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God Is as God Does: Law, Anthropology, and the Definition of "Religion"

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GOD IS AS GOD DOES: LAW, ANTHROPOLOGY, AND THE DEFINITION OF "RELIGION"

*James M. Donovan**

I.	INTRODUCTION	25
II.	DEFINITIONS OF RELIGION:	
	JUDICIAL ATTEMPTS	29
A.	HOW MANY DEFINITIONS ARE WE LOOKING FOR ANYWAY?	29
B.	REYNOLDS THROUGH BALLARD, 1878-1944: FROM THEISM TO SINCERITY	35
C.	KAUTEN THROUGH WELSH, 1943-1969: THE CONSCIENTIOUS OBJECTOR CASES AND STRUCTURALISM	41
	1. THE LOWER COURTS IN CONFLICT	41
	2. THE SUPREME COURT TO THE RESCUE?	47
D.	YODER THROUGH AMOS, 1972 TO PRESENT: A FINAL PHASE OF CONFUSION AND CAUTION	51
	1. THE SUPREME COURT MUDDIES THE WATERS AGAIN	52
	2. THE LOWER COURTS AGAIN IN CONFLICT	55
E.	SUMMARY OF THE LEGAL PROJECT	62
	1. STRETCHING TO BROADEN THE EXTENSION OF RELIGION	62
	2. PROBLEMS WITH THE BROADENED EXTENSION OF RELIGION	64

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	a.	OPERATIONALIZING "ULTIMATE CONCERN"	64
	b.	THE COURTS' AUSTERE RESTRICTION UPON GOVERNMENTAL POWERS	66
III.		DEFINITIONS OF RELIGION: ANTHROPOLOGICAL ATTEMPTS	70
	A.	FOUR-PART CLASSIFICATION OF DEFINITIONS	71
		1. CONTENT DEFINITIONS	72
		2. BEHAVIORAL — PERFORMATIVE DEFINITIONS	76
		3. MENTAL DEFINITIONS	79
		a. EMOTIONAL CRITERIA	79
		b. COGNITIVE CRITERIA	81
		c. PSYCHODYNAMIC CRITERIA	83
		4. FUNCTIONAL DEFINITIONS	86
	B.	CONJUNCTIVE AND GENERATIVE DEFINITIONS	89
IV.		COMPARING THE LEGAL AND THE ANTHROPOLOGICAL	91
	A.	INDEPENDENT VERIFICATION OF THE LEGAL TREND TOWARD A STRUCTURAL — FUNCTIONALIST UNDERSTANDING OF RELIGION	91
	B.	PROPOSED DEFINITION AND ITS POTENTIAL OPERATIONALIZATION	95
V.		CONCLUSION	98

GOD IS AS GOD DOES: LAW, ANTHROPOLOGY, AND THE DEFINITION OF "RELIGION"

James M. Donovan

Forthright observance of rights presupposes their forthright definition.¹

I. INTRODUCTION

Language is central to the rule of law. Whatever virtues a statute may embody — goodness, righteousness, justice, necessity, constitutionality — it must be comprehensible. If ordinary people are expected to obey the law, a reasonable prerequisite is that the law be stated in ordinary terms.² Essential to this goal of comprehensibility is that terms used in legal discourse acknowledge identifiable referents in the real world.³ Legal terms, in other words, must be open not merely to definition, but to good definitions which can be used to identify and manipulate legal distinctions.⁴

¹Douglas v. Jeannette, 319 U.S. 157, 182 (1943) (Jackson, J., concurring).

²As an example of the kind of legalese which is not helpful, consider the following statement: "Courts have . . . interpreted the word 'exclusively' to mean 'substantially.'" Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982). This result is amusing, especially given what Commissioner of Internal Revenue v. Beck's Estate, 129 F.2d 243, 245 (2d Cir. 1942), calls the "familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation." *Id.* at 245. If "exclusively" means *substantially*, then what word means *exclusively*, what does "substantially" mean, and how are Newt Gingrich's "normal" Americans supposed to know about this deviation from ordinary language? The important distinction is between the word's "form" and the word's *meaning*.

Another example, a bit on the humorous side, is that Tennessee law defines "nudity" to include covered parts of the male body if they are "in a discernibly turgid state." TENN. CODE ANN. § 39-13-511(a)(2)(A) (1994). No comment is necessary.

³To the extent that the laws are written to be observed by lawyers, legal terms may reference only other legal terms. This is the proper domain of a jargon. Laws written for application by non-lawyers should be composed in non-technical terms. Stated baldly, one should not have to go to law school to be a law-abiding citizen.

⁴The distinction here hinges upon the understanding that definitions define the unknown in terms of the known. Recall the frustration in being told that an X-er is "one who Xs." That much you probably knew; what you really needed to know was the meaning of X.

The focus of this Article is upon one term which lawmakers bandy with relative abandon: religion. All told, "religion" and "religious" are words which appear in 574 sections of the United States Code and 1,490 of the Code of Federal Regulations.⁵ These legislative and administrative references are interpretable only if the category of "religion" is appropriately and adequately defined.

Religion receives this legal notice because it is set apart culturally as an aspect of both social and individual life that is protected from government interference. This expectation is enshrined in the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶ The principle of non-interference therein appears within two standards, those of Establishment and Free Exercise.

Under the Establishment Clause, government cannot single out a religion, or even religion *per se*, over or against irreligion for favorable treatment.⁷ The issue, in other words, is to be ignored. The Free Exercise Clause, however, recognizes religions so that they can be protected, wherever possible, from the noxious effects of governmental action.⁸ The exemption of churches from paying some taxes,⁹ and the right of conscientious objectors to decline induction into the armed services are noteworthy examples. New conflicts necessitating further exemptions are perhaps arising from the recent proliferation of new religious movements in

Given your state of knowledge, "one who Xs" is a bad definition because it does not enable you to identify who is or is not an X-er; this definition is, in other words, unusable, even if it is technically correct.

⁵As of May 24, 1995, as searched on WESTLAW, "USC" and "CFR" respectively, querying "religion [or] religious." A similar search in LEXIS, Library "Genfed," Files "USCS" and "CFR" yielded 839 and 1,511 sections. The discrepancy may be attributed to the different use by the providers of headings and annotations.

⁶U.S. Const. amend. I.

⁷See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that government cannot advance non-religion or be hostile to religion as a whole, nor can it promote a particular religion).

⁸See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits for a worker discharged for using peyote even though the drug was used as part of a religious ritual).

⁹See, e.g., 26 U.S.C. § 501 (1988 & Supp. V. 1993); 26 U.S.C. § 2055 (1988).

our society.¹⁰ Given that these protections are available, to whom should they apply? By what standards can an individual's claim to these privileges be validated? These answers can be gleaned by turning to the definition of religion.

Definitions act "as a screening mechanism that determines what claims will be subjected to the substantive 'balancing test' that the Court has developed for judging whether an exemption for religion must be granted."¹¹ The proper administration and enforcement of laws and regulations requires that religious parties be identified so that entanglement can be avoided, or so that generally applicable laws can be waived. As identification is the task of definition, legislatures and courts, repeatedly facing the question of whether the presenting facts partake of "religiousness," must confront the problem of how "religion" and its cognates should be defined. This Article aims to review the work previously directed at this problem, and to suggest some directions for future scrutiny; it seeks, in other words, to define religion.

It is noteworthy that for at least two legal analysts, this approach is precisely the wrong one. George Freeman holds that religion has no universal essence, and hence *has* no definition,¹² while Anita Bowser claims that the process of classification "is . . . inherently arbitrary."¹³

Andrew Austin, however, rebuts Freeman by arguing that, because "religion" is a linguistic token in use, it is legitimate to seek rules about such use.¹⁴ Even if the category of religion is not a natural category which thrusts its predetermined features upon our senses the alternative is not the

¹⁰Thomas Robbins, *Cults, Converts, and Charisma: The Sociology of New Religious Movements*, 36 CURRENT SOC. 1, 180 (1988).

¹¹Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 591 (1982) [hereinafter *Defining "Religion"*].

¹²George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1548, 1565 (1983) (stating that there are no traits that all religions share that makes them religious).

¹³Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 164 (1977) ("A judge cannot appeal to the canons of logic to decide whether a given classification is the necessary or the correct one. Because classification cannot be carried on deductively the task is an inherently arbitrary one." (footnote omitted)).

¹⁴Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 9 (1991).

cognitive anarchy Bowser fears. Bowser overlooks the kinds of classificatory motivations reviewed by George Lakoff.¹⁵

Futile or not, others argue that, even if possible, the attempt to define religion might be unconstitutional.¹⁶ This problem arises with particular force in confrontations with the Internal Revenue Service ("IRS") regarding whether "integrated auxiliaries" of churches are entitled to tax exemptions.¹⁷

The following section discusses the judicial deliberations upon the definition of religion. That discussion adopts a chronological sequence because, in legal matters, that is the one that counts. Statements of law and legal interpretation are accorded influence not solely by their content, but by their location within a hierarchical structure, so that they are binding on everyone beneath them, and at a temporal moment, being read in light of what has already occurred in the past. When something was said, and by whom, is often as important as what was said.

It can be a tedious, but not particularly difficult task to summarize the legal struggle to define religion. The strategy applied to evaluate the product of that struggle is intellectual triangulation, whereby bearings from two fixed positions are used to specify that of a third. For instance, the location of any

¹⁵See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987). Categorization is motivated when inclusion of an item cannot be predicted, but can be understood *post facto*. *Id.* at 104-107. Motivation explains how a collection of items into one category can make sense given various psychological transformations. Although, in theory, objects could be sorted randomly, as Bowser suggests, in reality languages prefer some strategies over others, leading to a biased, or motivated, but not determined, outcome.

¹⁶One author has described the problem as follows:

If government can define what is a "church," it can also define what is not a church, and can do so in a manner which excludes religions which are not favored by government officials. The very existence of such a power would be unconstitutional under the establishment clause.

Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345-46 (1980); cf. *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 92 (E.D.N.Y. 1987).

¹⁷Cf. Edward McGlynn Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church,"* 25 VAL. U. L. REV. 203, 222 (1991). The issue is how far a religious organization can stray from stereotypical religious activities before it attracts the attention of the IRS. Should the government be empowered to ascertain which activities of a body are religious, and which not?

physical spot can be completely described by ascertaining where longitude and latitude intersect. Any one of these alone eliminates some possibilities, but still leaves countless others from which to choose.

