect of which is at issue in this case, was first identified as a religious ritual in the Srimad Bhagavatam, during the ninth century A.D. In the broad Bhakti tradition, sankirtan involved congregational chanting of the name of the deity or that of a teacher and included highly stylized thespian and dancing action. Sankirtan was intended to bring a devotee closer to God and invoke others in such worship. Other forms of observance include Puja, a worship of a deity or its image through ritualistic offerings, and chanting in a temple. When a temple priest performs a particular ritual for lay members of a sect, donations are offered.

Krishna Consciousness is an outgrowth of the Chaitanya movement of Bengal, which derives from the Bhakti tradition. Bhaktivedanta Swami Prabhupada was the eleventh in a chain of disciples of Sage Chaitanya, who lived from 1486-1533 and was understood by his followers to be an incarnation of God, or Krsna. Lord Chaitanya made the chanting of the Hare Krishna mantra central to sankirtan. He opened up the process of spiritual liberation to the masses by bringing into his movement people who were outside the standard Hindu community and the caste system and proclaimed that one day his name will be chanted in every town and village of the world. His biography, Sri Caitanya Caritamrta, is considered part of the scriptures by the Krishna Consciousness Movement.
\end{quote}
\item Id. at 433-34.
\item Id. at 434.
\item Id. at 438 (citing Walz v. Tax Commission, 397 U.S. 664, 694 (1970)).
\item Id. at 439 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828 (1978)). See generally Pfeffer, \textit{Freedom and/or Separation: The Constitutional Dilemma of the First Amendment}, 64 MINN. L. REV. 561 (1980).
\end{enumerate}
\end{footnotesize}
defining “religion” in terms of a distinction between belief and conduct\textsuperscript{69} and then requiring faith in a “Creator,”\textsuperscript{70} the court acknowledged that judicial definitions of “religion” eventually evolved to encompass a “more subjective definition of religion, which examines an individual’s inward attitudes towards a particular belief system.”\textsuperscript{71} The Court noted that the availability of a Free Exercise defense cannot depend on the objective truth or verity of a defendant’s religious beliefs.\textsuperscript{72} Where a belief is asserted and acted upon in good faith, Courts must inquire into an adherent’s sincerity and then invoke Free Exercise analysis.\textsuperscript{73} Belief in the traditional concept of “God” is not a required element for a religion (citing \textit{Torcaso}\textsuperscript{74}) the court reasoned, and then relying on \textit{Seeger}\textsuperscript{75} announced that

The test for identifying an individual’s belief "in a relation to a Supreme Being," the Court noted, is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God....\textsuperscript{76}

Continuing to rely on \textit{Seeger}, the court adopted a functional, phenomenological investigation of an individual’s "religion" advocated by liberal theologian Paul Tillich\textsuperscript{77} where, in the absence of a belief in "God," this approach treats an individual’s "ultimate concern" as his “religion” whatever that concern may be. A concern is "ultimate" when it is more than "intellectual" and it is more than intellectual when a believer would categorically "disregard elementary self-interest in preference to transgressing its tenets."\textsuperscript{78} The court adopted this methodology and then proceeded to determine the role that Krishna Consciousness played in the life of an ISKCON devotee.\textsuperscript{79}

After a careful analysis, the court concluded that Krishna Consciousness is a "religion" for Free Exercise purposes because “Adherence to the sect's theological doctrines is an "ultimate concern" of the devotees.”\textsuperscript{80} These devotees, the court remarked, forsake

… the pleasures of the material world, donning strange clothing and altering one's diet, arising daily at 4 a.m. to chant religious prayers, and perhaps experiencing the scorn and derision of non-believing friends and family, ISKCON devotees govern their life by a "religious" philosophy.\textsuperscript{81}

\textsuperscript{69} \textit{Id}. (citing Reynolds v. United States, 98 U.S. 145 (1878)) (Mormon practice of polygamy not protected as free exercise of religion).
\textsuperscript{70} \textit{Id}. (citing Davis v. Beason, 133 U.S. 333, 342 (1890)) ("the term 'religion' has reference to one's views of his relations to his Creator "); see also Cleveland v. United States, 329 U.S. 14 (1946) (upholding Mann Act conviction of Mormon fundamentalist who crossed state lines with his wives).
\textsuperscript{72} \textit{Id}. (citing United States v. Ballard, 322 U.S. 78, 86 (1944)). \textit{See also} Thomas v. Review Board, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").
\textsuperscript{73} \textit{Id}. For an analysis of the Court’s often inconsistent application and interpretation of the Establishment Clause in Free Exercise cases, see L. Scott Smith, \textit{From Typology To Synthesis: Recasting The Jurisprudence Of Religion}, 34 CAP. U.L. REV. 51 (2005).
\textsuperscript{74} 367 U.S. 488 (1961).
\textsuperscript{75} 380 U.S. 163 (1965).
\textsuperscript{76} \textit{Id}. at 44 (citing Seeger, 380 U.S. at 166).
\textsuperscript{77} \textit{Id}. (citing Seeger at 187); see PAUL TILLICH, DYNAMICS OF FAITH (1958) at 1-2.
\textsuperscript{78} \textit{Id}. (citing United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943)).
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Id}.
\textsuperscript{81} \textit{Id}.
Further prove that Krishna Consciousness is a “religion” in the traditional sense, according to the court, is that it is “an outgrowth of the ancient and diverse Hindu tradition” and has “attracted thousands of devotees throughout the world.”\textsuperscript{82} Finally, following an inquiry into the sincerity of the devotees belief in the practice of “sankirtan” as central to their religious activity, the court held that it is indeed a "religious activity" deserving of Free Exercise protection.\textsuperscript{83} It resolved the dispute by reversing the lower court ruling that banned solicitation because, in its view, protecting the public from fraud was obtainable through less restrictive means,\textsuperscript{84} though the court made clear that it did not “condone the odious tactics of swindling and harassment hidden beneath a veneer of religion."\textsuperscript{85} The court concluded by commenting that it would not “sacrifice legitimate First Amendment rights at the altar of law enforcement” and that

