
CHAPTER I

FREE EXERCISE OF “RELIGION”

Introduction. The First Amendment to the United States Constitution states that Congress shall “make no law respecting an establishment of religion or prohibiting the free exercise thereof.” As you read the following cases, ask yourself what groups, organizations or beliefs qualify as “religious.” Then consider whether and in what circumstances the U.S. Constitution allows Congress or the states to restrict the free exercise of religion.

A. WHAT IS FREE EXERCISE?

Reynolds v. United States*

Supreme Court of the United States, 1878.
98 U.S. 145, 8 Otto 145, 25 L.Ed. 244.

■ MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

. . .

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty? . . .

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church “that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.” He also proved “that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . .

* Text omissions are indicated by three dots. Omitted citations are indicated by []. There is no indication when footnotes are omitted. When they do appear, footnotes are numbered as in the material quoted.—Eds.

that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing a crime—did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. [] At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. [] In the preamble of this act [] religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, [] but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. [] Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association [], took occasion to say: "Believing with you that religion is a matter which lies solely between man and his god; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of

all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void [], and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estate of Deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth." [] From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. . . .

Notes and Questions

1. Why did the United States Constitution need an amendment to protect the free exercise of religion? According to the opinion, does the First Amendment prohibit state and federal governments from taxing individuals in order to support religion? Is it the Free Exercise Clause or the Establishment Clause that would bar taxation?

2. If the First Amendment builds a wall of separation between church and state, how can the government criminalize marriage conducted according to a religious ceremony? Is the opinion's distinction between belief and conduct persuasive?

3. Do you agree that legalizing polygamy would have disrupted the social order in 1879? Would it disrupt the social order today? Do you think that polygamy should be legal today? Or should polygamy be illegal, and Mormons exempt from that law because of their sincere religious belief? Would such an exemption make every citizen a law unto himself?

Rodney Hans Holm married Suzie Stubbs in a legal marriage ceremony and then participated in a religious marriage ceremony with Suzie's sister Ruth when Ruth was sixteen years old. By the age of 18, Ruth was the mother of two of Holm's children. Holm was convicted of unlawful sexual conduct with a minor and bigamy. He unsuccessfully appealed his convictions on free exercise grounds under the Utah and U.S. Constitutions,

arguing that *Reynolds* was “nothing more than a hollow relic of bygone days of fear, prejudice, and Victorian morality.” Do you agree with Holm or the court that upheld his conviction? See *State v. Holm*, 137 P.3d 726, 742 (Utah 2006).

4. In *Davis v. Beason*, 133 U.S. 333 (1890), the Court upheld the conviction of Mormons in the territory of Idaho for falsely swearing the following oath when they registered to vote:

I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise.

Were the convictions defensible under *Reynolds*' reasoning? Do you think the convictions would be upheld today? See *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.”).

5. According to Professor Robert Gordon, “From 1860 to 1890, the federal government was mobilized to deploy an extraordinary arsenal of legal resources against Mormon families, churches, economic institutions, and political arrangements. In just a few years, the government disenfranchised polygamists and even those who merely advocated polygamy, repealed women’s suffrage in the Utah territory, disqualified polygamists from jury duty, criminalized plural marriage and brought 2,500 prosecutions against polygamists, including 200 against pregnant women for ‘fornication.’” Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. Miami L. Rev. 373, 382 (2003) (citing Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (2002)). Under such pressure, the church officially ended the practice of polygamy in 1890, although some Mormon groups such as the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) continue to practice it. Is the First Amendment violated when religious groups change their teachings under pressure from the state?

After receiving a telephone tip that a 16-year-old girl was sexually abused at the Yearning for Zion Ranch, an FLDS community in El Dorado, Texas, the Texas Department of Family and Protective Services took possession of all 468 children at the ranch, removing them to foster care across the state in order to protect them from the ranch’s culture of polygamy, which encouraged spiritual marriages of girls under age 18. The Supreme Court of Texas ruled that the state should have pursued less drastic measures than removing all the children from their families. See *In*

re Texas Dept. of Family and Protective Services, 255 S.W.3d 613 (Tex. 2008). A state report later concluded that 12 girls at the ranch were married between the ages of 12 and 15. The state prosecuted the husbands of those girls for sexual assault. Does the seizure of the children indicate that Mormons face discrimination because of their religious beliefs? Does it persuade you that polygamy should be legal? Raymond Jessop was convicted of sexual assault of a child and sentenced to ten years in prison in the first trial arising from the raid, and more trials are underway. See Michelle Roberts, AG Sits in on Child Sex Assault Trial, *Houston Chron.*, Dec. 9, 2009, at A03.

6. Does the following case adhere to the rule of *Reynolds*, as Justice Scalia argues?

Employment Division, Department of Human Resources of Oregon v. Smith

Supreme Court of the United States, 1990.
494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876.

■ JUSTICE SCALIA delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS and KENNEDY, joined.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. [] The law defines “controlled substance” as a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. [] Persons who violate this provision by possessing a controlled substance listed on Schedule I are “guilty of a Class B felony.” [] As compiled by the State Board of Pharmacy under its statutory authority, [] Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii* *Le-maire*. []

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related “misconduct.”

...

... Citing our decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981), the Oregon Supreme Court concluded that respondents were entitled to payment of unemployment benefits. [] ...

II

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*..." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner*, *supra*, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, see *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); cf. *Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 452, 89 S.Ct. 601, 604-608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S.Ct. 143, 143-56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388, 49 L.Ed.2d 151 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious

practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. []

Our decisions reveal that the latter reading is the correct one. We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594–595 (1940): “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. . . .

Subsequent decisions have consistently held that the right of free exercise 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 proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” [] . . .

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304–307, 60 S.Ct., at 903–905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938

(1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251–52, 82 L.Ed.2d 462 (1984) (“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed”).

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. [] . . .

■ JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court’s First Amendment jurisprudence. . . .

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.⁶ The Native American Church’s internal restrictions

6. In this respect, respondents’ use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. However compelling the Government’s then general interest in prohibiting the use of alcohol may have

on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.⁷ . . .

II

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. []

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be “forced to migrate to some other and more tolerant region.” This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. [] . . .

Notes and Questions

1. Distinguish *Smith* from *Reynolds*. Is Justice Scalia correct that *Smith* follows the rule enunciated in *Reynolds*? Did both decisions protect religious freedom?

2. Does the sacramental wine exception to Prohibition mentioned in footnote 6 of Justice Blackmun's dissent suggest that the legislatures and the courts may be more willing to protect majority or mainstream religions than minority or unusual religions? Do you agree with the suggestion in footnote 7 and accompanying text that the Native American Church's own restrictions on the use of peyote should override the State's health concerns?

3. How different is the dissent's “compelling interest” test from Justice Scalia's “neutral laws of general applicability” standard? Can you think of a scenario in which these two tests would yield widely different results? What about similar outcomes? We examine the application of these tests in Chapter IV.

4. What are some criticisms of the *Smith* case? How can these be countered? See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 *Hastings L.J.* 699, 700 (2005) (Asserting that the two main criticisms of *Smith* were: 1) it could lead to too much government regulation and 2) “religious minorities . . . can suffer disproportionately from laws that enact

been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.

7. The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

majoritarian mores.”). For a comprehensive discussion of how Congress responded after the *Smith* decision, see *City of Boerne v. Flores*, 521 U.S. 507 (1997). The casebook examines *Smith* and free exercise in more detail in Chapters IV and V.

5. As you read the following case, consider why the Court found a free exercise violation. What distinguishes *Lukumi* from *Reynolds* and *Smith*?

Church of the Lukumi Babalu Aye v. City of Hialeah

Supreme Court of the United States, 1993.
508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472.