By analogy, the correct definition of "religion" can be identified by finding where the legal efforts intersect with an independent sighting of the same target. Where this intersection occurs, there is the "spot" where a satisfying, usable definition is most likely to be found.

The independent discipline selected for this purpose is anthropology. The third section of this Article will provide a review of this field's attempts to define religion. The chronological outline of legal discussion will contrast with the thematic pattern in this anthropological discussion. A chronological order here would obscure patterns, not reveal them.

The fourth section will then directly compare the results of the two preceding discussions, and reveal that they intersect at a functional definition of religion: religion is to be identified by the needs it fulfills. Specifically, the heart of religion is its response to the existential concerns of the individual. The final section will offer a definition which conforms to these results.

II. DEFINITIONS OF RELIGION: JUDICIAL ATTEMPTS

A. HOW MANY DEFINITIONS ARE WE LOOKING FOR ANYWAY?

This review of judicial tussles with the problem of defining religion departs from conventional legal analyses in at least one way; strict attention has not always been paid to the differing contexts in which, linguistically, "religion" has been used. Such a conflation of language use is justifiable only if the goal is to identify a universal definition of the word. If multiple definitions are the desideratum, analysis would have to remain context-sensitive. The first task, then, is to defend the presumption that a single definition is being sought.

Some of the language used in *Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*¹⁸ illustrates the complexity of the question of context-sensitive, and thereby multiple definitions. For instance, the *Amos* court's understanding that "religious behaviors" are those behaviors involved in "religions," illustrates that religion relies upon an expectation that a straightforward relationship exists

¹⁸618 F. Supp. 1013 (D.C. Utah 1985) (upholding law exempting religious employers from Title VII).

between a noun and its adjectival forms.¹⁹ Such equations may be linguistically acceptable, but later prove not to be legally so.²⁰ In that case, identifying "religion" would not enlighten us about things which are "religious," and a separate quest for that word's definition would be necessary. Although a restricting analysis, it may be erroneous to assume that it is necessary to settle upon one quintessential definition. For example, although on an entirely different issue, the Second Circuit conceded that the word "gift" can have mutually exclusive meanings, depending upon the context.²¹ It would not be unprecedented, therefore, to argue that "religion" could likewise have different definitions corresponding to its sundry contexts.

Initially, the tension between *Wisconsin v. Yoder*²² and *Welsh v. United States*²³ might imply that the Supreme Court has fashioned separate

¹⁹*Id.* at 1015. If there is a substantial connection between the activity in question and the religious organization's religious tenets on matters of church administration and the tie under the first part is close, the court does not need to proceed any further and may declare the activity religious. *Id.*

²⁰Legalistic constructions of terms can deviate tortuously from ordinary expectations. See *Regina v. Ojibway*, 8 CRIM. L.Q. 137 (1965) (In this hypothetical "case", the judge treated a lame horse with a pillow on its back legally the same as a small bird because both were animals covered with feathers pursuant to a hypothetical act).

²¹The court stated:

At the bottom of respondents' contentions is this implied assumption: The same transaction cannot be a completed gift for one purpose and an incomplete gift for another. Of course, that is not true. . . . Perhaps to assuage the feelings and aid the understanding of affected taxpayers, Congress might use different symbols to describe the taxable conduct in the several statutes, calling it a "gift" in the gift tax law, a "gift" in the income tax law, and a "gift" in the estate tax law.

Commissioner of Internal Revenue v. Beck's Estate, 129 F.2d 243, 246 (2d Cir. 1942).

²²406 U.S. 205 (1972). The Court classified the Amish life-style as religious, asserting that "the traditional way of life of the Amish is not merely a matter of personal preference, but one . . . shared by an organized group, and intimately related to daily living." *Id.* at 216.

²³398 U.S. 333, 344 (1970) (Harlan, J., concurring in result) (stating that for the purposes of statutory construction, "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views") (quoting *United States v. Seeger*, 380 U.S. 163, 165-66 (1965)).

definitions of religion, depending upon whether the issue is constitutional or statutory. The possibilities, however, do not end there; substantial argument exists over how many constitutional definitions are required.

In *Everson v. Board of Education*,²⁴ the Supreme Court considered for the first time the meaning of "religion" in an Establishment Clause context.²⁵ In a dissenting opinion, Justice Rutledge penned a paramount statement regarding a constitutional definition of religion:

"Religion" appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.²⁶

The Justice's assertions directly address the identification of religion for both the Establishment Clause and the Free Exercise Clause.²⁷

Some have advocated the position that, for optimal results, "religion" for free exercise purposes should be different from "religion" for establishment purposes. This distinction will herein be referred to as the "dual classification" approach. Among these suggestions, Laurence Tribe's comments have been very influential. He proposed that when an activity or belief is "arguably religious," it should fall under the protections of the Free Exercise Clause, while an activity which is "arguably non-religious" does not

²⁴330 U.S. 1 (1947) (holding that a statute authorizing reimbursement of transportation expenses to parents for students attending other than public schools does not violate the Constitution).

²⁵See *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 246 (1963) (Brennan, J., concurring) ("It is only recently that our decisions have dealt with the question whether issues arising under the Establishment Clause may be isolated from problems implicating the Free Exercise Clause." (citing *Everson*, 330 U.S. at 1)). Prior to *Abington*, the Court incorporated the Establishment Clause into the Fourteenth Amendment. See *Walz v. Tax Comm'n*, 397 U.S. 664, 702 (1970).

²⁶*Everson*, 330 U.S. at 32 (Rutledge, J., dissenting).

²⁷*Id.* at 32-33 (Rutledge, J., dissenting).

conflict with the Establishment Clause.²⁸ Under a standard such as this, a single set of facts may be labeled religious for one purpose, but not religious for another.

The primary goal of Tribe's theory is to avert the consequences which emerge in the combined wake of *United States v. Seeger*²⁹ and *Welsh*. These cases seem to identify religion with the psychological states of believers rather than with any readily identifiable content.³⁰ "To borrow the ultimate concern test from the free exercise context and use it with present [E]stablishment [C]lause doctrines," according to one commentator, "would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns."³¹ If, in other words, religion is anything in the role of personal ultimate concern, which only the most compelling of state concerns can override, then almost any statute can be construed to affect religious beliefs and be subject to constitutional challenge. Thus, plaintiffs may make First Amendment challenges on the ground that such statutes infringe upon their personal beliefs and practices or encourage one set of beliefs at the expense of all others. Such litigation would present a formidable obstacle to the implementation of any new legislation.

Beyond these unpalatable results, however, the lack of a flexible, multi-vocal definition for religion could aggravate the inherent strain between the Establishment Clause and Free Exercise Clause. According to Justice Brennan, an inevitable conflict between the two religion clauses was presaged

²⁸LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 828 (1978). Tribe, in the second edition of his text, recants this proposal, stating that "[t]he dual definition approach . . . constitutes a dubious solution to a problem that, on closer inspection, may not exist at all." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1186 (2d ed. 1988). All subsequent citations to TRIBE are to the second edition.

²⁹380 U.S. 163 (1965) (considering the scope of § 6(j) of the Universal Military Training and Service Act, which provides an exemption from combat services for those individuals who are "conscientiously opposed to participation in war by reason of their 'religious tyranny and belief'" and determining that the test for religious belief is "whether it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by God of those admittedly qualified for this exemption").

³⁰See *Welsh v. United States*, 398 U.S. 333, 344 (1970) (holding that § 6(j) "exempts from military service all those whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part on an instrument of war").

³¹Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1084 (1978) [hereinafter Note, *Toward a Constitutional Definition*].

as early as 1907.³² "The logical interrelationship between the Establishment and Free Exercise Clauses," the Justice stated, "may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise."³³

While some semanticists might bristle at the thought of defining a term in two mutually exclusive ways, the dual definition approach does have the virtue of potentially minimizing the conflict between competing constitutional interests. To accomplish this, the dual definitional approach would have to succeed in making the protections apply to different classes of interests, an outcome favored by the Ninth Circuit.³⁴ Unpredictable results, however, can arise under Tribe's dual approach, notably the creation of three separate categories of arguably religious activity as considered within a free exercise and an establishment context.³⁵

³²School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 230-33 (1963) (Brennan, J. concurring).

³³*Id.* at 247 (Brennan, J., concurring); cf. Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) [hereinafter Choper, *The Religion Clauses*] (confronting "the seemingly irreconcilable conflict: on the one hand the Court has said that the Establishment Clause forbids government action whose purpose is to aid religion, but on the other hand the Court has held that the Free Exercise Clause may require government action to accommodate religion"); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 506 (1992) (discussing the recent loosening of the Establishment and Free Exercise Clauses' parameters, which "allows government even greater freedom to accommodate religion" and accordingly, disentangle the tenets of the two seemingly disposed clauses).

³⁴*See* Grove v. Mead Sch. Dist., 753 F.2d 1528, 1528 (9th Cir. 1985) ("At issue here is a school Board's refusal to remove a book from a Sophomore English literature curriculum based on plaintiff's religious objections to the book."). The court held that the inclusion of the implicated book in the curriculum did not constitute an abridgment of the First Amendment. *Id.*

³⁵The Third Circuit accurately described this potential confusion:

[Tribe's approach would] create a three-tiered system of ideas: those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible to receive government support; and those that are only religious under [certain circumstances] and thus free from governmental regulation but open to receipt of government support.

Malnak v. Yogi, 592 F.2d 196, 212 (3d Cir. 1979).

The foregoing shows that balancing all legal possibilities could produce a complex lattice of two constitutional and one statutory definitions of "religion," and perhaps even an equally numerous corresponding set for "religious." Not only would this offend most English language speakers, but it would open the door for systematically disadvantaging religion, as ordinarily understood, in an increasingly secular society. With so many definitions from which to choose, very easily, the most restrictive could be applied at will. Both language and fairness concerns, then, would motivate a single definition of religion in all contexts, as previously favored by the District Court of Nebraska,³⁶ and a direct translation between "religion" and "religious."

The formulation of three contradictory definitions of "gift" in the tax code may be tolerable because the distinctions are relevant only among the higher income brackets and for professional tax accountants. Arguably, American civic life is not jeopardized when the ordinary citizen cannot discern income tax gifts from estate tax gifts.

Religion, however, is special. Every individual has a strong sense that he or she knows perfectly well what constitutes "religion." Indeed, it is plausible that the First Amendment presupposes this universal certainty. How else could citizens be expected to allow for and be considerate of the religions of others if they do not know for themselves what constitutes religion?³⁷ People will accept, albeit begrudgingly, that a transaction is not a "gift" enough for income tax purposes, but to tell people that they are not "religious" enough is less like the gift example than like trying to say that someone is not "human" enough.