The unpopular traditions, practices, and doctrines of alien religions need not receive our approval or support, but must be tolerated if our freedoms are to be preserved.\textsuperscript{86}

A more vigorous and robust defense of religious tolerance and freedom can scarcely be found.

III. RELIGIOUS PRETENDERS

While the above cases demonstrate sincere religious beliefs and convictions, courts unfortunately are too often confronted with disingenuous invocations of religious faith. All too frequently many of these “religious pretenders” grow, distribute, or use marijuana and when apprehended, invoke the Free Exercise Clause as their defense. It is to several of these more prominent cases that we now turn.

A. Alleged Religious Justification for Marijuana Use

1. The “Great Pretender” of Religious Pretenders

Without doubt the “Great Pretender” of religious pretenders is the Neo-American Church, whose head is Chief Boo Hoo, which, in 1968, found one of its “primates” (analogous to a bishop) indicted in the District of Columbia for unlawfully obtaining and transferring marihuana (sic) and for the unlawful sale, delivery and possession of LSD.\textsuperscript{87} In this commentator’s view, the Neo-American Church and its doctrines impugn the honesty and integrity of genuine religious institutions. So that readers may judge for themselves, the court’s description of the “church” is as follows:

The Neo-American Church was incorporated in California in 1965 as a nonprofit corporation. It claims a nationwide membership of about 20,000. At its head is a Chief Boo Hoo. Defendant Kuch is the primate of the Potomac, a position analogized to bishop. She supervises the Boo Hoos in her area. There are some 300 Boo Hoos throughout the country. In order to join the church a member must subscribe to the following principles:

"(1) Everyone has the right to expand his consciousness and stimulate visionary experience by whatever means he considers desirable and proper without interference from anyone;
"(2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the Self, and therefore belong to everyone;

"(3) We do not encourage the ingestion of psychedelics by those who are unprepared."

Building on the central thesis of the group that psychedelic substances, particularly marihuana and LSD, are the true Host, the Church specifies that "it is the Religious duty of all members to partake of the sacraments on regular occasions." [emphasis in original]

A Boo Hoo is "ordained" without any formal training. He guides members on psychedelic trips, acts as a counselor for individuals having a "spiritual crisis," administers drugs and interprets the Church to those interested. The Boo Hoo of the Georgetown area of Washington, D.C., testified that the Church was pantheistic and lacked a formal theology. Indeed, the church officially states in its so-called "Catechism and Handbook" that "it has never been our objective to add one more institutional substitute for individual virtue to the already crowded lists." In the same vein, this literature asserts "we have the right to practice our religion, even if we are a bunch of filthy, drunken bums." The members are instructed that anyone should be taken as a member "no matter what you suspect his motives to be."88

The court then proceeds to discuss how difficult it is to define “religion” but counsels that

Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. In a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must at the very least demonstrate adherence to ethical standards and a spiritual discipline.89

Thus the court announces that it won’t be hoodwinked into sanctioning illegal conduct simply by invoking a religious declaration. It reviews the “Catechism and Handbook” which contain some insightful revelations as to the true aims of this so-called church:

Reading the so-called "Catechism and Handbook" of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a "martyrdom record" to reflect his arrests. The Church symbol is a three-eyed toad. Its bulletin is the "Divine Toad Sweat." The Church key is, of course, the bottle opener. The official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." In short, the "Catechism and Handbook" is full of goofy nonsense, contradictions, and irreverent expressions.90

The court mentions that this supposed church has attributes of religion but only for tactical purposes91 and that the overall effect of all the evidence and the catechism is “agnostic, showing no regard for a supreme being, law or civic responsibility.” 92 It remarks that its seal is a three-eyed toad with the name of the Church at the top and across the bottom is the Church motto: "Victory over

88 Id. at 443.
89 Id. at 443-44.
90 Id. at 444.
91 Id. at 445.
92 Id.
The court doubts whether the Neo-American Church is a religion within the First Amendment and states that the defendant Kuch “has totally failed in her burden to establish her alleged religious beliefs.” At this point the court could rule that based on the evidence, the Church is not a “religion” for First Amendment Free Exercise purposes, but declined to do so. Instead it took the position that assuming for the sake of argument that the Church is a genuine religion, its practices must still comply with the law. While the First Amendment protects religious beliefs, actions done pursuant to religious beliefs must conform to the law. The court then provides some vivid examples:

Mormons were not permitted to practice polygamy. Nor would the Constitution protect the practice of religions requiring infanticide, the killing of widows [suttee], or temple prostitution, as some religions have done in the past.

After rejecting defendant’s arguments that since peyote is allowed in religious activities, to deny her use of marijuana would violate Equal Protection, the court held that “the Neo-American Church is not an establishment of religion and the defendant did not sustain her burden of demonstrating that her religious beliefs require her to ingest psychedelic drugs.” Furthermore, the court held that the “statutes under which she stands indicted are in aid of a substantial government interest and have a rational and constitutional basis. These laws, enacted to preserve public safety, health and order, will be enforced.” Thus rightly ended the Neo-American Church’s pretense that it was a religious establishment exempt from compliance with anti-drug laws.