■ JUSTICE KENNEDY delivered the opinion of the Court.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. [] . . .

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, “the way of the saints.” The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. []

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. [] The sacrifice of animals as part of religious rituals has ancient roots. [] Animal sacrifice is mentioned throughout the Old Testament, [] and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, []. In modern Islam, there is an annual sacrifice commemorating Abraham’s sacrifice of a ram in the stead of his son. []

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the

cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. []

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. [] The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. []

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church) and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. . . .

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and prompted the city council to hold an emergency public session on June 9, 1987. . . .

[At that meeting], the city council adopted Resolution 87-66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "the City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. [] Among other things, the incorporated state law subjected to criminal punishment "whoever . . . unnecessarily or cruelly . . . kills any animal." [] . . .

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." . . . [Ordinance 87-71] provided that "it shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87-72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption,

however, for the slaughter or processing for sale of “small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” All ordinances and resolutions passed by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding \$500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. . . . The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners.

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners’ rights under the Free Exercise Clause. [] . . . The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion, stat[ing] simply that it concluded the ordinances were consistent with the Constitution. [] . . .

II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . .” (Emphasis added.) The city does not argue that Santeria is not a “religion” within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” [] Given the historical association between animal sacrifice and religious worship, [], petitioners’ assertion that animal sacrifice is an integral part of their religion “cannot be deemed bizarre or incredible.” [] Neither the city nor the courts below have questioned the sincerity of petitioners’ professed desire to conduct animal sacrifices for religious reasons. . . .

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words “sacrifice” and “ritual” does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council’s enactments discloses the improper attempt to target Santeria. Resolution 87-66 . . . recited that “residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and “reiterate[d]” the city’s commitment to prohibit “any and all [such] acts of any and all religious groups.”

No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. [] The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," [] an impermissible attempt to target petitioners and their religious practices.

. . .

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

Notes and Questions

1. *Lukumi* holds that the government may not improperly target a religion. Is that the *only* limitation that the Free Exercise Clause places on the government? Does *Lukumi* follow the rule of *Smith* or add a new rule to Free Exercise jurisprudence?

2. Why should animal sacrifice deserve constitutional protection while peyote use and polygamy do not? Does that practice seem less abhorrent or disruptive of the social order than polygamy or peyote use? Is animal sacrifice respected because of its ancient roots in Judaism and Islam? Is animal sacrifice comparable to the use of wine in communion?

Jose Merced is a Santerian Oba Oriate (priest) from Eules, Texas. His religion's priestly initiation rituals require the sacrifice of four-legged animals. Merced usually sacrifices goats during those ceremonies. A city law prohibits the domestic slaughter of animals (except chickens and turkeys) and allows four-legged animals to be kept only on properties that

are much larger than Merced’s home, where he conducts the rituals. Home shrines are the norm for the Santeria religion. Should Merced win or lose his lawsuit against Eules for violations of his religious freedom? See *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009) (upholding Merced’s claim). Why isn’t public health a sufficiently compelling government interest to override Merced’s claim?

3. Does *Lukumi* prove that the courts, not the legislatures, are best equipped to protect unpopular minority religions? See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919, 965 (2004) (asserting that because “laws tend to reflect the majority’s values, rules that on their face treat all faiths equally, and reflect no intent to discriminate, will nevertheless have an unequal impact on different faiths”); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (arguing that mainstream faiths face more difficulty in the courts than minority religions do).

4. The Supreme Court cited *Lukumi* in the case of *Javid Iqbal*, a Pakistani Muslim who was detained by federal officials in the wake of the September 11, 2001 attacks. Iqbal filed a *Bivens* action against corrections officers, FBI Director Robert Mueller and Attorney General John Ashcroft alleging, *inter alia*, that he was detained on account of his religion and was not allowed to pray in detention because he was a Muslim. In a 5–4 decision, the Court concluded that Iqbal’s allegations were too conclusory to survive the pleadings requirements of a *Bivens* lawsuit.

The majority’s opinion stated that in order to succeed on a First Amendment claim, Iqbal must demonstrate that the government defendants acted with a discriminatory purpose:

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–41, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (First Amendment); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). It instead involves a decisionmaker’s undertaking a course of action “‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.” *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Did the Court interpret *Lukumi* correctly? Does *Lukumi* require plaintiffs to prove a discriminatory purpose, or only to prove that a law is not neutral and general? Is there a difference between those two standards? Did the Court set a higher standard because Iqbal brought a *Bivens* claim against government officials?

In support of his conclusion that Iqbal's allegations were too conclusory, Justice Anthony Kennedy wrote:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, [citations omitted] and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1951–52 (2009). Does this mean no Muslim lawsuits alleging religious discrimination are possible in connection with the events of September 11, 2001?

Before Japanese forces bombed Pearl Harbor on December 7, 1941, the FBI investigated Japanese–American Buddhists to verify their loyalty to the United States. They compiled a list of Buddhist priests who were arrested immediately after the Pearl Harbor attacks, before the later internment of non-priest individuals of Japanese ancestry. The FBI had concluded that Japanese Christians were more likely to be loyal American citizens than Japanese Buddhists. Was *Lukumi* violated by these actions? Could the Buddhists succeed in bringing an *Iqbal* claim? Did banning Shinto and Buddhist practice in the internment camps violate free exercise? See Duncan Ryūken Williams, *Camp Dharma: Japanese–American Buddhist Identity and the Internment Experience of World War II*, in Charles Prebish and Martin Baumann, eds., *Westward Dharma: Buddhism Beyond Asia* 191–200 (2002).

B. WHAT IS RELIGION?

In *Reynolds*, *Smith* and *Lukumi* the Court agreed that the cases involved individuals' *religious* beliefs that were protected by the First Amendment. The following notes identify different rituals, practices and belief systems. As you read each note, decide whether the beliefs and

conduct described qualify as a religion and deserve First Amendment protection.

1. THE CHURCHES OF MARIJUANA

Does any one of these marijuana churches deserve more First Amendment protection than the others? How do you compare the claims of the marijuana users with the Native American peyote rituals in *Smith*?

- a. According to the district court, “David Meyers stated that he began worshipping marijuana because it brought peace into his life. Meyers founded the ‘Church of Marijuana’ in 1973. The church allegedly has 800 members and one designated meeting spot. The church’s ‘religion’ is to grow, possess, and distribute marijuana. 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’). The church does not have a formal clergy, but does have approximately 20 ‘teachers.’ Meyers did not explain what the teachers do. Although there are teachers, the church has no hierarchy or governing body. 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. Meyers testified that he (and presumably other church members) pray to the marijuana plant. The church’s only ceremony revolves around one act: the smoking and passing of joints. Joint smoking apparently results in a sort of ‘peaceful awareness.’ Meyers did not assert that this ‘peaceful awareness’ is a religious state. While ‘peacefully aware’ (vulgarly known as being ‘high’), church members ‘talk to one another.’ Meyers did not divulge the nature of their discussions. There are no formal church services.” *United States v. Meyers*, 906 F.Supp. 1494, 1504 (D. Wyo. 1995); see also *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). Is the court’s description of the Church of Marijuana too sarcastic, suggesting the animosity prohibited by *Lukumi*?
- b. Pedersen argued that her use of marijuana for medicinal purposes was “consistent with her religious belief as a Messianic Jew.” She believed that both Genesis and Exodus authorize the use of cannabis for medical reasons. Pedersen believed God told Moses to include “sweet cane,” i.e., cannabis, in the incense for the temple. See *State v. Pedersen*, 679 N.W.2d 368, 371–72 (Minn. Ct. App. 2004).
- c. Olsen is a member and priest of the Ethiopian Zion Coptic Church, a Christian church. The church has several thousand members in Jamaica, but only 100 to 200 members in the United States. The church’s sacrament is marijuana; under church teachings, marijuana is combined with tobacco and smoked “continually all day,

through church services, through everything we do.” See *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989).