Definitionally, "religion" will not tolerate the multivocality acceptable for "gift." Multiple legal definitions of religion would rightly offend the psychological expectation of the citizen who purports to know what "religion" is; indeed, this certainty is a part of what makes religion so special and important in a personal sense. As that expectation is directed toward the highest interests of human existence, any potential insult would be grave, and should be suffered only for the most compelling of reasons.

³⁶See *Womens Services, P.C. v. Thone*, 483 F. Supp. 1022, 1022 (D. Neb. 1979) ("The word religion imports the same meaning for both clauses in the First Amendment.").

³⁷As the philosopher George Berkeley wrote, "ordinary practice does not require a nicety of speculative knowledge." GEORGE BERKELEY, *THREE DIALOGUES BETWEEN HYLAS AND PHILONOUS* 62 (1979).

Sloppy semantics on the part of Capitol Hill do not meet this standard. As such, the goal should always be for a single definition.³⁸

The only question remaining, then, and the one to be examined in the remainder of this Article, asks for the most appropriate definition. Case law provides an overview of this problem, as well as insight into potential solutions.

B. *REYNOLDS* THROUGH *BALLARD*, 1878-1944:
FROM THEISM TO SINCERITY

The initial phase of judicial scrutiny is perhaps the most radical, embodying an understanding of "religion" that turned from object, the worshipped God, to subject, the worshipping person. American judicial efforts to clarify the concept of "religion" began in 1878 with *Reynolds v. United States*.³⁹ In that decision, the Court set the tone for the next century of legal interpretation: "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."⁴⁰

The *Reynolds* Court adopted the reconstructed intentions of the Framers,⁴¹ keeping with the common, but not universal, position that "a word should be defined as it was understood by the legislators who enacted it."⁴² Unfortunately, there is no clear idea of what the Framers meant when they used the word.⁴³ The *Reynolds* Court gave judicial cognizance to the

³⁸Only the blindest of optimists could in fact argue for multiple readings. Two hundred years of American jurisprudence have yet to settle on even *one* definition. See *infra* notes 39-175 and accompanying text (discussing the American judiciary's effort to define religion). To find a single definition would be a major accomplishment for legal philosophy; to hold out for even more may well be a fool's quest.

³⁹98 U.S. 145 (1878) (rejecting the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice).

⁴⁰*Id.* at 162.

⁴¹*Id.* at 162-63.

⁴²Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 539 (1965) [hereinafter Comment, *Defining Religion*].

⁴³The Department of Justice articulated the problem:

intellectual emphasis on duty, stating that each man is best able to judge his duty to, and relationship with, the Supreme Being for himself.⁴⁴ Still, religion for these eighteenth century men was inevitably theistic.⁴⁵ Theism, therefore, could be viewed as a constitutionally necessary ingredient to qualify a belief system as religion.

Twelve years after *Reynolds*, the Court in *Davis v. Beason*⁴⁶ held that a man could lose his right to vote for belonging to an organization "which teaches, advises, counsels, or encourages its members . . . to commit . . . bigamy or polygamy."⁴⁷ Within this moralistic decision, the Court also commented on religion, defining religion in terms of views, obligations, and obedience to humanity's "Creator."⁴⁸ Through the *Davis* Court's definition, the theism latent within the concept of "religion" is made explicit

There is no direct evidence to demonstrate what the Founders would have considered to constitute a "religion" for First Amendment purposes. . . . Belief in a Supreme Being was, of course, prominent in their references to religion, but more important was the idea that religion embodied the fulfilling of duties that were beyond the jurisdiction of the state either to prescribe or to proscribe.

U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 9 (1986).

⁴⁴*Reynolds v. United States*, 98 U.S. 145, 163-64 (1878).

⁴⁵Freeman, *supra* note 12, at 1520.

⁴⁶133 U.S. 333 (1890).

⁴⁷*Id.* at 334.

⁴⁸The Court stated:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.

Id. at 342.

and determinative of the category. This decision also distinguishes between "religion," as views and obligations, and "cults" as ritual and behavior.⁴⁹

Reynolds had already argued for a belief-action dichotomy, whereby religious beliefs, but not necessarily religious actions, which were still subject to general law, are constitutionally protected.⁵⁰ With this understanding, the *Reynolds* Court could hold that laws prohibiting religious polygamy were directed at action and, therefore, permissible. In the course of its rationalization, the Court opined that just as society could interfere in the practice of human sacrifice, so could it with any other religious practice it deemed contrary to the good.⁵¹ *Davis* also spoke in this vein, but opined that to call polygamy "a tenet of religion is to offend the common sense of mankind."⁵²

In *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*⁵³ the Court took the *Davis* argument one step further and depicted polygamy as "a crime against the laws, and abhorrent to the

⁴⁹This distinction is important and recurring. In addition to the textual discussion, consider that *Reynolds* and *Davis* wish to protect only religious belief but not religious action; but if religion is itself defined as an action, as *Yoder* would later try by emphasizing organization and public ritual, then potential contradictions present themselves.

⁵⁰*Reynolds v. United States*, 98 U.S. 145, 166 (1878).

⁵¹*Id.* at 166.

⁵²*Davis v. Beason*, 133 U.S. 333, 342 (1890).

⁵³136 U.S. 1 (1890). The Church of Latter-Day Saints was incorporated by an act of assembly on February 8, 1891. *Id.* at 3. Organized under the name "the State of Deseret," the Church included in § 3 of its acts of incorporation a provision empowering the Church to establish rules and laws. *Id.* at 4. The section provided, however, that the laws "relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithings, marriages" and other religious-based activities. *Id.*

Over ten years later, Congress passed an act on July 1, 1862, which made the prohibition of polygamy applicable to the state of Utah. *Id.* at 5. The act provided that it was unlawful for "any corporation or association for religions or charitable purposes to hold real estate in any United States territory where the corporation enacted laws condoning polygamy." *Id.* Further, the act nullified any such laws enacted by the Church and allowed the Attorney General to initiate proceedings to "forfeit and escheat to the United States the property of such corporations violating polygamy laws." *Id.* Consequently, the Attorney General instituted proceedings against the Church of Latter-Day Saints. *Id.* at 8.

sentiments and feelings of the civilized world."⁵⁴ Like *Reynolds*, this decision dismissed any claims that laws against polygamy conflict with the free exercise guarantee, but, unlike *Reynolds*, the grounds for this outcome are not based on society's needs to regulate religious action, but instead because so "barbarous" a practice could not be, by its very nature, religious.⁵⁵

The *Late Corporation* Court held that polygamy belongs in this class of "open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced."⁵⁶ Thus, polygamy is not a religious practice

⁵⁴*Id.* at 48.

⁵⁵*Id.* at 49. The Court stated:

No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifice by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

Id. at 49-50.

⁵⁶*Id.* at 50. This sentiment, if not the language, is preserved by the Internal Revenue Service. As part of the test to determine whether the activities of an organization applying for tax-exempt status are for "religious purposes," the Commissioner claimed that "'religious purpose' implies the absence of activities which are illegal or harmful in an important way to others." Terry Slye, *Rendering unto Caesar: Defining "Religion" for Purposes of Administering Religion-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL'Y 219, 254 (1983) (quoting J. Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 302 (1978)). Thus, religiosity depends upon its social innocuousness; as the *Late Corporation* Court held, that which offends is definitionally never religious. *Late Corp.*, 136 U.S. at 50. According to Slye, this principle has determined the outcome of at least one modern court case. Slye, *supra*, at 266 (citing *Puritan Church - The Church of America*, 10 T.C.M. 485 (C.C.H. 1951)).

This is not the explicit reasoning used by the Supreme Court to decide *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that when state law prohibits peyote ingestion, and where that prohibition is constitutional, the state may deny unemployment compensation when dismissal results from sacramental use of the drug. *Id.* at 890. Nonetheless, the effect of the Court's reasoning seems to be same as above, since the Court held that states need not demonstrate a compelling need when they criminalize behavior central to some religious practices — in this case, the ingesting of peyote during ceremonies of the Native American Church — so

which by its extremity passes beyond the protection of the Constitution; polygamy is not truly religious at all, and hence has no claim upon the protections of the Free Exercise Clause.⁵⁷ Religion was now not merely theocentric, but also "enlightened."

Over forty years later, Justice Hughes would urge the Court to back down from the extreme position it had assumed in its fury to disenfranchise the Mormons, and to return to its original, purely theistic standard. Justice Hughes argued, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."⁵⁸ Many subsequent decisions quoted this definition even though the Court has yet to adopt it.⁵⁹

By the early decades of this century, religious diversity in the United States had increased, and, with it, the range of claims for religious protection under the Constitution. In *Minersville District v. Gobitis*,⁶⁰ for example, Jehovah's Witnesses contested a state regulation requiring that students in the public schools participate in a daily ceremony of saluting the flag.⁶¹ During the course of this litigation, the plaintiffs asserted that "[t]he saluting of the flag of any earthly government by a person who has covenanted to do the

long as the law has general applicability and is not directed at the religious behavior particularly.

Thus, while the Court does not say that the criminal is not religious, it does imply that it is at least religious in a sense not protected by the Constitution. The act of criminalization need not be justified. By fiat, then, legislatures can freely circumvent the First Amendment, so long as they do not attack or promote religions directly, as was the fatal mistake in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 113 S. Ct. 2217 (1993).

⁵⁷*Late Corp.*, 136 U.S. at 49-50. In finding that the Constitution afforded polygamy no protection, the Court characterized the practice as "abhorrent to the sentiments and feelings of the civilized world" and as "a return to barbarism." *Id.* at 48-49. Consequently, the Court stated that where a religious practice constitutes a violation of societal laws, a state may constitutionally forbid the practice without offending the Free Exercise Clause. *Id.* at 50.

⁵⁸*United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting).

⁵⁹*See Welsh v. United States*, 398 U.S. 333, 348 (1970) (Harlan, J., concurring); *United States v. Seeger*, 380 U.S. 163, 175 (1965); *Malnak v. Yogi*, 592 F.2d 197, 201 (3rd Cir. 1979).

⁶⁰380 U.S. 586 (1940).

⁶¹*Id.* at 591-92.

will of God is a form of religion and constitutes idolatry."⁶² The Court, in upholding the regulation, failed to address the intriguing issue of whether patriotism or nationalism constitutes religion.