2. The Court Puts “Religion” to the Test

93 Id.
94 Id.
95 Id. (citing Leary v. United States, 383 F.2d 851, 859 (5th Cir. 1967) (upholding the constitutionality of the federalMarihuana Tax Act of 1937 against claims that it violated the Fifth Amendment’s prohibition against self-incrimination)). A unanimous U.S. Supreme Court reversed the decision on other grounds. See 395 U.S. 6 (1969).

In response Congress passed the Controlled Substances Act to continue the prohibition of certain drugs into the U.S. See 21 U.S.C. §801 et seq.

96 Id. at 445. Accord: Rheuark v. State, 601 So.2d 135 (Ala. 1992) (because possession of marijuana is unlawful, it does not matter that it was for religious use); Nesbeth v. United States, 870 A.2d 1193 (D.C. 2005) (Free Exercise clause does not allow defendant to possess and use marijuana for religious purposes); Hawaii v. Sunderland, 168 P.3d 526 (Haw. 2007); State v. Bullard, 148 S.E.2d 565 (N.C. 1966) (First Amendment permits freedom of religion, but does not authorize committing acts which threaten the public safety, morals, peace and order); State v. Flesher, 585 N.E.2d. 901 (Ohio 1990) (even if marijuana use was a necessary and indispensable part of religion and state did not have a compelling interest in banning it, its use can be proscribed); Commonwealth v. Nissenbaum, 536 N.E.2d 592 (Mass. 1989); State v. Venet, 797 P.2d 1055 (Or. 1990); Burton v. Texas, 194 S.W.3d 686 (Tex. 2006); State v. Rocheleau, 451 A.2d 1144 (Vt. 1982) (doubtful defendant was practicing his religion by smoking marijuana in a nightclub restroom, but even if so, compelling state interest overrides Free Exercise claim); State on Behalf of Hendrix v. Waters, 89 Wash. App. 921 (Wash 1998) (custody case; father claims marijuana use part of his religion; court finds use illegal and not protected by Free Exercise clause); Whyte v. U.S., 471 A.2d 1018 (D.C. 1984) (Congress’s interest in regulating use and distribution of drugs and public’s interest in enforcement or drug laws outweigh Free Exercise clause). See generally http://jayleiderman.com/htm/presentations/Religious_Use_Marijuana_Cases_Aspen.pdf (collecting cases involving Free Exercise Clause in defense of marijuana use) (last visited Sept. 9, 2013).

97 Id. at 446, note 6 (citing Reynolds v. United States, 98 U.S. 145 (1878). supra note 69).

98 Id. Perhaps the court is referring to worship of the god Baal, whose followers practiced licentious fertility rites and human sacrifice. See THE ENCYCLOPEDIA OF THE JEWISH RELIGION (1965) EDITED by R. J. Zwi Werblonsky & Geoffrey Wigoder at 53.

99 Id. at 451. The Native American Church’s peyote exemption is codified in 21 C.F. R. §1307.31 (1990).

100 Id. at 452.

101 Id.
A particularly noteworthy case where the defendant claimed religious use of marijuana and the court went to great lengths to define “religion” is United States v. Meyers. In that case the issue squarely before the court was whether the "Church of Marijuana" was a bona fide religion that triggered the protections of the Religious Freedom Restoration Act ("RFRA"). Meyers was convicted in a jury trial of conspiracy to possess with intent to distribute and to distribute marijuana, and aiding and abetting possession with intent to distribute marijuana.

After a conscientious and thoughtful review of judicial endeavors to define religion for First Amendment and RFRA purposes, the court determined that "religion" under RFRA was the same as "religion" under the First Amendment. It admonished Meyers that he simply could not “raise a RFRA defense by asserting that his possession and use of marijuana is a central tenet of his religion.” He needed to show that his beliefs constituted a "religion" and that the "The Church of Marijuana" was a bona fide religion for RFRA purposes. Otherwise, counseled the court, the “RFRA could easily become the first refuge of scoundrels if defendants could justify illegal conduct simply by crying "religion."” The court then announced that it had canvassed the cases on religion and catalogued the many factors that courts have used to determine whether a set of beliefs is "religious" for First Amendment purposes. These factors provide some structure for the word “religion” according to the court, and it would use them to decide whether Meyer’s beliefs were “religious,” though it would err on the side of inclusion rather than exclusion, giving him the benefit of the doubt.

1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." (citing Africa v. Commonwealth, 662 F.2d 1025, 1032 (3rd Cir. 1981)). These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.

2. Metaphysical Beliefs: Religious beliefs often are "metaphysical," that is, they address a
reality that transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.

3. Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." In other words, these beliefs often describe certain acts in normative terms, such as "right and wrong," "good and evil," or "just and unjust." The beliefs then proscribe those acts that are "wrong," "evil," or "unjust." A moral or ethical belief structure also may create duties -- duties often imposed by some higher power, force, or spirit -- that require the believer to abnegate elemental self-interest.

4. Comprehensiveness of Beliefs: Another hallmark of "religious" ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching. *Africa*, 662 F.2d at 1035.