- d. The McBrides are members of the Rastafarian faith, which began in Jamaica in the 1930s and regards the Ethiopian Emperor Haile Selassie as a god. Rastafarians believe that marijuana or “ganja” is a sacrament and that when one inhales and smokes it, he achieves a spiritual self-consciousness that cannot be achieved without the use of marijuana. One religious studies expert testified that Rastafarians cannot practice their religion without the use of marijuana. See *Kansas v. McBride*, 24 Kan.App.2d 909, 955 P.2d 133 (1998).

2. VEGANISM

Should the Free Exercise Clause protect the animal sacrifice of Sante-ria but not Veganism’s commitment to animal rights, or should Vegan Jerold Friedman succeed on the following religious freedom claim:

As a strict Vegan, [the employee] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [he] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, . . . [he] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [he] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. . . . [he] has even been arrested for civil disobedience at animal rights demonstrations.

Friedman was required to get a mumps vaccine at his workplace. The mumps vaccine was grown in chicken embryos and so vaccination would violate his religious beliefs. See *Friedman v. Southern California Permanente Medical Group*, 102 Cal.App.4th 39, 44, 125 Cal.Rptr.2d 663 (2002).

3. MOVE

Is MOVE any different from Veganism?

John Africa founded MOVE, “a ‘revolutionary’ organization ‘absolutely opposed to all that is wrong.’” MOVE has no hierarchy. MOVE’s goals are “to bring about absolute peace, . . . to stop violence altogether, to put a stop to all that is corrupt.” Toward that end, Africa and other MOVE adherents are committed to a “natural,” “moving,” “active,” and “generating” way of life. By contrast, what they alternatively refer to as “this system” or “civilization” is “degenerating”: its air and water are “perverted”; its food, education, and governments are “artificial”; its words are “gibberish.”

Central to this conception of an unadulterated existence is MOVE's religious diet. "That diet is comprised largely of raw vegetables and fruits; MOVE members who fully adhere to the diet decline to eat any foods that have been processed or cooked. . . . Failure to follow the diet constitutes deviation from the 'direct, straight, and true' and results in 'confusion and disease.' . . . Africa contends that the diet, in conjunction with 'our founder's wisdom,' transformed him from a weak, timid, and ailing being to a strong, confident, and healthy individual. 'Our religious diet is work, hard work, simple consistent unmechanized unscientific self-dependent work,' he concludes; 'our religious diet is family, unity, consistency, (and) uncompromising togetherness.'" *Africa v. Pennsylvania*, 662 F.2d 1025, 1027-28 (3d Cir. 1981).

On May 13, 1985, the Philadelphia police dropped a bag of gel explosives by helicopter onto a row house occupied by members of MOVE. The ensuing fire was one of the worst in the city's history, resulting in the destruction of sixty-one homes, damages over \$8 million and the death of eleven MOVE affiliates, including four children. Only two people, a thirteen-year-old child and a woman, Ramona Africa, escaped the blaze. Ms. Africa was later convicted of riot and conspiracy and sentenced to seven years in prison. Frank Trippett, "It Looks Just Like a War Zone": A Police Raid in Philadelphia Turns to Tragedy, *Time*, May 27, 1985, at 16. Police had issued the arrest warrants after the city had received numerous complaints from neighbors regarding the group's unsanitary practices, threatening behavior toward area residents, and broadcasting of obscene messages denouncing the government. Tom Morgenthau and Anne Underwood, *The Mysteries of MOVE*, *Newsweek*, May 27, 1985, at 25.

Does the information about the bombing of MOVE headquarters change your assessment of MOVE's status as a religion protected by the First Amendment?

4. KOZY KITTEN CAT FOOD

A plaintiff brought suit against the Director of the Equal Employment Opportunity Commission for dismissing his claim that he had been discriminated against because of his "'personal religious creed' that Kozy Kitten People/Cat Food . . . is contributing significantly to [his] state of well being . . . and overall work performance by increasing his energy." *Brown v. Pena*, 441 F.Supp. 1382, 1384 (S.D. Fla. 1977).

5. HUMANISM

A prisoner was a member of the American Humanism Association (AHA). In his application to establish a chapter of the AHA at the prison, "humanism is described alternately as a philosophy, a non-theistic religion, a life stance and a world view. . . . Corliss Lamont's book, *The Philosophy of Humanism*, considered 'a standard text and reference' on secular humanism, describes humanism as 'a philosophy that advocates happiness in this life rather than hope for a heaven in an afterlife.' Lamont defines

humanism as ‘a philosophy of joyous service for the greater good of all humanity in this natural world and advocating the methods of reason, science, and democracy.’ Among humanism’s central tenets, Lamont lists a rejection of the supernatural; the belief that the universe is self-subsisting; that humans are a part of the natural universe; and that there is no life after death.” An AHA publication includes an advertisement advising readers of AHA-sponsored humanist counselors who provide humanistic marriage and memorial services and have the legal status of minister in all fifty states. See *Kalka v. Hawk*, 215 F.3d 90, 92 (D.C. Cir. 2000). Does religion require theism, a belief in a God or Supreme Being?

6. SUICIDE

Calvin Kline, also known as “Calvin of Planet Earth,” founded the Religious Society of Families, which is “entirely this-worldly. . . . The constitution, by-laws, and advertised beliefs deny the existence of a higher power, or any divine power at all.”

The Society describes itself as “a disciplined neo-monastic religious society for the prevention of bionomic cruelty to the Planet and genetic cruelty to Posterity. Emphasis is on decommercialized land-use, homesteading, solar power, decentralization of production and authority, recycling materials, population control, and survival of mankind and other wildlife. Unique features include eugenics practice requiring members to forego reproduction in earlier barbarian tradition. Scientific humanism is the theological gist. Nominal monogamy is the sexual gist.”

The Society supports suicide: “It is morally monstrous to avoid and postpone death in the extreme and at preposterous expense. You have a moral obligation to self-destruct after age 60 (decimal 72), and Society has a right and obligation to impose death after age 100 (decimal 144). Deep freeze of moribund is tabu. Mercenary medicine should be phased out as soon as possible.” See *Religious Soc’y of Families v. Assessor of the Town of Carroll*, 343 N.Y.S.2d 159, 161 (N.Y. Misc. 1973).

7. CHURCH OF THE CHOSEN PEOPLE

The Church of the Chosen People (CCP) and Demigod Socko Pantheon preach The Gay Imperative, i.e., the “philosophic fundamental whereby the Gods direct that ever increasing numbers of persons expand their affectional preferences to encompass loving Gay relationships to hasten their full development for the control of overbreeding, and to ensure the survival of the human species and the multitude of terrestrial ecologies.” The group’s goals include population control.

The Church also “includes the belief that there are three equally valid human pair-bonds: male-male, female-female, and male-female. . . . Adherents to The Gay Imperative believe that only 10 percent of the population has to reproduce in order to be self-fulfilled; another 10 percent of the population needs a female-female bond for self-fulfillment; and another 10 percent of the population needs a male-male bond for self-fulfillment.

According to this doctrine, the remaining 70 percent of the population can be persuaded to join religions advocating any of the three pair-bonds. . . . [I]ndividuals have a duty to develop 'viewpoints' and 'ideologies' to counterbalance mainstream or traditional religions. An often-stated goal of the CCP is the conversion of 'breeders' to the CCP beliefs and espoused lifestyle." See *Church of the Chosen People v. United States*, 548 F.Supp. 1247, 1250 (D. Minn. 1982).