This first period of judicial debate terminated in 1943 with *United States v. Ballard*.⁶³ The defendants, who were founders of the "I am" religious sect, were accused of mail fraud.⁶⁴ The defendants claimed that they communicated with spiritual entities, including one deceased Guy Ballard, "alias Saint Germain, Jesus, George Washington, and Godfre Ray King," and that through such communication they were able to cure otherwise incurable diseases.⁶⁵ The jury was instructed to address only whether the defendants had used the sect to defraud their followers of money, or whether they themselves "honestly and in good faith" believed their own propaganda.⁶⁶ In only the first instance could the defendants be found guilty of mail fraud.⁶⁷

The circuit court reversed the defendants' conviction, holding that it was an error for the district court to exclude the issue of the defendants' beliefs from the jury because their beliefs were a material element of the indictment.⁶⁸ The Supreme Court reversed, holding that religious beliefs could not be examined during a criminal trial to ascertain their truth or falsity.⁶⁹ If such inquiry were allowed, the Court reasoned, then "little indeed would be left of religious freedom."⁷⁰ Instead, courts should gauge

⁶²*Id.* at 590. This decision was overturned a mere three years later in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶³322 U.S. 78 (1944).

⁶⁴*Id.* at 79.

⁶⁵*Id.* at 79-80.

⁶⁶*Id.* at 82.

⁶⁷*Id.*

⁶⁸*Id.* at 82-83.

⁶⁹*Id.* at 86. In rejecting the defendants' argument, the Court noted the dual function of the First Amendment in protecting the "freedom to believe and freedom to act." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). Although the freedom to act is not absolute, the Court proffered, the freedom of belief forms an essential part of the freedom of thought; an absolute hallmark of a free society. *Id.*

⁷⁰*Id.* at 87.

only whether individuals are sincere in their beliefs. Thus, even "rank heresy," sincerely believed, could be religious.⁷¹ *Ballard* "significantly undermined the view expressed in *Davis* . . . that beliefs that 'offend the common sense of [Christian] mankind' are not religious."⁷²

Under *Ballard*, the distinction between religious practice and confidence manipulation is found not in the content or outcome of either, but in the person's psychological condition of sincere belief which is necessarily present in the former, and necessarily absent in the latter. Whereas Hughes' *Macintosh* dissent had urged a characterization of religion as belief, *Ballard* now described it as *sincere* belief, a narrower, if more elusive, category.

By 1944, the substantive standard of theism was expanded to include the psychological criterion of sincere belief. The next phase was characterized by efforts to shed the theistic element altogether.

C. KAUTEN THROUGH WELSH, 1943-1969: THE CONSCIENTIOUS OBJECTOR CASES AND STRUCTURALISM

The second phase of judicial scrutiny was characterized by religious challenges to the Second World War and Vietnam War drafts. During this time, the sincere belief standard first offered by *Ballard* was carried to its logical limits by allowing beliefs other than theistic or even supernatural beliefs to satisfy its criteria.

1. THE LOWER COURTS IN CONFLICT

During this time period, courts were faced with the recurring problem of how to interpret the congressional military draft exemption. The text of the 1940 Selective Training and Service Act exempts any person from military service who, "by reason of religious training and belief" objects to "war in any form."⁷³

⁷¹*Id.* at 86.

⁷²Steven D. Collier, Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 979 (1982).

⁷³The Selective Training and Service Act stated:

Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

*United States v. Kauten*⁷⁴ was one of the first religious military draft exemption cases. Mathias Kauten was convicted for failing to appear for military induction on the grounds that he was a conscientious objector.⁷⁵ Kauten appealed his conviction to the Second Circuit, characterizing himself as an "atheist or at least an agnostic."⁷⁶ The court ruled that Kauten did not fall within the embrace of those who opposed all wars by reason of religious training and belief.⁷⁷ The Second Circuit explained that these religious beliefs, which entail objection to either all or no wars, are different from beliefs that are considered to be political objections to particular wars.⁷⁸

Selective Training and Service Act of 1940, Pub. L. No. 73-783, ch. 720, 54 Stat. 885 (repealed 1955).

⁷⁴133 F.2d 703 (2d Cir. 1943).

⁷⁵*Id.* at 705. A conscientious objector is one who refuses to participate in a war deemed unjust. The Selective Training Act of 1940 described conscientious objectors as those persons who "by reason of religious training and belief, conscientiously opposed participation in war in any form." *Id.* at 705 n.1. Pursuant to the Act, any person inducted into military service could retain noncombat service if a local board agreed to the "conscientious objector's" reasons for avoiding the combat service. *Id.*

⁷⁶*Id.* at 707 & n.2.

⁷⁷The Court stated:

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe. . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.

Id. at 708.

⁷⁸*Id.* One thoughtful commentator has stated:

The *Kauten* interpretation represents a dramatic shift in emphasis. Whereas *Davis* saw religion as relating man to God, *Kauten* examined the relationship of man to the broad universe and to other men. Where most other courts had considered the external attributes of a denomination — its dogma, doctrines, and creeds — the Second Circuit focused on the psychological function of the belief in the life of the individual.

The *Kauten* court adopted two signifiers of religion. First, the court articulated a version of *Ballard*'s sincerity test: a religious belief is a belief which the person would refuse to violate, no matter the cost.⁷⁹ Secondly, *Kauten* stipulated upon the epistemological status of such sincere belief.⁸⁰ Religion is not limited by reason and logic, but in fact must go beyond them into — without using the word — “faith.” Any belief which meets these two criteria would meet, in the Second Circuit's estimate, the definition of religion as required by the Selective Service and Training Act.⁸¹ *Kauten* represented the first time that a court inculcated “faith” into the effort to define religion.

Not all circuit courts, however, have defined religion as broadly as the Second Circuit. The Ninth Circuit, for example, “dismissed Judge Hand's broad definition of religion as obiter dictum and stated that cases relying on the dictum were in error.”⁸² Other courts have adhered to the notion of “faith,” but disagreed over the characterization of that faith.⁸³ While the differing circuit courts believed that religion begins where reason ends, some courts replaced the *Kauten* emphasis on epistemology with *Berman*'s attention

Note, *Toward a Constitutional Definition*, *supra* note 31, at 1061.

⁷⁹*United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

⁸⁰*Id.* (“Religious belief . . . accepts the aid of logic but refuses to be limited by it.”)

⁸¹*See United States ex rel. Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944) (holding that a claimant may be classified as a “conscientious objector” where the claimant's opposition to war is based on humanitarian concerns rather than strictly religious opposition); *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943) (reversing the district court's ruling that a claimant's opposition to war be “definitely traceable to some religious belief or training”).

⁸²Helen Yomtov Herman, *History and Utility of the Supreme Court's Present Definition of Religion*, 26 LOY. L. REV. 87, 96 (1980).

⁸³*Berman v. United States*, 156 F.2d 377 (9th Cir. 1946) (denying a claimant a “conscientious objector” exemption where the claimant's opposition to the war had no relation to any religious training or practice).

to object.⁸⁴ Theistic power, the courts believed, is necessarily on the other side of the gap between reason and faith.⁸⁵

In 1948, Congress adopted the Selective Service Act to include its own definition of "religious training and belief."⁸⁶ The Act defined "[r]eligious training and belief . . . [as] an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."⁸⁷ This definition was remarkably similar to the definition offered by Chief Justice Hughes in *Macintosh* and cited with approval in *Berman*.⁸⁸ Both cases advocated a theistic standard either as the complete, or at least essential, element in the definition of religion.

⁸⁴See, e.g., *United States v. Seeger*, 216 F. Supp. 516, 520-22 (S.D.N.Y. 1963), *rev'd*, 380 U.S. 163 (1970) (reiterating that "religious training and belief" may not be evidenced merely by personally-held beliefs); *In re Wissen*, 138 F. Supp. 483, 484 (D. Mass. 1956) (holding that Congressional intent underlying the exclusion exception "was not to exclude from the obligation to bear arms one whose beliefs, however conscientious, were self-imposed, and self-convinced without the operation of affirmative religious training."). *But see Seeger*, 380 U.S. at 177 (specifically rejecting "the Berman interpretation of what constitutes 'religious belief'"). In *Welsh v. United States*, 398 U.S. 333 (1970), the Court adopted the *Seeger* Court's test for ascertaining whether a conscientious objector's religious beliefs fall within the meaning intended by Congress in providing for exceptions as follows, "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." *Id.* at 339 (quoting *Seeger*, 380 U.S. at 176).

⁸⁵"Faith in a supreme power above and beyond the law of all creation mollifies our fears and satisfies our longings." *Berman*, 156 F.2d at 380. In *George v. United States*, the Ninth Circuit again weighed in on the side of this restrictive reading of religion. *George*, 156 F.2d 445, 451 (9th Cir. 1952) ("So it is evident that the definition which the Congress introduced . . . comports with the spirit in which 'Religion' is understood generally, and the manner in which it has been defined by the courts. It is couched in terms of the relationship of the individual to a Supreme Being . . .").

⁸⁶Selective Service Act of 1948, Pub. L. No. 80-759, ch. 625, § 6(j), 62 Stat. 604, 612-13 (current version at 50 U.S.C. app. § 456(j) (1976)).

⁸⁷*Id.*

⁸⁸*Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting))).

In *George v. United States*,⁸⁹ the plaintiff argued that the Congressional definition of "religious training and belief" was "unreasonably restrictive."⁹⁰ The court ruled that, even if the definition were unreasonably restrictive, Congress had the right to be arbitrary in legislating matters it was empowered to prohibit altogether.⁹¹ The Ninth Circuit expounded on the matter of definition, noting that the definition offered by Congress in the 1948 amendment to the Selective Training and Service Act "cover[ed] the case of most persons who derive inspiration from what has been called 'the Life of God in the Soul of Man.'"⁹²

Other courts, both state and federal, voiced their opinions as well. The District of Columbia Circuit in *Washington Ethical Society v. District of Columbia*⁹³ ruled that, despite the definitional ambiguity surrounding religion, the First Amendment protected "the idea of 'devotion to some principle; strict fidelity or faithfulness; conscientiousness, pious affection or attachment.'"⁹⁴ This central "idea" seems to be a version of the *Ballard* standard.

In *Fellowship of Humanity v. County of Alameda*,⁹⁵ a tax exemption case, the California Court of Appeals rejected *Berman's* theistic approach and

⁸⁹196 F.2d 445, 451 (9th Cir. 1952).

⁹⁰*Id.* at 450.