5. Accoutrements of Religion: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious":

   a. *Founder, Prophet, or Teacher*: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.

   b. *Important Writings*: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writing often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.

   c. *Gathering Places*: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.

   d. *Keepers of Knowledge*: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.

   e. *Ceremonies and Rituals*: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.

   f. *Structure or Organization*: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc.

   g. *Holidays*: As is etymologically evident, many religions celebrate, observe, or mark "holy," sacred, or important days, weeks, or months.
h. **Diet or Fasting**: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.

I. **Appearance and Clothing**: Some religions prescribe the manner in which believers should maintain their physical appearance and other religions prescribe the type of clothing that believers should wear.

j. **Propagation**: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called "mission work," "witnessing," "converting," or proselytizing.

The court then presented beliefs that it presumed to be “religious.” They included:

Judaism, Christianity, Islam, Hinduism, Buddhism, Shintoism, Confucianism, Taoism, Hare Krishnas, Bantus, Mormons, Seventh Day Adventists, Christian Scientists, Scientologists, Branch Davidians, Unification Church Members, and Native American Church Members (whether Shamanists or Ghost Dancers).\(^{115}\)

Not wishing to exclude any belief, the court then added “Paganism, Zoroastrianism, Pantheism, Animism, Wicca, Druidism, Satanism, and Santeria” as well as the ancient beliefs or "mythology" of “Greek religion, Norse religion, and Roman religion.”\(^{116}\)

Having covered the waterfront of religious beliefs so to speak, the court next rhetorically asked what was been left out. Answering its own question, the court disclosed that “[P]urely personal, political, ideological, or secular beliefs” have been excluded\(^{117}\) and proceeded to explain that these included “nihilism, anarchism, pacifism, utopianism, socialism, libertarianism, Marxism, vegetarianism, and humanism.”\(^{118}\) The moment of truth for Meyer’s beliefs and "The Church of Marijuana" was at hand.

Out of the presence of the jury, Meyers furnished the following responses to the court’s questions:\(^{119}\)

1. Although he lived in Ethiopia for a while, he apparently never joined the Ethiopian Zion Coptic Church, which is a Christian sect that uses marijuana as a sacrament;\(^{120}\)

2. He began worshipping marijuana because it brought peace into his life;

3. In 1973 he founded the "Church of Marijuana" which allegedly has 800 members and one designated meeting spot. The church's "religion" is to grow, possess, and distribute marijuana;

4. The church's "bible" is a ponderously titled book: *Hemp & the Marijuana Conspiracy: The Emperor Wears No Clothes -- The Authoritative Historical Record of the Cannabis Plant, Marijuana Prohibition, & How Hemp Can Still Save the World* ("Hemp");

\(^{115}\) Id. at 1503

\(^{116}\) Id. at 1504.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) See Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989) (Drug Enforcement Agency denial of limited religious exemption for sacred use of marijuana in the sacramental practices of the Church upheld). The case is discussed at length by Jeffrey T. Lawrence in NOTE, The War on Drugs and Denominational Preferences: Farewell to Strict Scrutiny Analysis, 1990 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1083.
5. The church does not have a formal clergy, but does have approximately 20 "teachers" but no hierarchy or governing body;

6. The church does not attempt to propagate its beliefs in any way, and does not assert that everyone should smoke marijuana. Nonetheless, part of the "religion" is to work towards the legalization of marijuana;

7. He testified that he prays to the marijuana plant and that the church's only ceremony revolves around smoking and passing of joints;

8. Joint smoking apparently results in a sort of "peaceful awareness" that he did not assert is a religious state;

9. There are no formal church services;

10. The church’s only moral code is “to give a hand up, but not a hand out."

Finally, Meyers stated that the church had no teachings on "ultimate ideas" such as life, death, and purpose, but that he was a Christian though the church was not a Christian sect or denomination.121

Based on this information, the court concluded that “The Church of Marijuana” satisfied few criteria for a “religion”122 and that Meyers’ beliefs were more aptly characterized as “medical, therapeutic, and social,” especially since he repeatedly referred to its medicinal benefits.123 Therefore, as Meyers used marijuana, it was as for its “medical, therapeutic, and social effects” which are secular, not religious, concluded the court.124

The courts wrapped up its analysis by pointing out that

Had Meyers asserted that the Church of Marijuana was a Christian sect, and that his beliefs were related to Christianity, this Court probably would have been compelled to conclude that his beliefs were religious. Under these hypothetical circumstances, Meyers would have been able to fit his beliefs into a tradition that is indisputably religious. If Meyers had linked his beliefs to Christianity, the Court could not have inquired into the orthodoxy or propriety of his beliefs, no matter how foreign they might be to the Christian tradition.125

Although the court, under Ballard, could not inquire into the validity of Meyers’ Christian beliefs as to the use of marijuana, it does not follow, as the court seems to suggest, that his invoking Christianity would have extended Free Exercise protection to his use of the substance. It has generally been held that the substance must be an indispensable part of the religion in order for Free Exercise protection to attach.126 Thus the court held that Meyers’ beliefs did not constitute a “religion” for RFRA purposes because they meet almost none of the criteria that are the hallmarks of religious belief, and they were secular (i.e., medical, therapeutic, and social).127

121 Id. at 1504.
122 Id. 1508.
123 Id.
124 Id.
125 Id. (citing Ballard, 322 U.S. at 87) (courts cannot assess validity of beliefs) supra note 33 and Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975) (courts cannot determine religious orthodoxy).
127 906 F. Supp. at 1509.
3. A Sincere Religious Pretender