CCP has no membership list and no requirements to attend ceremonies, participate in instruction or read any publications. There is no published or oral literature explaining CCP's traditions. CCP held no regular religious services but declared certain parts of an annual Gay Pride Week a "Festival of the Chosen." Are the CCP's beliefs about the Gay Imperative analogous to the Mormons' acceptance of polygamy and therefore an indication that the CCP is a religion?

8. CREATIVE INTELLIGENCE AND TRANSCENDENTAL MEDITATION

Should the courts decide that certain practices are "religious" although the practitioners claim to be "secular"? Some humanists, *supra* note 5, state that they are not religious.

The Science of Creative Intelligence was founded by Maharishi Mahesh Yogi. "It teaches that 'pure creative intelligence' is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives. Essential to the practice of Transcendental Meditation is the 'mantra'; a mantra is the sound aid used while meditating. Each meditator has his own personal mantra which is never to be revealed to any other person. It is by concentrating on the mantra that one receives the beneficial effects said to result from Transcendental Meditation." See *Malnak v. Yogi*, 592 F.2d 197, 198 (3d Cir. 1979).

"To acquire his mantra, a meditator must attend a ceremony called a 'puja.' . . . During the puja the student [stands or sits] in front of a table while the teacher [sings] a chant and ma[kes] offerings to a deified 'Guru Dev.' The chanter . . . makes fifteen offerings to Guru Dev and fourteen obeisances to Guru Dev. The chant then describes Guru Dev as a personification of 'kindness' and of 'the creative impulse of cosmic life,' and the personification of 'the essence of creation,' . . . The chanter then makes three more offerings to Guru Dev and three additional obeisances to Guru Dev. The chant then moves to a passage in which a string of divine epithets are applied to Guru Dev. Guru Dev is called 'The Unbounded,' 'the omnipresent in all creation,' 'bliss of the Absolute,' 'transcendental joy,' 'the Self-Sufficient,' 'the embodiment of pure knowledge which is beyond and above the universe like the sky,' 'the One,' 'the Eternal,' 'the Pure,' 'the Immovable,' 'the Witness of all intellects, whose status transcends thought,' 'the Transcendent along with the three gunas,' and 'the true preceptor.'" *Id.*

A Hindu monk directs the puja, but the teachers "unwaveringly insist that the Puja chant has no religious meaning whatsoever and is, in fact, a

‘secular Puja,’ quite common in Eastern cultures.” They also insist “‘Transcendental Meditation is primarily a relaxation or concentration technique with no ‘ultimate’ significance.” *Id.* at 203, 213.

Why would the teachers dispute the claim that their rituals are religious? Would it violate free exercise if a court ruled that they are a religion? Are the teachers atheists?

9. ATHEISM

James Kaufman defines an atheist as “‘someone who does not believe in the supernatural or in any gods, does not believe in rituals and prayer, basically believes in what you can see and test through science or through your own observations.’ He states also that atheism is a ‘communal type thing,’ with no hierarchy or power structure. [He] believes that atheists have ethics derived from society, history and personal experience that help believers determine what is right and wrong.” Kaufman sought to establish a prison group whose goals were to “stimulate and promote Freedom of Thought and inquiry concerning religious beliefs, creeds, dogmas, tenets, rituals, and practices. To educate and provide information and literature on all religions, including their origins and history. To teach a progressive life stance, Free of Supernaturalism, to encourage critical thinking between fact and legend.” See *Kaufman v. McCaughtry*, No. 03-C-027-C, 2004 WL 257133 (W.D. Wis. 2004), *aff’d* in part by *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005).

A new survey from The Program on Public Values at Trinity College, in Hartford, Connecticut, found that 15% of Americans say they have no religion—a number that is increasing in every state. In particular, 27% of those polled said they do not want a religious funeral and 30% of married Americans said they did not have a religious ceremony. See Rachel Zoll, *More Americans Have No Religion, Survey Shows: In All States, the Percentage Lacking Faith Rose*, *Houston Chron.*, Mar. 9, 2009, at A9. What difference should this development make to American law about religion? Should it affect the definition of religion?

10. SCIENTOLOGY

The Church of Scientology was founded in 1954 by L. Ron Hubbard. According to Hubbard’s system of Dianetics, humans possess both an analytical mind and a reactive mind. The reactive mind stores emotions in the form of engrams. The analytical mind is freed to act more fully when humans release their engrams and reach the state of “clear.” Scientology counselors use electrical e-meters to audit the reactive mind and to help believers attain the state of clear. See J. Gordon Melton, *Scientology*, in Catharine Cookson, ed., *Encyclopedia of Religious Freedom* 430–33 (2003). In 1963 the Food and Drug Administration seized some of the church’s e-meters, alleging “false and misleading labeling” under the Food, Drug and Cosmetic Act as well as false healing. See *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1151 (D.C. Cir.), cert. denied, 396 U.S. 963

(1969). Is Scientology a religion? Does the government violate free exercise when it pursues Scientology for false labeling and false healing for these religious activities?

France has an anti-sect law that allows the state to take action against sects or cults that practice mental manipulation, false claims of healing or fraud. Sects are distinguished from traditional religions like Catholicism or Islam. According to French law, Scientology is a sect. French judges recently fined Scientology 600,000 euros for fraud after a woman complained that she paid 20,000 euros for an e-meter and other equipment under pressure from Scientologist officials. French prosecutors were unsuccessful in their efforts to have Scientology banned in France due to recent changes in the anti-sect law. See Gordon H. Smith, *Religious Freedom and the Challenge of Terrorism*, 2002 B.Y.U. L. Rev. 205; N.A., *Scientology Fraud Case*, *Townsville Bulletin* (Australia), Oct. 29, 2009. Should the government be allowed to define groups as sects rather than religions and to monitor the sects' behavior more strictly?

11. UTILITARIANISM

Utilitarianism is “the moral theory that an action is morally right if and only if it produces at least as much good (utility) for all people affected by the action as any alternative action the person could do instead. Its best-known proponent is John Stuart Mill, who formulated the greatest happiness principle: always act so as to produce the greatest happiness.” Utilitarians debate “whether the utilitarian principle should be applied to individual actions or to some form of moral rule. According to *act utilitarianism*, each action's rightness or wrongness depends on the utility *it* produces in comparison with possible alternatives. Even act utilitarians agree, however, that rules of thumb like ‘keep your promises’ can be used for the most part in practice because following them tends to maximize utility. According to *rule utilitarianism*, on the other hand, individual actions are evaluated, in theory not just in practice, by whether they conform to a justified moral rule, and the utilitarian standard is applied only to general rules.” Dan W. Brock, *Utilitarianism*, in R. Audi, ed., *The Cambridge Dictionary of Philosophy* 824 (1995).

12. SATANISM

- a. *The Satanic Book of Rituals* describes two rituals. “The fertility ritual includes the sacrifice of a female virgin, preferably a Christian. Also explained in this book is the initiation ritual. Wrist-slashing, blood-drinking, and the consumption of human flesh—usually fingers—are some of the gory highlights of this ceremony Hopefully the person whose flesh is eaten is alive at the end of the ritual. Candles, a common item in many religious ceremonies, are also used in the Satanic rituals. However, the candles preferred by the plaintiff and other Satanists are not made of wax or paraffin; instead, they are made from the fat of unbaptized infants.”

“A ‘master counselor’ of a Satanic sect testified that the premise underlying all of the teachings in *The Satanic Bible* is that life should be lived according to individual desires without regard for conscience or consequences. . . . Hatred of one’s enemies is of utmost importance; revenge should be a top priority.” See *McCorle v. Johnson*, 881 F.2d 993, 995–96 (11th Cir. 1989).