⁹¹*Id.*

⁹²*Id.* at 451. The court stated:

[The] definition which the Congress introduced into the 1948 Amendment . . . is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of "Religion" in American society. It covers the case of most persons who derive inspiration from what has been called "the Life of God in the Soul of Man."

Id.

⁹³249 F.2d 127 (D.C. Cir. 1957).

⁹⁴*Id.* at 129.

⁹⁵315 P.2d 394 (Cal. Ct. App. 1957).

attempted to clarify the definition.⁹⁶ Many courts have followed *Fellowship* because it dismissed *Berman*'s implicit reliance upon "'religious worship' in the ordinary sense," and *George*'s explicit "understood generally" standard as the appropriate standard by which to judge the definition of religion.⁹⁷ Such a reading of *Berman* and *George*, albeit general or common, cannot control because "the United States Constitution . . . [cannot] foster 'religious worship,' used in this [ordinary, theistic] sense."⁹⁸ As the Supreme Court would later declare, once Congress has elected to provide a religious exemption, it cannot favor one religion over another.⁹⁹ Thus, the ordinary reading of "religion," when incorporated statutorily, would be imperiled by the Establishment Clause.¹⁰⁰

This development in the judiciary's attempt to define religion is important largely because it allows for a completely new understanding of the term "religion." If the ordinary sense is not adequate, then its substitute can only be discovered after a serious, meticulous examination. As Plato discussed, considering the nature of "justice" may render a result which

⁹⁶The Court of Appeals clarified that the definition of religion in tax laws recognized belief and organized practice. The court stated:

The proper interpretation of the terms "religion" or "religious" in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief.

Id. at 406.

⁹⁷*George v. United States*, 196 F.2d 445, 451 (9th Cir. 1952).

⁹⁸*Fellowship of Humanity*, 315 P.2d at 409 (stating that the appropriate question is not whether the individual believes in a Supreme Being, but rather whether the individual's activities "are analogous to the activities, serve the same place in the lives of its members, and occupy the same place in society, as the activities of the theistic churches").

⁹⁹*United States v. Seeger*, 380 U.S. 163 (1965).

¹⁰⁰This would seem to contradict the assertions made in this Article's Introduction, that the ordinary sense should prevail. Ordinary semantic boundaries, however, may be violated *if* they conflict with other rules of law, in this case, the Establishment Clause. Deviations should not be tolerated, though, which arise merely from careless legislative language.

shocks, even offends, the initial, common understanding of justice.¹⁰¹ This example warns that religion, too, may appear in forms which, while defying the "common understanding," constitute religion nonetheless. This is the door opened by *Fellowship*. In retrospect, the post-*Fellowship* cases were just what one would expect to be on the other side of that threshold, as a bewildering variety of religious forms would become the order of the day.

2. THE SUPREME COURT TO THE RESCUE?

The conflict between the Second and Ninth Circuits necessitated the Supreme Court's intervention. Most courts supported the "sincere belief" standard of *Ballard*, therefore, the crux of the issue was whether the object of that belief was necessarily theistic. In *Torcaso v. Watkins*,¹⁰² the Court determined, for the first time, that religions are not necessarily theistic.¹⁰³ The *Berman* reading was seemingly doomed.

All ambiguity on the issue ended with the watershed case of *United States v. Seeger*.¹⁰⁴ In *Seeger*, the Court faced the decision whether to find section 6(j) of the Universal Military Training and Service Act ("the Military Act") unconstitutional for unevenly treating religions, or to construe the section to encompass the full, newly-asserted breadth of the term "religion." The Court chose the latter route, and ruled expansively on the meaning of religion as applied to the conscientious objector exclusion.¹⁰⁵ The *Ballard* "sincere belief" standard was further narrowed to include only those beliefs

¹⁰¹PLATO, *REPUBLIC* (G.M.A. Grube trans., 1992).

¹⁰²367 U.S. 488 (1961).

¹⁰³*Id.* at 495 n.11 ("Among religions in this country, which do not teach what would be considered a belief in the existence of God . . . are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."). The Court, nonetheless, recognized these belief sets as religions. *Id.*

¹⁰⁴380 U.S. 163 (1965).

¹⁰⁵*Id.* at 164. The Court declared:

We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.

Id. at 165-66. A lower court's application of the results of *Seeger* can be found in *United States v. Shacter*, 293 F. Supp. 1057 (D. Md. 1968).

which are structurally equivalent to the clearly theistic beliefs of devout adherents to traditional theistic religions.¹⁰⁶ The Court seemed to suggest that devout belief in a God occupies specific coordinates within an individual's mental structure; whatever belief set resides at these coordinates for another individual must be deemed "parallel" to theism and thereby judged "religious". Slye notes that the "sincere belief" test implies that "belief in God should always be sufficient to constitute a religion" because that is the paradigm case.¹⁰⁷ The "sincere belief" test, however, is flexible enough to include novel religious forms.¹⁰⁸ Specifying just what place within an individual's mental structure sincere belief occupies, requires one to look more closely at the three theologians cited explicitly by *Seeger*.¹⁰⁹

Among the theologians cited by the *Seeger* Court was Paul Tillich. Tillich's writings on the "ultimate concern," must be emphasized because these are the terms, more than any other, which comprise the current discussion of religion.¹¹⁰ For Tillich, concern about something is more than mere involvement with certain social issues; rather, interests that cause great anxiety are those for which we hold true concern and form the foundation for religious belief.¹¹¹ For Tillich that which "concerns one

¹⁰⁶*Seeger*, 380 U.S. at 166.

¹⁰⁷Slye, *supra* note 56, at 287.

¹⁰⁸*Id.* As we shall see later, belief in a god is not necessarily sufficient. *See infra* notes 285-298 and accompanying text.

¹⁰⁹*Seeger*, 380 U.S. at 180-82. The Court cited John A. T. Robinson, Dr. David Saville Muzzey, and especially Paul Tillich, all of whom Schmid termed "progressive theologians." *See also* Peter D. Schmid, *Religion, Secular Humanism and the First Amendment*, 13 S. ILL. U. L.J. 357, 364 (1989) (stating that the Court "derived its definition of religion by consulting three progressive theologians" who maintain that one's ultimate concern can become a religious belief).

¹¹⁰*See generally* Note, *Toward a Constitutional Definition*, *supra* note 31. The emphasis on Tillich is warranted because he was already considered to be a theological touchstone in this context. *Cf.* *United States v. Jakobson*, 325 F.2d 409, 415 (2nd Cir. 1963) (proclaiming Professor Tillich to be a "theologian of high distinction and wide influence, who has taught at great universities on both sides of the Atlantic").

¹¹¹Tillich writes:

[Concern] means that we are involved in it, that a part of ourselves is in it, that we participate with our hearts. And it means even more than that. It points to the way in which we are involved, namely, *anxiously*. The wisdom of our language often identifies concern with anxiety. Wherever we

ultimately becomes holy. The awareness of the holy is awareness of the presence of the divine, namely of the content of our ultimate concern."¹¹² Identifying what is holy to an individual, what is his religion, his ultimate concern, is completely independent of the specific content of the belief. It is to be identified structurally, rather than substantively. Thus any specific belief statement can be either secular or religious, depending upon its significance to the individual. Without this personalized context, no assertion can be made that one statement is religious, while another is merely secular. As the Eighth Circuit stated in *Wiggins v. Sargent*,¹¹³ a "notion" identified as secular does not mean it cannot be religious.¹¹⁴

Tillich's "ultimate concern" offers philosophical and theological substance to the "martyrdom" standard first suggested by *United States v. Kauten*.¹¹⁵ Choper, however, thinks little of Tillich's equation between religion and ultimate concern, and concludes that Tillich's theories are too sophisticated for judges and lawyers.¹¹⁶ Instead, Choper advocates the

are involved we feel anxiety. There are many things which interest us, which provoke our compassion or horror. But they are not our real concern; they do not produce this driving, torturing anxiety which is present when we are genuinely and seriously concerned.

PAUL TILLICH, *THE ESSENTIAL TILLICH: AN ANTHOLOGY OF THE WRITINGS OF PAUL TILLICH* 33 (1987).

¹¹²*Id.* at 19.

¹¹³753 F.2d 663 (8th Cir. 1985).

¹¹⁴*Id.* at 666 (suggesting that the notion of white supremacy is secular does not necessarily preclude it from also being religious in nature). This same ambivalence will be seen below in discussions of evolutionism. *See infra* notes 203-206 and accompanying text. Moreover, secular theories may be appropriated into religious mindsets, leading some, such as Justice Scalia, to wrongly conclude that evolutionism is necessarily religious. *See Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹¹⁵133 F.2d 703, 708 (2d Cir. 1943) (stating that "[r]eligious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow men and to his universe . . . [requiring] the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets").

¹¹⁶Choper argues:

Tillich's writings occupy volumes and are directed at theologians and lay believers, not lawyers. To extract from them the phrase, "ultimate concerns," and instruct judges to apply it as a legal formula seriously

"belief in the phenomenon of 'extratemporal consequences' [as] a sensible and desirable criterion for determining when the [F]ree [E]xercise [C]lause should trigger judicial consideration."¹¹⁷ He would, in other words, direct attention away from the believer, and back toward what is claimed to be believed; he overlooks that the constitutional right lies with the individual to believe, not with the thing to be believed. Although Choper freely acknowledges that his scheme excludes many groups currently protected by the religion clauses, such as Deists and Universalists, among others, he assumes that such groups would be protected from "uncontrolled punishment or persecution" under *other* constitutional provisions.¹¹⁸

The trend toward a broader definition of the term "religion" was given final articulation in *Welsh v. United States*.¹¹⁹ Relying on *Seeger*, the Court determined that under section 6(j) of the Military Act, a conscientious objector's "religious" opposition to war must be grounded in strong morals and ethics.¹²⁰ The *Welsh* Court "thus did what the *Berman* Court refused to do [and] 'completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely

underestimates the subtlety of Tillich's thought and overestimates the theological sophistication of the participants in the legal process.

Choper, *Defining "Religion"*, *supra* note 11, at 595.

¹¹⁷*Id.* at 599.

¹¹⁸*Id.* at 600.

¹¹⁹398 U.S. 333 (1970).

¹²⁰The Court stated:

What is necessary under *Seeger* for a registrant's conscientious objection to all war to be "religious" within the meaning of 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. . . . If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.