While *Meyers* involved an extensive and far ranging inquiry into the nature, purpose and eschatology of religion, *Rupert v. City of Portland*\(^{128}\) dealt with more mundane matters, namely request for return of a marijuana pipe [commonly known as a “bong”]\(^{129}\) seized by police as drug paraphernalia. It is also notable in that the defendant in the case, one Erwin L. Rupert,\(^ {130}\) claimed membership in the “New World Church” whose deity was methylenedioxymethamphetamine and whose sole member was the defendant\(^ {131}\). As set forth in the court’s Opinion, Rupert was walking away from the Portland Public Library when he was stopped by a Portland police officer for allowing his dog, "Little Bear," to run at large. Upon frisking Rupert, the officer found a container of vegetable matter and took him to the police station to be searched. The search produced a small amount of marijuana and a pipe containing marijuana residue. The marijuana pipe and bag were wrapped in a United Nations flag. The police seized the pipe and the marijuana. Subsequently, the City filed two civil complaints against Rupert, one for possession of less than 1 1/4 ounces of marijuana and the other for allowing his dog to run at large. Those civil complaints were later dismissed when no police officer appeared in court for the scheduled hearing. Rupert then wrote to the police department requesting the return of his marijuana pipe. The police refused to return the pipe on the ground that it was drug paraphernalia under the state’s Drug Paraphernalia Act,\(^ {132}\) and that it empowered the law enforcement officers to confiscate it as contraband\(^ {133}\).

Rupert admitted that at the time the police confiscated his pipe, he used it to smoke marijuana and that he wanted to recover it to continue using it. He conceded that it was "drug paraphernalia," but argued that because he smoked marijuana only for religious purposes, his use of the pipe was protected by the Free Exercise Clauses of the Maine and U.S. Constitutions.\(^ {134}\) Rupert claimed he was a clergymen of the Native American Church of the United States of America and described the manner of worship of his church as "shamanic." He also claimed that "church members experience the deity of nature by ritually ingesting psychedelic plants" that they "bear true faith in the sacrality of marijuana." He alleged his marijuana pipe was a registered medicine pipe of the New World Church, of which he is the secretary and sole member as well as being the "medicine pipe registrar."\(^ {135}\) He told the court that "the pipe is central to Native American worship and constitutes the altar from which prayers ascend to God" and that he held a Master of Divinity degree from Harvard University for which he wrote a thesis on the historical use of hallucinogenic mushrooms in Indian religion.\(^ {136}\) Over the years Rupert had a considerable amount of correspondence with the United States Drug Enforcement Administration (DEA), in which he has sought, without success, to obtain religious exemptions for various prohibited drugs, including use of "North American Deity Psilocybin Mushrooms" in holy communion in that church and the use of marijuana in the Rastafarian Church of America founded by him.\(^ {137}\)

128 605 A. 2d 63 (Me. 1992).
130 *Id.* at 63. Apparently the defendant appeared pro se.
131 *Id.* at 65.
133 605 A. 2d at 64-65.
134 *Id.* at 65.
135 *Id.*
136 He also informed the court that he was a graduate of the United States Air Force Academy and a former U.S. Air Force officer as well as a graduate of Georgetown University Law Center. *Id.* note 2.
137 *Id.*
Whereas many “religious pretenders” in court appear to behave in a “tongue-in-cheek” attitude, Rupert’s sincerity is not in doubt as the court dutifully acknowledges. The court admits that he has carried his burden to show that his religious belief is sincerely held and that the challenged regulation restrains the free exercise of that belief. Then the burden shifts to the State. It can prevail only by proving that the challenged regulation is motivated by a compelling public interest and that no less restrictive means can adequately achieve that compelling public interest. The court then declares that the State has a compelling public interest in preventing the distribution and use of illegal drugs, including marijuana, which the legislature has determined poses a threat to individual health and social welfare. In addition, the court announces that the State has met its second burden of showing that the regulation of drug paraphernalia as applied to Rupert’s marijuana pipe is the least restrictive means by which the compelling public interest in controlling drugs and drug paraphernalia can be accomplished. The court ruled that a religious exemption to use the pipe to smoke marijuana, as Rupert proposed, would “severely hamper the public’s effort to control the amount of marijuana in circulation.” So Rupert’s creative proposal to use his marijuana pipe exclusively for religious purposes did not outweigh the government’s compelling interest in controlling the illicit substance.

In a final coup de grâce to Rupert’s proposal, the court cites the U.S. Supreme Court case of Employment Div., Dept. of Human Resources v. Smith for the proposition that laws of general application that burden a particular religious practice, if enacted without hostility to religion, need not be justified under the First Amendment by a compelling governmental interest. Quoting the high Court, "the right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes)" and that "if prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." So Rupert’s marijuana pipe stayed securely ensconced in police custody.

4. An Insincere Religious Pretender

Although sincerity of defendant’s religious belief was not an issue in Rupert, lack of it played a decisive part in State v. Pederson, where the court held that defendant’s medicinal use of marijuana was not a sincerely held religious belief and that her attempt to demonstrate how her medicinal use of marijuana was supported or advocated by Essenic or Messianic Judaism was not corroborated by any evidence in the record.
Defendant Ariel Suzette Pedersen was stopped for speeding. When the officer approached her vehicle he detected an odor of marijuana coming from it. He asked Pederson if she had any marijuana and she admitted "yes, a little." During a search of the vehicle the officer discovered 529.3 grams of marijuana. She was later charged with felony possession of a controlled substance crime in the fifth degree under Minnesota law and possession of marijuana in a motor vehicle. She moved to dismiss contending that the criminal statutes under which she was prosecuted were unconstitutional as applied to her because they violated the Freedom of Conscience Clause of the Minnesota Constitution, article I, section 16. At a hearing a physician testified she suffered from various maladies. She testified that while legal drugs improve her condition, marijuana is the most effective pharmacological remedy and her physician agreed.