- b. “Howard is seeking to perform three Satanic rituals. He calls them a compassionate ritual, a destruction ritual, and a personal ritual. . . . [The rituals] serve as a form of dogma, which every man has a piece missing in themselves that they always seek, things that they can’t understand, ways to do things that they can’t possibly do, and they explain the unexplainable. That fills a void in a Satanist, whose basic life is philosophy, not religion. . . . The implements necessary for the rituals are candles, candle holders, incense, a gong, a black robe, a chalice, and a short wooden staff or other object suitable for pointing. Such an object could be as small as a pencil.

“Howard says he would perform ‘a compassion ritual to release my own energy, and like get it off my chest, like going to a psychiatrist. The destruction ritual I would perform when someone has made me so angry that I would actually be able to visualize in my mind their death, and I would think that through to keep myself from actually killing that individual; and a person[al] ritual to handle all things in between, just same basic implements, same basic actions, just different words. My religious beliefs and practices are non-violent in nature. . . . I believe in a humanistic ethical system which would never allow for violence, rape, human sacrifice, animal sacrifice, or bloodletting.’ ” See *Howard v. United States*, 864 F.Supp. 1019, 1021–22 (D. Colo. 1994).

Is your assessment of Satanism influenced by whether the Satanism is violent or non-violent?

13. CHURCH OF THE NEW SONG

The Church of the New Song, the Eclatariian faith, was founded by Harry Theriault and Jerry M. Dorrrough at a federal penitentiary in Atlanta. The Church of the New Song can be found only at three federal penitentiaries. The Eclatarians worship a divine spirit known as Eclat. The Church of the New Song does not promote a particular philosophy of life, but rather encourages free-form philosophy. The group’s attempt to hold a paschal-type feast included a request for prison officials to provide steak and wine. See *Theriault v. Silber*, 391 F.Supp. 578 (D.C. Tex. 1975), vacated by *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977).

14. WICCA

Wiccans are sometimes called Witches. “The Wiccan faith is a matriarchal religion which originated in Europe. In this faith, there is a belief in a

deity, but not in the sense of an anthropomorphic God. Rather, the Wiccan belief is that there is a primordial, supernatural force which is the creator of the world and universe and which permeates everything therein. . . . [T]here is a deification of this force, and all individuals are seen as divine sparks from this divinity with a concomitant moral and ethical responsibility to themselves and to everything in nature. This responsibility arises from the fact that each individual is connected to all things in the universe in what is known as the 'karmic circle,' and each individual both causes the events occurring within the circle and is affected thereby.

"The Wiccan church is not Christian, but it does believe in the teachings of Christ. It does not believe in the devil. In the Wiccan faith, there are eight Sabbaths per year, which are major festivals celebrating changes of seasons. . . . The sacraments and ceremonies of the Wiccan doctrinal theology include: honoring the deity through reverence and homage, communion, marriages (referred to as 'hand fastings'), funeral ceremonies, and ceremonies for naming babies." See *Roberts v. Ravenwood Church of Wicca*, 249 Ga. 348, 292 S.E.2d 657, 658 (1982).

15. KU KLUX KLAN

At a hearing, a state chaplain for the area Ku Klux Klan testified "that the cross-lighting ceremony is a necessary and integral part of the religious rituals of the Ku Klux Klan" because Christ was the light of the world. He also stated,

It is the belief of the Klan that the cross as a burning fire be lifted upon a hill where all people can see it as a light unto the world pursuant to the religious traditions of the Klan as a Christian organization.

He described the cross burning as representing

the circle, the inner and outer circle of people that gather around the cross and, as you mentioned, were around the cross to protect it from the fire . . . from spreading, also represent the inner and outer circle which is representative of the white race, whose invention was the wheel, and it's further stated in the book of Ezekiel of the wheel within a wheel that represented the race of God.

He also testified to the KKK's reliance on the Bible as their "religious charter," and stated the group did not have "ordained ministers but everyone is ordained by God to speak the word of God." See *Commonwealth v. Lower*, 2 Pa. D. & C. 4th 107 (1989).

16. CREATIVITY

The World Church of the Creator "preaches a system of beliefs called Creativity, the central tenet of which is white supremacy. Creativity teaches that all people of color are 'savage' and intent on 'mongreliz[ing] the White Race,' that African-Americans are subhuman and should be 'ship[ped] back to Africa'; that Jews control the nation and have instigated

all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany 'would have done the world a tremendous favor.' [] An introductory pamphlet about Creativity states:

After six thousand years of recorded history, our people finally have a religion of, for, and by them. CREATIVITY is that religion. It is established for the Survival, Expansion, and Advancement of [the] White Race exclusively. Indeed, we believe that what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin."

"Creativity considers itself to be a religion, but it does not espouse a belief in God, afterlife or any sort of supreme being." See Peterson v. Wilmur Communications, Inc., 205 F.Supp.2d 1014, 1015–16 (E.D. Wis. 2002).

17. PAGANS

Three hundred pagans danced around a maypole in southwestern Massachusetts to celebrate the Rites of Spring. The maypole represents their connection with nature. Participants covered a birch tree with ribbons and wove the ribbons together as they danced around the pole. Paganism holds that " 'the world, the earth, is where holiness resides.' " Estimates of the pagan population of the United States range from 200,000 to 700,000. Present at the Massachusetts festival were adherents of Norse, Celtic, Germanic and Greco–Roman traditions, as well as Druids, faeries, Dianics, Wiccans, and Asatru and ceremonial magicians. Halloween marks another important pagan holiday. See Eric Goldscheider, *Witches, Druids and Other Pagans Make Merry Again in the Magical Month of May*, N.Y. Times, May 28, 2005, at B7; Michael York, *Pagan Theology: Paganism as a World Religion* (2003).

18. RELIGION OR PHILOSOPHY?

Are the beliefs labeled or summarized in notes a-g religions that deserve First Amendment protection, or personal or philosophical beliefs that fall outside the protection of the First Amendment?

- a. What about "Judaism, Christianity, Islam, Hinduism, Buddhism, Shintoism, Confucianism, and 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) . . . Paganism, Zoroastrianism, Pantheism, Animism, Wicca, Druidism, Satanism, and Santeria . . . [w]hat we now call 'mythology': Greek religion, Norse religion, and Roman religion . . . Nihilism, anarchism, pacifism, utopianism, socialism, libertarianism, Marxism, vegetism, and humanism." United States v. Meyers, 906 F.Supp. 1494, 1503–04 (D.Wyo. 1995).

- b. This group "has no carefully articulated system of doctrine and ethics; rather it participates in traditional rites and festivals in the shrine setting and, by extension, in the household. The typical setting for the practice is the shrine (*jinja*) precinct, which is an enclosed sacred area with a gate, ablution area, and sacred buildings including the main sanctuary which houses the symbol of the kami and a worship area. The natural surroundings are also regarded as permeated with the kami presence; in fact, occasionally a mountain or sacred forest may take the place of the sanctuary. Important in worship at the shrine are rituals which bring about purification from defilements and which foster an integration of human life with the life-bearing power of the kami. Other rituals center around rites of dedication such as offerings of sprigs of the sacred sasaki tree or offerings of foods to the kami. Priests chant special prayers for the worshippers expressing gratitude to the kami." P.E. Nosco, in John Bowker, ed., *The Oxford Dictionary of World Religions* 892–93 (1997).
- c. "There are four classes of people: priests, nobles, commoners, serfs. These are ranked relative to one another, depending on their perceived proximity to ultimate reality. The priests, who are considered especially close to ultimate reality, are on the top of society, followed by the nobles, the commoners and the serfs. Thus, at birth one is given an identity that specifies his or her relationship to ultimate reality. One is either close to it or far from it, meaning that one's existence is more or less meaningful—more or less real—in comparison with others. Depending on class, an individual is assigned a set of duties that must be performed in order to maintain his or her status relative to others and relative to ultimate reality." Will Deming, *Rethinking Religion: A Concise Introduction* 25–26 (2004).
- d. "'Avoiding the two extremes (of self-denial and self-indulgence) . . . has realized the Middle Path: it gives vision, it gives knowledge, and it leads to calm, to insight, to awakening, to nirvana.' . . . This teaching presents a path for living—a path that is balanced and oriented toward the cessation of suffering. The Path often is divided into eight categories: right views, right thoughts, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration. . . . The five 'moral precepts' are not to kill, not to steal, not to lie, not to abuse sex, and not to take intoxicants. 'Concentration' has to do with the practice of mental discipline that is commonly called 'meditation.' . . . To practice this form of discipline, one sits down in a stable posture and concentrates on the movement of the breath. As thoughts arise in the mind, one observes them and lets them flow away, returning to concentration on the movement of the breath. Wisdom constitutes the insight that finally frees a person from suffering and from the cycle of death and rebirth." Malcolm David Eckel, in Jonathan Z.