Id. at 339-40.

personal moral code.””¹²¹ The *Welsh* Court’s holding was justified because these distinctions, as originally conceived, connote the very criterion that is no longer relevant to identifying “religion.” Under *Welsh*, exemptions from military service are denied only if the beliefs are entirely, not merely essentially nonreligious.¹²² This situation is likely to arise only when the belief resembles traditional religion in neither topic nor structural placement. Thus, according to *Welsh*, the original burden upon the individual to prove he is entitled to the exemption, shifts to the government who must prove he is not. The Court accomplished this turnabout by equating religion with conscience, thereby reading the statute to refer to the free exercise of conscience, not merely that of religion.¹²³

The period from 1943 to 1969, then, began with a sense of religion as a sincere, but theistic, belief. By its end, the Court characterized the object of such belief not by content, but by a unique psychological positioning within the individual. Theism may be a prototypical instance of such positioning, but it holds no monopoly over it.

D. YODER THROUGH AMOS, 1972 TO PRESENT: A FINAL PHASE OF CONFUSION AND CAUTION

After *Seeger* and *Welsh*, the public would have been justified to think that the definitional problem regarding the term “religion” was nearing

¹²¹Herman, *supra* note 82, at 101-102.

¹²²*Welsh*, 398 U.S. at 339-40.

¹²³But see Freeman, *supra* note 12, at 1522 (“What the [F]ree [E]xercise [C]ause protects is the free exercise of religion not the free exercise of conscience.”). The *Welsh* result can be read either of two ways: The Court explained the *meaning* of religion was expanded to include nontheisms and unsupernaturalisms, or the Court implicitly supplemented the statutory text so that the original, narrow understanding of “religion” is preserved, but is followed by a bracketed, judicial insertion of “or other nontheistic or nonsupernatural belief system.” The ambiguity can be discerned from many of the Court’s statements.

I will focus on the first reading, because it corrects the understanding of “religion.” A recent statement from a sitting Supreme Court justice, however, indicates that the Court would favor the second interpretation. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O’Connor, J., concurring) (“Likewise, the selective service laws provide exemptions for conscientious objectors whether or not the objection is based on religious beliefs.”). Justice O’Connor appears to be saying that other categories of beliefs besides “religion” may now claim the exemption. This declaration departs from the proposition, asserted earlier, that “religion” itself has been expanded to encompass new sets of beliefs.

resolution. Soon after these statutory cases, however, arose a clearly constitutional case which seemingly rejected the broad libertarian structural standard developed during the previous phase of judicial scrutiny. The Court would explicitly pass over later opportunities to clarify the resulting ambiguities.

1. THE SUPREME COURT MUDDIES THE WATERS AGAIN

By 1970 the Supreme Court had ruled that "religion," at least statutorily, was not identified by any specific content, but rather, by its psychological place within the personality of the individual. The Court did not answer, however, how this reading applied within a constitutional context. Nonetheless, most agree that we can expect the *Seeger-Welsh* reading, or some form thereof, to apply to the constitutional use of "religion."¹²⁴ According to Slye, the IRS, at least, does read *Seeger* as a constitutional case.¹²⁵

There is, however, some evidence suggesting that the Supreme Court does not view the *Seeger-Welsh* standard as applying to religion in all contexts, or as suggesting a universal legal definition of religion. In *Wisconsin v. Yoder*,¹²⁶ Amish parents sought exemption from mandatory school attendance for their children after the eighth grade.¹²⁷ Although the

¹²⁴See, e.g., *Malnak v. Maharishi Mahesh Yogi*, 592 F.2d 197, 204 (3rd Cir. 1979) ("Although *Seeger* and *Welsh* turned on statutory interpretation, and despite some indication that the Court has, to some degree, drawn back from the broadest possible reading of these cases, they remain constitutionally significant." (footnote omitted)).

¹²⁵Slye, *supra* note 56, at 244 ("The I.R.S. reads *Seeger* as a constitutional case, citing it for the proposition that 'serious Constitutional difficulties would be presented if [section 501(c)(3)] were interpreted to exclude even those beliefs that do not encompass a Supreme Being in the conventional sense, such as Taoism, Buddhism, and Secular Humanism.'" (alteration in original) (quoting EXEMPT ORGANIZATION HANDBOOK, I.R.M. 7751, § 344.2)). The District Court of Nebraska, however, disagrees. See *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022, 1035 (D.C. Neb. 1979) ("The Supreme Court studiously framed the conscientious objector issue narrowly as one of statutory, rather than, constitutional, construction.").

¹²⁶406 U.S. 205 (1972).

¹²⁷*Id.* at 207-09.

Yoder Court granted the exemption, the standard required of the Amish¹²⁸ was much stricter than might have been expected in a post-*Seeger-Welsh* environment. Indeed, much of the Court's rhetoric would seem a regression from the Court's earlier positions. The Court stated that the religion clauses of the First Amendment required something more than a mere subjective belief, such as that offered by Thoreau, because such a loose standard was contrary to the concept of ordered liberty.¹²⁹ What is odd about the Court's statement is that under *Seeger* and *Welsh*, a seemingly non-religious philosopher, such as Thoreau, would indeed have been adjudged religious had he been applying for conscientious objector status.¹³⁰ Yet here in *Yoder*, as Justice Douglas suggested, it is not that the religion Thoreau espoused is insufficient to defeat a compelling state interest, but rather that it is no religion at all.¹³¹ It would seem, therefore, that the Court had retreated to the nineteenth century definition articulated in *Late Corporation*,

¹²⁸"Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs . . ." *Id.* at 235.

¹²⁹The Court explained the need for a limitation on the scope of "religion" within the constitutional concept of liberty:

Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of the subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the Religion Clauses.

Id. at 215-16.

¹³⁰Justice Douglas also noted this contradictory treatment of Thoreau in *Yoder*. *Id.* at 247-48 (Douglas, J., dissenting in part).

¹³¹*Id.*

where the strategy was to avoid messy intellectual inconsistencies by simply redefining the problem.¹³²

Instead of the psychological structural approach, *Yoder* favors the requirement of an organizational or historical dimension for constitutionally protected religions. Steven Collier exemplifies the dangers inherent in this perspective. In response to the *Seeger-Welsh* excesses, Collier would include an organizational requirement before recognizing a religion.¹³³

Collier worries that many ordinary religious believers attend services and profess religion, yet they may not be prepared to die for their faith, as is required of believers in "ultimate concerns" under the narrow *Seeger-Welsh* definition.¹³⁴ Ordinary believers, because their religion is not uncompromising enough to qualify as an ultimate concern, would thus appear to fall outside the narrow *Seeger-Welsh* definition of religion. In fact, ordinary believers may not warrant First Amendment protections. Unless religious form is to take precedence over religious substance, one's right to go to church for social, extrinsic reasons is of a lower order than the same church-going behavior for intrinsic motives. Thus, what Collier identifies as a *reductio ad absurdum*¹³⁵ is, in fact, a desirable outcome.¹³⁶ While concerned about protecting the casually religious, Collier clearly denies protection to "individuals with unique, personal religious beliefs."¹³⁷ Under Collier's scheme, the "ordinary, nonmartyr religious believers" are protected, but Jesus the Christ as religious innovator is not.¹³⁸

¹³²The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (stating that engaging in and promoting polygamy, which was considered a crime against the civilized, Christian world, could not be held up as a religious belief). This is certainly still the strategy of Title VII. See *infra* notes 175-177 and accompanying text.

¹³³Collier, *supra* note 72, at 995.

¹³⁴*Id.*

¹³⁵*Reductio ad absurdum*: a process of reasoning, which if carried forward, leads to absurd consequences. LATIN WORDS & PHRASES FOR LAWYERS 20 (R.S. Vassam ed., 1980).

¹³⁶Others agree with Collier. Cf. Note, *Toward a Constitutional Definition*, *supra* note 31, at 1075 n.108.

¹³⁷Collier, *supra* note 72, at 1000.

¹³⁸*Id.* at 995.

Yoder, then, confuses the issue by advocating a different reading of "religion" for constitutional purposes than for statutory ones.¹³⁹ Subsequent Supreme Court decisions do little to resolve this apparent inconsistency by either choosing one over the other, or by explicitly establishing a dual reading. For example, the Court repeatedly passed over opportunities to elaborate on earlier rulings, such as in *Roemer v. Board of Public Works of Maryland*.¹⁴⁰

2. THE LOWER COURTS AGAIN IN CONFLICT

The Supreme Court has perhaps done more harm than good by pronouncing two incompatible standards for "religion" without articulating how they are related. As the highest court has again lapsed into unhelpful silence, the lower courts have offered their own interpretations. Most of these courts have made unsuccessful attempts to append *Yoder's* organizational and historical dimensions to the *Seeger-Welsh* psychological structural one.

*Malnak v. Maharishi Mahesh Yogi*¹⁴¹ has the unique distinction of being "the first appellate court decision . . . that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas."¹⁴² The issue at bar was whether the teaching of the Science of Creative Intelligence-Transcendental Meditation in the New Jersey public high schools was an unconstitutional establishment of

¹³⁹The contrast between *Yoder* and *Seeger-Welsh* might be explained away by saying that the first applies to communities, and the latter to individuals. But this reading overlooks that *Yoder* was brought by individuals, and not as a group action by the Amish. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972). This analysis is also problematic in that it would imply that a community has religious rights over and above those possessed by its member individuals. Finally, a communal versus individual legal distinction would make for two utterly incompatible referents for "religion," since the *Seeger-Welsh* definition finds its meaning in mental states, and communities have no mind. Religion for communities must therefore be found elsewhere, and be something completely different than that for individuals. For reasons previously discussed, this would be a poor direction to go in, and may not be very intellectually defensible. See *supra* notes 18-38 and accompanying text.

¹⁴⁰426 U.S. 736 (1976). In *Roemer*, the Court noted, "We have no occasion to elaborate further on what is and is not a 'specifically religious activity.'" *Id.* at 760.

¹⁴¹592 F.2d 197 (3d Cir. 1979) (per curiam).

¹⁴²*Id.* at 200 (Adams, J., concurring).

religion.¹⁴³ The Third Circuit decided in the affirmative, even though the members of the program denied that the program was a religion.¹⁴⁴

After reviewing the case law as it stood at that time, Judge Adams, in a concurring opinion, concluded that the cases dealing with the proper definition of religion have not produced a single, clear definition, but do suggest that such a definition is broader than the traditional theistic approach.¹⁴⁵ Judge Adams hoped to operationalize the *Seeger-Welsh* principle into a reliable general method by abstracting "three useful indicia that are basic to our traditional religions," and which, by analogy, should be present in any contested case which is to be decided on the side of religion: (1) the nature of the ideas in question; (2) the element of comprehensiveness; and (3) any formal, external, or surface signs that may be analogized to accepted religions such as rituals and organizational structure.¹⁴⁶

¹⁴³*Id.* at 197.