As regards her religious beliefs and use of marijuana, Pederson testified that her medicinal use of cannabis is consistent with her religious belief as a Messianic Jew and cited various biblical passages to support this contention. She declared that Messianic Jews have been using cannabis since the beginning of time for incense and oils and medicinal purposes and that in the book of Exodus the Bible authorizes the use of cannabis for medicinal purposes. According to Pederson, "God was explaining to Moses all the ingredients to put into the incense for the temple. Within this confinement of the five ingredients was sweet cane. Sweet cane is cannabis in Hebrew, meaning scented reed or sweet smelling reed." A minister who had been ordained into the Baptist Missionary Ministry testified that he had knowledge of Essenic teachings and that the medicinal use of marijuana is consistent with the teachings of Essenic Judaism and Messianic Judaism. The district court denied Pederson's motion to dismiss and after a trial to the court on stipulated fact, she was convicted of a felony controlled substance crime in the fifth degree. She appealed.

The appeals court pointed out that the Minnesota Supreme Court has interpreted the Freedom of Conscience Clause to afford greater protection than the Free Exercise Clause of the United States Constitution. Thus the court explained the language in the Minnesota Constitution "is of a distinctively stronger character than the federal counterpart." Accordingly, the lower court instructed that in order to determine whether an individual's rights under the Freedom of Conscience Clause are violated, the compelling-state-interest test articulates the standard to apply. Therefore, "once a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means." Therefore, the lower court had to first determine whether Pederson's medicinal use of marijuana was a sincerely held religious belief intended to be protected by section 16. While she argued that the medicinal use of marijuana is consistent with her sincerely held religious beliefs as a Messianic Jew, she was convicted of a felony controlled substance crime in the fifth degree.

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149 679 N.W.2d at 371.
150 Id. Article I, section 16, provides "the right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted."
151 Id.
152 Id. at 371. She cited Genesis 1:11-12, 29; 9:3 stating that the book of Genesis instructs that "God gives us every plant bearing seeds inside itself for our consumption and for our health." Id. at 372.
153 Id. at 371-72.
154 Id. at 372.
155 Id.
156 Id. at 373 (citing State v. Hershberger, 462 N.W.2d 393, 397-98 (Minn. 1990)).
157 Id. (citing Hershberger at 397).
158 Id. (citing Hershberger at 398).
159 Id. at 373.
Jew, the district court was not persuaded, and concluded that her beliefs in connection with the use of marijuana were personal beliefs, based on a personal, rather than communal, interpretation of religious significance. 160

The court admitted that whether the medicinal use of marijuana is a sincerely held religious belief entitled to protection under the Freedom of Conscience Clause is an issue of first impression for the court. 161 While noting that it is difficult to determine what is a “sincerely held religious belief,” other courts have wrestled with this issue and they take counsel and advice from their decisions. 162 The court points out that Pederson in support of her purported religious belief did not address three of the Meyers criteria—ultimate ideas, metaphysical beliefs, and comprehensiveness of beliefs; and only generally addressed the moral or ethical dimension of her belief and its purported scriptural foundation. 163 Furthermore, she failed to provide the court with any evidence that her medicinal use of marijuana involves a religious ceremony, a principle, tenet, or dogma pertaining to the spiritual or eternal, or that she uses marijuana to communicate with any supreme being. 164 Addressing her testimony that the Bible supports her use of marijuana, the court had this to say:

Moreover, even if we accept appellant's assertion that in the book of Exodus sweet cane refers to cannabis, this is the sole Biblical text cited by appellant that makes any reference to the use of marijuana for medicinal purposes. More importantly, other than citing this one verse, appellant fails to demonstrate how her medicinal use of marijuana is supported or advocated by Essenic or Messianic Judaism in the context of their fundamental tenets, precepts, scriptures or rites. Appellant's isolated and anecdotal citations to scriptures generally extolling the virtues of plant life are insufficient to prove that her medicinal use of marijuana is a communal religious belief. 165

Finally, the court comments that Pederson “has failed to provide any evidence that establishes a connection between the practice of her religion and the medicinal use of marijuana. In the court’s view, her belief in the medicinal use of marijuana is a personal, secular belief, driven more by her medical needs than any philosophical principle or religious tenet.” 166 Accordingly, it affirmed the district court's decision that Pederson did not have a sincerely held religious belief in the medicinal use of marijuana, because she failed to articulate a connection between her use of marijuana and the practices or central tenets of her religion. 167

To the court’s credit it was not taken in by Pederson’s attempt to link marijuana use with Biblical passages to justify its use. So thankfully in none of these cases did the “religious pretenders’ prevail. In Kuch, the Neo-American Church’s preposterous claims to be a “religion” were so patently counterfeit as to present no real question as to its religious authenticity. In Meyers, the “Church of Marijuana” – just as bogus as the Neo-American Church – could not withstand the doctrinal and theological requirements of a conscientious and scholarly judge. In Rupert, sincerity was assumed but the legal commands of a secular state took precedence.

160 Id. at 373-74.
161 Id. at 374.
163 679 N.W.2d at 376.
164 Id.
165 Id.
166 Id.
167 Id. at 378.
We now turn to another arena where religious pretenders are to be found – in employment discrimination cases where plaintiffs refuse to comply with reasonable employer rules and policies on the basis they conflict with their religious beliefs.