Smith, ed., *The HarperCollins Dictionary of Religion* 140–41 (1995).

- e. “But I say to you, ‘Love your enemies and pray for those who persecute you, so that you may be children of your Father in heaven; for he makes his sun rise on the evil and on the good, and sends rain on the righteous and on the unrighteous. For if you love those who love you, what reward do you have? Do not even the tax collectors do the same?’ ” *Matthew* 5: 44–46.
- f. “The name of the faith means ‘submission to God,’ the adherent being therefore ‘one who submits himself to God,’ i.e. surrenders himself unconditionally to the divine will.” Edmund Bosworth, in John R. Hinnells, ed., *A New Dictionary of Religions* 238 (1995).
- g. This system “is made up of (1) a worldview, which by reference to Torah sets forth the intersection of the supernatural and the natural worlds, accounts for how things are, and puts them together into a cogent and harmonious picture; (2) a way of life explained by that worldview that carries out the concrete laws of the Torah and so expresses the worldview in concrete actions; and (3) a social group . . . for which the worldview accounts and which is defined as an entity and in concrete terms by the way of life.” Jacob Neusner, in Jonathan Z. Smith, ed., *The HarperCollins Dictionary of Religion* 598 (1995).

C. HOW SHALL COURTS DEFINE RELIGION?

Following are two extensive definitions of religion, the first by the court in the *Church of Marijuana* case, *supra*, note 1(a), and the second by a prominent scholar of religious studies. Do these definitions of “religion” help you to decide what is and is not a religion in the materials above? Could these readings help courts to define a standard that protects free exercise of religion, or do they intrude upon religious freedom by imposing the court’s definition of religion upon religious believers? Should each individual’s religion be whatever she says it is, or would that allow each citizen to become a law unto himself?

The district court in the *Meyers, Church of Marijuana* case, *supra*, note 1(a), developed the following list of factors to help it identify a religion:

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.” [] These matters may include existential matters, such as man’s perception of life; ontological 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 which 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.⁷
4. *Comprehensiveness of Beliefs:* Another hallmark of “religious” ideas is that they are comprehensive. More often than not, such beliefs provide a *telos*, an overarching 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. []
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 writings 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 train-

7. To the extent that these morals or ethics restrain behavior, they comport with the original meaning of the word “religion,” which comes from the Latin verb *religare*, meaning to “tie back” or “rebind.” []

ing, 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.

United States v. Meyers, 906 F.Supp. 1494, 1502–03 (D.Wyo. 1995).

After listing those factors, the district court added the following comment in a footnote: “Unfortunately, another factor that the Court could have included in the list is ‘Dogmatism and Intolerance.’ One need not be exceptionally familiar with the course of human history to realize that religious intolerance has been and continues to be the cause of countless deaths, many wars, and endless suffering.” *Id.* at 1503, n.10 (D. Wyo. 1995).

Was the district court’s comment about dogmatism and intolerance unfair? Did the comment suggest that the court was hostile to religion? Does Professor Smart do a better job than Judge Brimmer of defining religion in the following reading?

The World’s Religions

Ninian Smart.
11–12, 13–22 (2d ed. 1998).

THE NATURE OF A RELIGION

In thinking about religion, it is easy to be confused about what it is. Is there some essence which is common to all religions? And cannot a person

be religious without belonging to any of the religions? The search for an essence ends up in vagueness—for instance in the statement that religion is some system of worship or other practice recognizing a transcendent Being or goal. Our problems break out again in trying to define the key term "transcendent." And in answer to the second question, why yes: there are plenty of people with deep spiritual concerns who do not ally themselves to any formal religious movement, and who may not themselves recognize anything as transcendent. They may see ultimate spiritual meaning in unity with nature or in relationships to other persons.

It is more practical to come to terms first of all not with what religion is in general but with what *a* religion is. Can we find some scheme of ideas which will help us to think about and to appreciate the nature of the religions? . . . One approach is to look at the different aspects or dimensions of religion.

The Practical and Ritual Dimension

Every tradition has some practices to which it adheres—for instance regular worship, preaching, prayers, and so on. They are often known as rituals (though they may well be more informal than this word implies). This *practical* and *ritual* dimension is especially important with faiths of a strongly sacramental kind, such as eastern Orthodox Christianity with its long and elaborate service known as the Liturgy. The ancient Jewish tradition of the Temple, before it was destroyed in 70 C.E., was preoccupied with the rituals of the sacrifice, and thereafter with the study of such rites seen as equivalent to their performance, so that study itself becomes almost a ritual activity. Again, sacrificial rituals are important among Brahmin forms of the Hindu tradition.

Also important are other patterns of behavior which, while they may not strictly count as rituals, fulfill a function in developing spiritual awareness or ethical insight: practices such as yoga in the Buddhist and Hindu traditions, methods of stilling the self in Eastern Orthodox mysticism, meditations which can help to increase compassion and love, and so on. Such practices can be combined with rituals of worship, where meditation is directed toward union with God. They can count as a form of prayer. In such ways they overlap with more formal or explicit rites of religion.

The Experiential and Emotional Dimension

We only have to glance at religious history to see the enormous vitality and significance of experience in the formation and development of religious traditions. Consider the visions of the Prophet Muhammad, the conversion of Paul, the enlightenment of the Buddha. These were seminal events in human history. And it is obvious that the *emotions* and *experiences* of men and women are the food on which the other dimensions of religion feed: ritual without feeling is cold, doctrines without awe or compassion are dry, and myths which do not move hearers are feeble. So it is important in understanding a tradition to try to enter into the feelings which it generates—to feel the sacred awe, the calm peace, the rousing inner dynamism,

the perception of a brilliant emptiness within, the outpouring of love, the sensations of hope, the gratitude for favors which have been received. One of the main reasons why music is so potent in religion is that it has mysterious powers to express and engender emotions.

Writers on religion have singled out differing experiences as being central. For instance, Rudolf Otto (1869–1937) coined the word “numinous.” For the ancient Romans there were *numina* or spirits all around them, present in brooks and streams, and in mysterious copses, in mountains and in dwelling-places; they were to be treated with awe and a kind of fear. From the word, Otto built up his adjective, to refer to the feeling aroused by a *mysterium tremendum et fascinans*, a mysterious something which draws you to it but at the same time brings an awe-permeated fear. It is a good characterization of many religious experiences and visions of God as Other. It captures the impact of the prophetic experiences of Isaiah and Jeremiah, the theophany through which God appeared to Job, the conversion of Paul, the overwhelming vision given to Arjuna in the Hindu song of the Lord (*Bhagavadgita*). At a gentler level it delineates too the spirit of loving devotion, in that the devotee sees God as merciful and loving, yet Other, and to be worshipped and adored.