¹⁴⁴*Id.* at 199-200.

¹⁴⁵Judge Adams stated:

[T]he constitutional cases that have actually alluded to the definitional problem . . . strongly support a definition for religion broader than the Theistic formulation of earlier Supreme Court cases. What this definition is, or should be, has not yet been made entirely clear.

Id. at 207 (Adams, J., concurring).

¹⁴⁶*Id.* at 207-09. One author suggested four criteria that seem more workable than the criteria espoused by Judge Adams:

An individual or group belief is religious if it occupies the same place in the lives of its adherents that orthodox beliefs occupy in the lives of their adherents. Four characteristics should be present:

- (1) a belief regarding the meaning of life;
- (2) a psychological commitment by the individual adherent (or if a group, by the members generally) to this belief;
- (3) a system of moral practice resulting from adherence to this belief; and,
- (4) an acknowledgement by its adherents that the belief (or belief system) is their exclusive or supreme system of ultimate beliefs.

Comment, *Defining Religion*, *supra* note 42, at 550-51. These criteria are not only more in keeping with the spirit of *Seeger* and *Welsh*, but would have produced a more rational outcome in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981). Note that "system of moral practice" can encompass overt behaviors of interest without unreasonably restricting

The Court defended the first point by claiming that "[t]he First Amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. . . . Thus, the 'ultimate' nature of the ideas presented is the most important and convincing evidence that they should be treated as religious."¹⁴⁷ The second criterion requires that such ultimate concerns be connected with one another, and not be isolated beliefs which bear no demonstrable relationship.¹⁴⁸ The Court noted that this standard might allow unexpected social forms, such as "patriotic views" to receive religious protections.¹⁴⁹

The third criterion illustrates an attempt to require a social dimension to what often has been conceived as a private experience between the individual and his or her God: an effort seemingly warranted by *Yoder*.¹⁵⁰ While the presence of rituals might satisfy a common sense expectation of analogy, its required presence to identify "religion" can lead to counterintuitive results. For example, Andrew Austin states approvingly that on one hand "intensely dedicated Democrats or Republicans" ought not be viewed as religious, while on the other that "one can have religious beliefs which [one] does not hold strongly."¹⁵¹ Austin's conclusion that the first instance is not one of "religion" while the second is, is clearly based upon criteria which have nothing to do with religion *per se*. For example, if Austin believes religion and non-religion follow a theistic and non-theistic pattern, then we can better understand why strong politics is never, but weak theism is always "religious." Perhaps his result is better explained by the fact that a member of a political party, however devoted he may be, can invoke few socially recognized rituals while maintaining a strong affiliation

them to corporate rituals, as Adams preferred.

¹⁴⁷*Malnak v. Maharishi Manesh Yogi*, 592 F.2d 197, 208 (3rd Cir. 1979) (Adams, J., concurring).

¹⁴⁸*Id.* at 209 (Adams, J., concurring).

¹⁴⁹*Id.* Judge Adams seemingly would agree with the Jehovah's Witnesses' complaint in *Minersville District v. Gobitis*, 310 U.S. 586, 590 (1940), that saluting the flag can be "a form of religion and constitutes [for them] idolatry." *Id.* at 590.

¹⁵⁰*See Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972) ("The Amish alternative to formal secondary education has enabled them to function effectively in their day-to-day life In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.").

¹⁵¹Austin, *supra* note 14, at 28.

with the political party, while the apathetic church-goer participates in many extensive rituals even if their deeper meaning is not fully understood or recognized.

Although Judge Adams obviously intended these indicia to derive from the general *Seeger-Welsh* test, they actually render great violence to it. The Supreme Court requires that the candidate's belief be a psychological equivalent.¹⁵² Judge Adams's "definition by analogy" is more concerned with cognitive and social similarities. Perhaps this inadvertent change of focus explains why the first major application of these indicia was a disappointment.

In *Africa v. Pennsylvania*¹⁵³ the Third Circuit denied that American Christian Movement for Life ("MOVE")¹⁵⁴ was a religion, and that the state was not compelled to provide for dietary restrictions claimed by an adherent prisoner.¹⁵⁵ The court found that the organization lacked a "functional equivalent of the Ten Commandments," thus failing the first criterion, and held that if MOVE qualified on the second criterion of comprehensiveness, so too could vegetarianism.¹⁵⁶ *Africa* seems to clearly meet the *Seeger-Welsh* standard. The court conceded that the defendant's beliefs were "truly held" within the meaning of *Ballard* and *Seeger*.¹⁵⁷ He was denied First Amendment protections, however, because MOVE did not otherwise resemble prototypical religions. *Seeger* and *Welsh*, however, did not specify these additional inquiries, and thus, there would be nothing counterintuitive about declaring MOVE a religion.

¹⁵²See *supra* notes 104-123 and accompanying text.

¹⁵³662 F.2d 1025 (3d Cir. 1981).

¹⁵⁴MOVE is an anti-technology group whose present name is a shortening of its original, "American Christian Movement for Life." *Id.* at 1026. The group came to public awareness dramatically with the May, 1985 fires in Philadelphia, when police dropped a fire bomb to dislodge members, and inadvertently destroyed a large section of the neighborhood. See *Radical Cult Bombed by Philadelphia Police Resulting Blaze Spreads to 50 or 60 Homes*, L. A. TIMES, May 14, 1985, at 1.

¹⁵⁵*Africa*, 662 F.2d at 1025.

¹⁵⁶*Id.* at 1033. These same indicia were adopted by lower courts, but always to disallow claims to religious status. See, e.g., *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985); *Jacques v. Hilton*, 569 F. Supp. 730 (D. N.J. 1983); *Church of the Chosen People v. United States*, 548 F. Supp. 1247 (D. Minn. 1982). While *Church of the Chosen People* was clearly decided correctly, the courts probably erred in both *Jacques* and *Africa*.

¹⁵⁷*Africa*, 662 F.2d at 1030-31.

In *Womens Services, P.C. v. Thone*¹⁵⁸ the United States District Court for the District of Nebraska similarly tried to put some positive content into the concept of "religion." Instead of *Seeger* and *Welsh*, however, the district court favored *Yoder*.¹⁵⁹

Both *Malnak* and *Womens Services* require that claimants of First Amendment protections be affiliated with organizations.¹⁶⁰ *Yoder* also favors such social criteria.¹⁶¹ The problem with requiring affiliation with an organization, though, is that it distinguishes religions by virtue of their history. While Christianity at its inception would fail to merit First Amendment protections, Christianity today would warrant protection, because now it has a history and an organization, both of which were lacking in the Apostolic era. The Book of Acts, in fact, is concerned with the creation of just these features.

Malnak and *Womens Services* also share the view that what is or is not religious is a judicial determination.¹⁶² In the former, Judge Adams stated that "the question of the definition of religion for [F]irst [A]mendment purposes is one for the courts, and is not controlled by the subjective perceptions of believers."¹⁶³ Similarly, *Womens Services* concluded that "the mere labeling of something as coming within a 'religious' area by theologians [or, we might assume, by anthropologists] does not serve to make that area 'religious' for purposes of invoking First Amendment protections."¹⁶⁴ This position would seem to contravene the spirit, if not

¹⁵⁸483 F. Supp. 1022 (D.C. Neb. 1979).

¹⁵⁹*Id.* at 1034. The court concluded:

A nontheistic belief which qualifies as religious in the First Amendment sense is one limited at least to a belief of an adherent to an organized, nontheistic group. Whatever else nontheistic religion is, it has at least two essential qualities: *tenets* and *organization*.

Id.

¹⁶⁰*Id.*; *Malnak v. Yogi*, 592 F.2d 197, 199-200 (3d Cir. 1979) (per curiam).

¹⁶¹*Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972).

¹⁶²*Malnak*, 592 F.2d at 199; *Thone*, 483 F. Supp. at 1032.

¹⁶³*Malnak*, 592 F.2d at 210 n.45 (Adams, J., concurring).

¹⁶⁴*Womens Services*, 483 F. Supp. at 1040.

the letter, of *Seeger* and *Welsh*, and invokes exactly the kind of powers feared by Sharon Worthing.¹⁶⁵

At least one commentator would argue that the combined impacts of *Welsh*, *Seeger*, and *Ballard* would render judicial challenge to a claim of religiosity impermissible.¹⁶⁶ Denying a claim that a particular belief set is a religion can come dangerously close to transgressing the Establishment Clause and certainly approaches the close scrutiny and entanglement forbidden by *Ballard*, and, later *Lemon v. Kurtzman*.¹⁶⁷

The confusion created by the Supreme Court impacts not only the lower courts, but also administrative departments which also suffer from the lack of guidance. Needing to know what is or is not a "religion," some of those departments have fashioned their own standards. The IRS has taken a particularly activist role, as it seeks concrete solutions to practical

¹⁶⁵See Worthing, *supra* note 16, at 353.

¹⁶⁶As Bowser states:

If religion under law, according to the *Welsh* decision, involves nothing more than a "deeply and sincerely" held belief which may be "purely ethical or moral in source and content," and if under *Seeger* the inquiry must be limited to "whether the beliefs professed by a registrant are sincerely held and whether they are in his own scheme of things religious," and if *Ballard* mandates that "no inquiry can be made into the verity of beliefs," then under the combined holdings, presumably, the mere assertion by an individual that his beliefs are religious is the only *prima facie* evidence needed to substantiate the validity of the professed beliefs. What is held out to be a religious claim, therefore, cannot be challenged.

Bowser, *supra* note 13, at 191.