B. A Religious Pretender in the Workplace – Facial Jewelry & The Church of Body Modification

Obviously there are instances where religious faith and the requirements of the workplace genuinely conflict and both sides act in good faith.\(^{168}\) However, let’s examine a case where an employee argued with dubious sincerity that their employer’s policies interfered with the practice of her religion.\(^{169}\)

In Cloutier v. Costco Wholesale Corp.,\(^ {170}\) Kimberly Cloutier alleged that her employer, Costco Wholesale Corp. (Costco), failed to offer her a reasonable accommodation after she alerted it to a conflict between the "no-facial-jewelry" provision of its dress code and her religious practice as a member of the Church of Body Modification.\(^{171}\) She argued that this failure amounted to religious discrimination in violation of the Civil Rights Act\(^ {172}\) and the corresponding state statute.\(^{173}\) The district

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\(^{168}\) See the historic case of Sherbert v. Verner, 374 U.S. 398 (1963) where the Court held that the Free Exercise Clause required the government demonstrate a compelling governmental interest before denying unemployment compensation to someone who was fired because their job conflicted with their religion. The case established the Sherbert Test, requiring demonstration of such a compelling interest in Free Exercise cases. But this test was overruled by Employment Div., Dept of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990), supra note 143. Congress revived it by passage of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000 et seq. (1993). However, the Court in City of Boerne v. Flores, 521 U.S. 507 (1997) limited its application to federal laws only. See also Sánchez-Rodríguez v. AT&T Mobility P.R., Inc., 673 F.3d 1 (1st Cir P.R. 2012) (where employee, a Seventh Day Adventist, could not work on Saturday, the court held employer's combination of accommodations were reasonable and affirmed summary judgment in his favor).

\(^{169}\) The workplace is not the only location where religious pretenders are to be found. See Thompson v. Penn. Dept. of Corrections, 2006 U.S. Dist. LEXIS 95008 (MD. PA, filed Feb. 1, 2007) where a Pennsylvania federal district court rejected the religious claims of a Rastafarian prisoner who had been refused an exemption from a prison’s hair length requirements. Officials found that his religious beliefs were not sincere.

\(^{170}\) 390 F.3d 126 (1st Cir. 2004), cert. denied 545 U.S. 1131 (2005). Accord: Marchant v. Tsickrutzis, 506 F. Supp. 2d 63 (D. Mass. 2007) (plaintiff’s desire to leave work early on certain weekdays to attend religious classes was a personal preference since the classes were offered at other times & places; court recommends summary judgment for employer); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7 (D. Mass. 2006) (request of an employee, a Rastafarian, whose religious beliefs did not allow him to shave or cut his hair, that he be granted a blanket exemption from employer’s policy requiring all employees to be clean-shaven, held to constitute an undue burden on employer).


\(^{171}\) For the definition of a “church” for tax exemption purposes, see Mason Powell, Ecclesia Semper Reformanda Est: Radical Reformation And The IRS, 101 KY L.J. 207 (2012/2013).


\(^{173}\) Massachusetts General Laws Chapter 151B, § 4(1A).
court granted summary judgment for Costco, concluding that Costco reasonably accommodated Cloutier by offering to reinstate her if she either covered her facial piercing with a band-aid or replaced it with a clear retainer. The appeals court affirmed, but on a different basis, holding that Costco had no duty to accommodate Cloutier because it could not do so without undue hardship.

Cloutier began employment at Costco in 1997 and for the next four years was assigned various positions all intended to accommodate her facial jewelry, piercing and cutting habits. When Costco began enforcing its no-facial-jewelry policy (except earrings) in June 2001, Cloutier did not comply and at that time did not indicate that the jewelry had religious or spiritual significance. In late June, Cloutier was told to remove her facial jewelry or go home. At this point Cloutier indicated for the first time that she was a member of the Church of Body Modification (CBM), and that her eyebrow piercing was part of her religion. The court noted that there was some dispute as to when Cloutier joined the CBM. The record included an application dated June 27, 2001, two days after Cloutier was first told to remove her facial piercing. However, she claimed that she first filled out an electronic application in March 2001, but that she had to reapply in June because the March application had not been processed due to a computer error. Giving her the benefit of the doubt, the court accepted her account.

The court stated that the CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification." The church's website, apparently its primary mode for reaching its adherents, did not state that members' body modifications had to be visible at all times or that temporarily removing body modifications would violate a religious tenet. Still, Cloutier interpreted the call to be a confident role model as requiring that her piercings be visible at all times and precluding her from removing or covering her facial jewelry.

While Cloutier and Costco continued to negotiate, she filed a complaint with the Equal Employment Opportunity Commission (EEOC). Eventually she was terminated due to absenteeism because she refused to go to work without her facial jewelry. Earlier Costco had offered to let Cloutier return to work wearing either plastic retainers or a band-aid over her jewelry (the same accommodation that Cloutier had suggested prior to her termination).