But the numinous is rather different in character from those other experiences which are often called “mystical.” Mysticism is the inner or contemplative quest for what lies within—variously thought of as the Divine Being within, or the eternal soul, or the Cloud of Unknowing, emptiness, as dazzling darkness. There are those, such as Aldous Huxley (1894–1963), who have thought that the imageless, insight-giving inner mystical experience lies at the heart of all the major religions.

There are other related experiences, such as the dramas of conversion, being “born again,” turning around from worldly to otherworldly existence. There is also the shamanistic type of experience, where a person goes upon a vision quest and acquires powers to heal, often through suffering himself and vividly traveling to the netherworld to rescue the dying and bring them to life again. Shamans are common to many small-scale societies and people that make their living by hunting, but many of the marks of the shamanistic quest have been left upon larger religions.

The Narrative or Mythic Dimension

Often experience is channeled and expressed not only by the ritual but also by sacred *narrative* or *myth*. This is the third dimension—the *mythic* or *narrative*. It is the story side of religion. It is typical of all faiths to hand down vital stories: some historical; some about that mysterious primordial time when the world was in its timeless dawn; some about things to come at the end of time; some about great heroes and saints; some about great founders, such as Moses, the Buddha, Jesus, and Muhammad; some about assaults by the Evil One; some parables and edifying tales; some about the adventures of the gods; and so on. These stories often are called myths. This term may be a bit misleading, for in the modern study of religion there is no implication that a myth is false.

The seminal stories of a religion may be rooted in history or they may not. Stories of creation are before history, as are myths which indicate how death and suffering came into the world. Others are about historical events—for instance the life of the Prophet Muhammad, or the execution of Jesus, and the enlightenment of the Buddha. Historians have sometimes cast doubt on some aspects of these historical stories, but from the standpoint of the student of religion this question is secondary to the meaning and function of the myth; and to the believer, very often, these narratives *are* history.

This belief is strengthened by the fact that many faiths look upon certain documents, originally maybe based upon long oral traditions, as true scriptures. They are canonical or recognized by the relevant body of the faithful (the Church, community, Brahmins and others in India, the Buddhist Sangha or Order). They are often treated as inspired directly by God or as records of the very words of the Founder. They have authority, and they contain many stories and myths which are taken to be divinely or otherwise guaranteed. But other documents and oral traditions may also be important—the lives of the saints, the chronicles of Ceylon as a Buddhist nation, the stories of famous holy men of Eastern Europe in the Hasidic tradition, traditions concerning life of the Prophet (hadith), and so forth. These stories may have lesser authority but they can still be inspiring to the followers.

Stories in religion are often tightly integrated into the ritual dimension. The Christian Mass or communion service, for instance, commemorates and presents the story of the Last Supper, when Jesus celebrated with his disciples his forthcoming fate, by which (according to Christians) he saved humankind and brought us back into harmony with the Divine Being. The Jewish Passover ceremonies commemorate and make real to us the events of the Exodus from Egypt, the sufferings of the people, and their relationship to the Lord who led them out of servitude in ancient Egypt. As Jews share the meal, so they retrace the story. Ritual and story are bound together.

The Doctrinal and Philosophical Dimension

Underpinning the narrative dimension is the *doctrinal* dimension. Thus, in the Christian tradition, the story of Jesus' life and the ritual of the communion service led to attempts to provide an analysis of the nature of the Divine Being which would preserve both the idea of the Incarnation (Jesus as God) and the belief in one God. The result was the doctrine of the Trinity, which sees God as three persons in one substance. Similarly, with the meeting between early Christianity and the great Graeco-Roman philosophical and intellectual heritage it became necessary to face questions about the ultimate meaning of creation, the inner nature of God, the notion of grace, the analysis of how Christ could be both God and human being, and so on. These concerns led to the elaboration of Christian doctrine. In the case of Buddhism, to take another example, doctrinal ideas were more

crucial right from the start, for the Buddha presented a philosophical vision of the world which itself was an aid to salvation.

In any event, doctrines come to play a significant part in all the major religions, partly because sooner or later a faith has to adapt to social reality and so to the fact that much of the leadership is well educated and seeks some kinds of intellectual statement of the basis of the faith.

It happens that histories of religion have tended to exaggerate the importance of scriptures and doctrines; and this is not too surprising since so much of our knowledge of past religions must come from the documents which have been passed on by the scholarly elite. Also, and especially in the case of Christianity, doctrinal disputes have often been the overt expression of splits within the fabric of the community at large, so that frequently histories of a faith concentrate upon these hot issues. This is clearly unbalanced; but I would not want us to go to the other extreme. There are scholars today who have been much impressed with the symbolic and psychological force of myth, and have tended to neglect the essential intellectual component of religion.

The Ethical and Legal Dimension

Both narrative and doctrine affect the values of a tradition by laying out the shape of a worldview and addressing the question of ultimate liberation or salvation. The law which a tradition or subtradition incorporates into its fabric can be called the *ethical* dimension of religion. In Buddhism, for instance, there are certain universally binding precepts, known as the five precepts or virtues, together with a set of further regulations controlling the lives of monks and nuns and monastic communities. In Judaism we have not merely the Ten Commandments but a complex of over six hundred rules imposed upon the community by the Divine Being. All this Law or Torah is a framework for living for the Orthodox Jew. It is also a part of the ritual dimension, because, for instance, the injunction to keep the Sabbath as day of rest is also the injunction to perform certain sacred practices and rituals, such as attending the synagogue and maintaining purity.

Similarly, Islamic life has traditionally been controlled by the Law or *shar'a*, which shapes society as both a religious and a political society, as well as shaping the moral life of the individual—prescribing that he should pray daily, give alms to the poor, and so on, and that society should have various institutions, such as marriage, modes of banking, etc.

Other traditions can be less tied to a system of law, but still display an ethic which is influenced and indeed controlled by the myth and doctrine of the faith. For instance, the central ethical attitude in the Christian faith is love. This springs not just from Jesus' injunction to his followers to love God and their neighbors: it flows too from the story of Christ himself who gave his life out of love for his fellow human beings. It is also rooted in the very idea of the Trinity, for God from all eternity is a society of three persons, Father, Son, and Holy Spirit, kept together by the bond of love. The Christian joins a community which reflects, it is hoped at any rate, the

life of the Divine Being, both as Trinity and as suffering servant of the human race and indeed of all creation.

The Social and Institutional Dimension

The dimensions outlined so far—the experiential, the ritual, the mythic, the doctrinal, and the ethical—can be considered in abstract terms without being embodied in external form. The last two dimensions have to do with the incarnation of religion. First, every religious movement is embodied in a group of people, and that is very often rather formally organized—as Church, or Sangha, or *umma*. The sixth dimension therefore is what may be called the *social* or *institutional* aspect of religion. To understand a faith we need to see how it works among people. This is one reason why such an important tool of the investigator of religion is that subdiscipline which is known as the sociology of religion. Sometimes the social aspect of a worldview is simply identical with society itself, as in small-scale groups such as tribes. But there is a variety of relations between organized religions and a society at large: a faith may be the official religion, or it may just be one denomination among many, or it may be somewhat cut off from social life, as a sect. Within the organization of one religion, moreover, there are many models—from the relative democratic governance of a radical Protestant congregation, to the hierarchal and monarchical system of the Church of Rome.

It is not, however, the formal officials of a religion who may in the long run turn out to be the most important persons in a tradition. For there are charismatic or sacred personages, whose spiritual power glows through their demeanor and actions, and who vivify the faith of more ordinary folk—saintly people, gurus, mystics, and prophets, whose words and example stir up the spiritual enthusiasm of the masses, and who lend depth and meaning to the rituals and values of a tradition. They can also be revolutionaries and set religion on new courses. They can, like John Wesley, become leaders of a new denomination, almost against their will; or they can be founders of new groups which may in due course emerge as separate religions—an example is Joseph Smith II, Prophet of the new faith of Mormonism. In short, the social dimension of religion includes not only the mass of persons but also the outstanding individuals through whose features glimmer old and new thoughts of the heaven toward which they aspire.

The Material Dimension

This social or institutional dimension of religion almost inevitably becomes incarnate in a different way, in *material* form, as buildings, works of art, and other creations. Some movements—such as Calvinist Christianity, especially in the time before the present century—eschew external symbols as being potentially idolatrous; their buildings are often beautiful in their simplicity, but their intention is to be without artistic or other images which might seduce people from the thought that God is a spirit who transcends all representations. However, the material expressions of religion are more often elaborate, moving, and highly important for believers

in their approach to the divine. How indeed could we understand Eastern Orthodox Christianity without seeing what ikons are like and knowing that they are regarded as windows onto heaven? How could we get inside the feel of Hinduism without attending to the varied statues of God and the gods?

Also important material expressions of a religion are those natural features of the world which are singled out as being of special sacredness and meaning—the river Ganges, the Jordan, the sacred mountains of China, Mount Fuji in Japan, Ayers Rock in Australia, the Mount of Olives, Mount Sinai, and so forth. Sometimes of course these sacred landmarks combine with more direct human creations, such as the holy city of Jerusalem, the sacred shrines of Banaras, or the temple at Bodh Gaya which commemorates the Buddha's Enlightenment.

Uses of the Seven Dimensions

To sum up: we have surveyed briefly the seven dimensions of religion which help to characterize religions as they exist in the world. The point of the list is so that we can give a balanced description of the movements which have animated the human spirit and taken a place in the shaping of society, without neglecting either ideas or practices.

Naturally, there are religious movements or manifestations where one or other of the dimensions is so weak as to be virtually absent: nonliterate small-scale societies do not have much means of expressing the doctrinal dimension; Buddhist modernists, concentrating on meditation, ethics, and philosophy, pay scant regard to the narrative dimension of Buddhism; some newly formed groups may not have evolved anything much in the way of the material dimension. Also there are so many people who are not formally part of any social religious grouping, but have their own particular worldviews and practices, that we can observe in society atoms of religion which do not possess any well-formed social dimension. But of course in forming a phenomenon within society they reflect certain trends which in a sense form a shadow of the social dimension (just as those who have not yet got themselves a material dimension are nevertheless implicitly storing one up, for with success come buildings and with rituals ikons, most likely).

If our seven-dimensional portrait of religions is adequate, then we do not need to worry greatly about further definition of religion. In any case, I shall now turn to a most vital question in understanding the way the world works, namely to the relation between more or less overtly religious systems and those which are commonly called secular: ideologies or worldviews such as scientific humanism, Marxism, Existentialism, nationalism, and so on.

Do you think that Professor Smart's framework applies to secular ideologies? Are "scientific humanism, Marxism, Existentialism, nationalism, and so on" religions?

The anthropologist Clifford Geertz defined religion as “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.” Clifford Geertz, *The Interpretation of Cultures* 90 (1973). Do you prefer this concise definition to *Meyers* and Smart?

Is Appleism a religion?

Appleism is a New Religion . . .

David Kuo.

<http://blog.beliefnet.com/jwalking/2007/06/appleism-kuo.html>, June 25, 2007.

Welcome to Appleism—the religion that is Apple.

For decades we have heard of the “Cult of Apple” and the “Mac Cult”—the relatively small group of slavishly devoted technology fanatics obsessed with Apple and its pontiff, Steve Jobs. These “cultists” were typically artsy, creative types, who sneered at anything Microsoft and “Windows” because Windows was a shamelessly pathetic rip off of Mac’s operating system and because Microsoft “had no taste”—as Jobs once sermonized. And so people bought into this idea of the Apple cult.

Apple isn’t a cult anymore, it has become a full blown religion with scores of millions of followers. The frenzy around the iPhone brings to mind the clamoring throngs that greeted Jesus at the height of his ministry.

There are many, many different tests for what makes something a religion. They range from belief in a higher power to sacred rituals to moral codes to sacred places. In every instance Appleism passes the test.

Religions are based on some belief in a higher or supernatural power. Meet Steve Jobs whose story is supernatural. He started Apple with a friend in his parent’s garage and by the time he was 30 was running a multibillion company that had revolutionized computing. Then he was tossed aside, sent to the desert abandoned and despised. Apple slowly sank. At a moment when the company, er, faith, was near its end Jobs returned—the Second Coming—and brought salvation (also known as the iMac, iBook, and iPod). With the introduction of iPhone, however, Appleism may be outgrowing even Jobs with a belief in the power of Apple in and of itself. Apple has become its own deity.

Sacred v. profane objects, places, and times. This one is easy. Sacred: Apple. Profane: Microsoft. Sacred times? MacWorld, Appleism’s equivalent of the annual return to Mecca. Then there is this coming Friday where millions will be standing in line to pay homage to the most sacred Apple of all—the iPhone. However, it is unclear whether some will one day move to make June 29th, the date of iPhone’s introduction, a national holiday.

Ritual acts focused on sacred objects, places, times. Every time someone with an iPod uses its ubiquitous “click wheel” and every time someone sits before a Mac, or opens a Macbook Pro (like the one I am currently using) they are performing a ritual act of worship, sacred in its own way. The same is true when using iTunes to manage music or iPhoto to manage pictures or iMovie to create films—these are all ritual acts both devoted to Appleism and made possible by the Apple deity.

Characteristically religious feelings (awe, wonder, gratitude, guilt, adoration, etc.). Appleism’s followers know of guilt and they experience it every time they use a Windows computer. I have a friend who is a loyal Mac guy but recently finished a big project on an IBM. He emailed me and talked about his guilt. (I’m not joking). More than guilt though, they know of awe, wonder, and gratitude. Every new Apple invention, every time Steve Jobs take a stage to announce something beautiful and wonderful all Appleists tingle with joy and anticipation.

A worldview and morality based on the faith. Appleism espouses a liberal worldview that challenges conventional morality and norms and encourages creativity. It was clearly seen in the famed “Think Different” ad campaign that highlighted everyone from John Lennon and Gandhi to two lesbians kissing in bed. It is, however, most clearly seen in the new “Get a Mac” ads where the casual kid who represents the Mac is constantly poking fun at the tie-wearing guy—the symbol of stodgy conservatism. These ads don’t just poke fun at Microsoft but at the kind of boring, humdrum, life that Microsoft empowers. They are jabs at the conventional; jabs at the orthodox and tried and true. They are ads that strike at the heart of older religions while evangelizing Appleism.

Oh, and one more thing.

I am an Appleist. I have a MacBook and an iMac. My wife and I have more than 7,000 photos on iPhoto and more than 15,000 songs (all legal—ok, there may be a few from the old Napster days) on iTunes. We have at least four iPods in the house. I own Apple stock. I have watched every iPhone ad repeatedly. Since my own faith in Jesus requires that I have no God before my God it is clear that something in my life must change. And things will change. Right after I get that iPhone.

In the next chapter, we examine the second Religion Clause of the First Amendment—the Establishment Clause. Do you think the courts should use the same definition of religion for Establishment that they do for Free Exercise? Harvard Law Professor Laurence Tribe once proposed a simple formula: when an activity or belief was *arguably religious*, it should be protected under the Free Exercise Clause; when such activity or belief is *arguably not religious*, government support or encouragement would not violate the Establishment Clause. See Laurence H. Tribe, *American Constitutional Law* 826–29 (1978). Is that a good idea, or should there be one definition of religion for both clauses?