However, she maintained that neither of these accommodations would be adequate because the CBM's tenets, as she interpreted them, required her to display all of her facial piercings at all times. Replacing her eyebrow piercing with a plastic retainer or covering it with a band-aid would thus contradict her religious convictions. Cloutier asserted that the only reasonable accommodation would be to excuse her from Costco's dress code, allowing her to wear her facial jewelry to work. Costco

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174 390 F.3d at 128.
175 Id.
176 Id. at 128-29.
177 Id. at 129.
178 Id.
179 Id. note 2.
180 Id.
181 Id. at129.
182 Id. at 130.
183 Id.
responded that this accommodation would interfere with its ability to maintain a professional appearance and would thereby create an undue hardship for its business.\textsuperscript{184}

In 2002 the EEOC determined that Costco's actions violated Title VII of the Civil Rights Act of 1964 and found her refusal to remove her facial jewelry was "religiously based as defined by the EEOC." Further, it found that there was no evidence that allowing her to wear the jewelry would have constituted an undue hardship.\textsuperscript{185} Based on the EEOC’s determination, Cloutier filed a lawsuit in federal district court against Costco alleging religious discrimination and a violation of state law. The district court granted Costco's motion to dismiss her state civil rights claim but allowed the federal and state discrimination claims to proceed. Costco then moved for summary judgment on the discrimination claims.\textsuperscript{186}

In ruling on that motion, the district court applied the two-part framework set forth in \textit{EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico},\textsuperscript{187} First, the court evaluated Cloutier's \textit{prima facie} case, which required her to show that (1) a bona fide religious practice conflicted with an employment requirement, (2) she brought the practice to Costco's attention, and (3) the religious practice was the basis for the termination.\textsuperscript{188} The court expressed serious doubts as to whether Cloutier's claim was based on a "bona fide religious practice" for purposes of the first element, noting that even assuming arguendo that the CBM is a bona fide religion, it "in no way requires a display of facial piercings at all times. The requirement that she display her piercings, open and always, represents the plaintiff's personal interpretation of the stringency of her beliefs."\textsuperscript{189} The court also questioned the sincerity of her personal interpretation, given that she initially offered to cover her piercing with a band-aid, an alternative that she now claims would violate her religion.\textsuperscript{190}

The district court ultimately avoided ruling on whether the CBM is a religion or whether Cloutier's interpretation of the CBM tenets is protected by Title VII. Instead, the court concluded that even if Cloutier had met her \textit{prima facie} case, Costco should prevail because it fulfilled its obligations under the second part of the Title VII framework. Specifically, the court found that Costco met its burden of showing that it had offered Cloutier a reasonable accommodation of her religious practice as a matter of law.\textsuperscript{191}

Before the appeals court Cloutier vigorously asserted that her insistence on displaying all her facial jewelry at all times was the result of a sincerely held religious belief.\textsuperscript{192} The court noted that there was no need to inquire whether her religious beliefs were sincerely held because assuming, \textit{arguendo}, that Cloutier established her \textit{prima facie} case, the facts of the case did not support a finding of impermissible religious discrimination.\textsuperscript{193} The court found dispositive that the only accommodation Cloutier considered reasonable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on Costco and in such a situation, an employer has no obligation to offer an accommodation before taking an adverse employment action.\textsuperscript{194}

\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 130-31.
\textsuperscript{187} 279 F.3d 49, 55 (1st Cir. 2002).
\textsuperscript{188} Id. at 55.
\textsuperscript{189} 390 F.3d at 131 (citing 311 F. Supp. 2d at 199).
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 131.
\textsuperscript{192} Id. at 132.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 132-33 (citing \textit{EEOC v. Ilona of Hungary, Inc.}, 97 F.3d 204, 211 (7th Cir. 1996); \textit{Toledo v. Nobel-Sysco, Inc.},
After a review of judicial interpretations of “undue hardship” viewed in light of an employer’s need to maintain a professional appearance before the public, the court concluded that Cloutier’s insistence on a wholesale exemption from the no-facial-jewelry policy precluded Costco from using its managerial discretion to search for a reasonable accommodation. Exempting Cloutier from the dress code would have imposed more than a de minimis burden on Costco because it would impair its professional image before the public. Her refusal to consider anything less meant that Costco could not offer a reasonable accommodation without incurring an undue hardship.

Based on the record before the court, a reasonable inference can be drawn that Cloutier’s sudden conversion to the CBM was simply a matter of convenience and lacked sincerity, as the district court astutely pointed out. As a “religious pretender” and someone who eschewed any compromise, she has few equals.

IV. A MODEST PROPOSAL DEFINING “RELIGION”

With some trepidation and a surfeit of modesty, this commentator hereby enters the lists as to what is a “religion.” Drawing on an authority more knowledgeable than he, the following definition of “religion” is hereby put forth:

An institution with a recognized body of communicants who gather together regularly for worship, and accept a set of doctrines offering some means of relating the individual to what is taken to be the ultimate nature of reality.

While most of the terms would appear to be self explanatory, only the “ultimate nature of reality” could be open to various interpretations. Perhaps it could be understood as “ultimate concern” though of course that term has its share of definitional difficulties.

V. CONCLUSION

Even though the Free Exercise Clause grants vast freedom to conduct religious activities according to the dictates of one’s conscience, this freedom can be abused and too often “religion” is invoked for purposes that have nothing whatsoever to do with religious conviction. Judges must remain ever vigilant against “religious pretenders” who would seek to subvert and make a mockery of not only the principles of religious faith but also the intent and rationale of the Free Exercise Clause.

892 F.2d 1481, 1490 (10th Cir. 1989)).
195 Id. at 134-36.
196 Id. at 137.
197 Supra note 189.
198 Reese, supra note 5, at 488.
200 See Greenawalt, Religion as a Concept in Constitutional Law, 72 CAL. L. REV. 753, 808 (1984), supra note 32.