¹⁶⁷403 U.S. 602 (1971). In *Lemon* the Court set forth a three prong test to determine when specific legislation constituted the establishment of religion:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13 (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

problems. Toward this end, the IRS has constructed "a subjective, highly questionable, fourteen point-test."¹⁶⁸

Nevertheless, the approach adopted by the IRS is extremely dubious because constitutional protections are guaranteed to religious believers, not to churches. Failing to qualify as a "church," therefore, provides little information about one's entitlement to religious protections unless one has *a priori* stipulated that all religions have churches, thereby treating the two categories as coterminous.¹⁶⁹

Despite the IRS list, "each of these criteria is fundamentally flawed."¹⁷⁰ Further, "because [the criteria] discriminate between religious organizations," favoring the "large, formal, well-established churches," the fourteen points "probably violate the first amendment."¹⁷¹ For example, Gaffney notes that these criteria probably leave "no room for unrestricted or loosely structured religious societies, such as the Society of Friends (Quakers) or the Christian Scientists, who undoubtedly enjoy the protection

¹⁶⁸Bruce J. Casino, "I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion, 25 AM. CRIM. L. REV. 113, 139-140 (1987). For the IRS, a church has

- (1) a distinct legal existence;
- (2) a recognized creed and form of worship;
- (3) a definite and distinct ecclesiastical government;
- (4) a formal code of doctrine and discipline;
- (5) a distinct religious history;
- (6) a membership not associated with any other church or denomination;
- (7) an organization of ordained ministers;
- (8) ordained ministers selected after completing prescribed studies;
- (9) a literature of its own;
- (10) established places of worship;
- (11) regular congregations;
- (12) regular religious services;
- (13) Sunday schools for religious instruction of the young;
- (14) schools for the preparation of its ministers.

Jerome Kurtz, Remarks of IRS Commissioner Jerome Kurtz Before the PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), in FED. TAXES (P-H) P54, 820 (1978).

¹⁶⁹This is precisely Emile Durkheim's strategy as discussed *infra* note 237 and accompanying text.

¹⁷⁰Casino, *supra* note 168, at 141.

¹⁷¹*Id.* at 140.

of the First Amendment Religion Clause."¹⁷² Brazilian Candomblé¹⁷³ fails on eight of these measures, meaning that a "terreiro"¹⁷⁴ is probably not a church — and perhaps, implicitly, not a "real" religion — as far as our federal government is concerned.

E. SUMMARY OF THE LEGAL PROJECT

1. STRETCHING TO BROADEN THE EXTENSION OF RELIGION

The legal understanding of religion is immature. Statutorily, the most sophisticated definition that Congress could construct was lacking:

[Religion] includes all aspects of religious observance and practice, as well as belief, *unless* an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.¹⁷⁵

Title VII seems to define religion under a broad *Seeger-Welsh* standard, until that generosity proves too costly or cumbersome to employers. At that point, the activities become definitionally non-religious, and hence no longer protected, a strategy first invoked in the 1890 *Late Corporation* case. Although unpalatable and intellectually repugnant, this approach does have the virtue of combining the elegance of the single definition with the practical economy of the dual.¹⁷⁶

¹⁷²Gaffney, *supra* note 17, at 209.

¹⁷³Candomblé is an African-derived spirit possession cult. A recent ethnographic depiction is offered by Jim Wafer. See JIM WAFER, *THE TASTE OF BLOOD: SPIRIT POSSESSION IN BRAZILIAN CANDOMBLÉ* (1991).

¹⁷⁴A "terreiro" is the cult house of Candomblé, and serves as the center for ritual activity and repository of its spiritual energies, or "axé."

¹⁷⁵42 U.S.C. § 2000(e)(j) (Supp. V 1993) (emphasis added).

¹⁷⁶As might be recalled from the discussion earlier, some fear that a single definition which fits the Free Exercise Clause will be too broad for the Establishment Clause. See *supra* note 31 and accompanying text. One possible response is to defend a different definition for each clause. The Title VII definition offers one definition — hence its "elegance" — yet avoids the problems of other single definitions by including a threshold condition which, when crossed, terminates the protections and avoids the conflict — hence

Even more indicative of the unsuccessful attempt by law to identify religion was that, as recently as 1980, the federal courts were called upon to adjudicate whether or not Haitian *voudon*¹⁷⁷ was a religion. Although clearly wishing to find in the negative, the Fourth Circuit could only decide that "[b]ased on the record presented, we cannot conclude that Voodoo is not a religion."¹⁷⁸ A decade later, the Supreme Court conceded that Santeria is inarguably a religion.¹⁷⁹

Still, despite the lack of success in defining religion, the legal understanding of the phenomenon has become more sophisticated. The most authoritative statements have progressed from simple Christian theism to a more inclusive standard of structural equivalency.¹⁸⁰ Our modern sensibilities tend to approve of this effort to recognize increasingly diversified religious forms. It remains to be seen whether this tendency can be implemented in a legally consistent way.

its "practical economy."

¹⁷⁷"Voudon" is the original French term for what became known in the American South as "voodoo."

¹⁷⁸*Barringer v. Garrison*, No. 80-6120, slip op. (4th Cir. June 16, 1980), *quoted in* Jon Gelberg, *Inmate Wins Voodoo Appeal: Remand over Whether "Cult" is Religion*, NAT. L.J., July 21, 1980, at 4.

¹⁷⁹*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993). Santeria is a Cuban religion of the same family as is Haitian voodoo, and which also includes Brazilian Candomblé. *See id.* at 2222.

¹⁸⁰One standard reference which ignores this trend is the latest edition of BLACK'S LAW DICTIONARY 1292 (6th ed. 1991). There, the preferred definition of religion is "Man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings." *Id.* One commentator has summarized the present understanding as follows:

This is religious which is related by doctrinal, ethical or ritualistic consideration to the Ultimate Concern (identified as God, Nature, Humanity, or other) in the life of an individual or group, the belief or faith to which all else is subordinate and which occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God, giving fundamental meaning to life and dictating standards of belief, conduct or worship.

Bowser, *supra* note 13, at 225-26.

2. PROBLEMS WITH THE BROADENED EXTENSION OF RELIGION

While the trend has been to increase the scope of the religion clauses, this resolution has proven logically vulnerable on at least two counts. First, it does not easily lend itself to operationalization. Operationalization refers to instructions for use; it provides the necessary link between an abstract concept and overt measures which will reveal the workings of that concept.¹⁸¹ For example, the psychological concept of the intelligence quotient ("IQ") is typically operationalized to mean that which is measured by pen-and-pencil IQ tests.¹⁸² Researchers must always specify how their concepts have been operationalized, since their final conclusions about the abstract concept depend upon the reliability and validity¹⁸³ of the operationalized proxy for that abstraction. Since the goal here is to identify religion, its definition must be operationalized in an explicit manner.

The second vulnerability of the trend toward greater expansion is that application of a broader definition of religion without mitigation would so severely restrict the range of actions available to government regulation as to make government utterly impotent in this capacity.

a. OPERATIONALIZING "ULTIMATE CONCERN"

The terms of a definition must be better understood than the term being defined; for this reason, "soul" or "spirit" would find no place in a well-constructed definition of "religion." Having stated that religion is an "ultimate" concern parallel to the traditional religious beliefs, how is an ultimate concern to be identified? Or does it, like "soul," pose an even more tangled problem of identification than does the original term, "religion"?¹⁸⁴

In order to give "ultimate concern" empirical value, some courts look to the sincerity principle, reasoning that an ultimate belief is a sincere belief,

¹⁸¹*Operationalism* or *operationism* stems from P. Bridgman and treats concepts as logical positivism treats statements: "[C]oncepts must be defined in terms of the operations employed in applying them, e.g. length can be defined only in terms of techniques of measurement" A.R. LACEY, A DICTIONARY OF PHILOSOPHY 185 (1986).

¹⁸²See KAREN HUFFMAN, MARK VERNEY & BARBARA WILLIAMS, *PSYCHOLOGY IN ACTION* 286-90 (1987) (discussing briefly the IQ concept).

¹⁸³"Validity" refers to the likelihood that a chosen operationalization is a true indicator of the underlying abstract concept; a test is "reliable" if, with similar subjects under similar circumstances, it produces similar results.

¹⁸⁴Cf. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 806-07 (1984).

and a sincere belief leads to consistent actions over time in keeping with that belief. Thus, "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief,"¹⁸⁵ and "[t]he devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than [go against that belief]." ¹⁸⁶ While it is likely that ultimate beliefs are included within this set, it is equally likely that they include more than ultimate beliefs. This standard may then succeed in eliminating some candidate religions, but not in ratifying them.¹⁸⁷

Other courts have attempted to explicate minimal objective ingredients.¹⁸⁸ These checklists are flawed and inconsistent with Supreme Court standards. They are concerned with whether or not the challenged systems socially "look like" traditional religions, and not whether, as the Supreme Court required in *Seeger* and *Welsh*, they occupy a personal psychological space parallel to that held by traditional religions within their adherents.

A final strategy might be to define "ultimate" and consequently "religion" by its epistemological status. Thus, "'[u]ltimate' refers to all values and 'knowledge' which cannot be proven true, or even tested, by empirical knowledge. Ultimacy judgments rest upon some type of nonrational 'faith.'" ¹⁸⁹ Religion, however, is "any belief system that is

¹⁸⁵*International Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

¹⁸⁶*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Black, J., concurring).

¹⁸⁷If citizens fail *Barnette's* martyrdom test, then the beliefs at issue are not religious. But willingness to undergo "persecutions" does not necessarily entail that the contested beliefs are religious.

¹⁸⁸*See Malnak v. Yogi*, 592 F.2d 197, 199 (3d Cir. 1979) (holding that the government's placement of certain textbooks in public schools violates the First Amendment Establishment Clause); *Womens Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979) (holding that abortion law asking citizens to protect unborn life "whenever possible" violates the First Amendment Establishment Clause).

¹⁸⁹Craig A. Mason, Comment, "*Secular Humanism and the Definition of Religion: Extending a Modified 'Ultimate Concern' Test to Mozert v. Hawkins County Public Schools and Smith v. Board of Education Commissioners*," 63 WASH. L. REV. 445, 456 (1988).

based upon one or more unprovable (as opposed to unproven) assumptions that include a belief in a greater power."¹⁹⁰

Austin's stance that the determining factor should be the gap between the known and unknown¹⁹¹ — in other words faith — is not wholly irrelevant. Austin builds his argument, however, upon faulty contrasts. He erroneously believes that "scientific theories do not rely on faith in support of their theories, but rather on empirical observations and logic."¹⁹² He overlooks the fact that all science is premised upon the unprovable assertion that the universe is law-governed, and that these laws are uniform over time and space.

Since Austin's depiction of science is inaccurate, the fact that it strongly contrasts with his vision of religion should not be surprising. The line between the two is not as bold as he would have us believe, and the element of faith, at least as a present, absent characteristic, does not distinguish them.

At this point we must conclude that judicial interpretation of "religion" and "religious behavior" has oriented thinking in a direction — toward "ultimate concern" — which it is itself helpless to illuminate. Either the legal field will have to look elsewhere to clarify this concept, or it will have to repudiate its incorporation into legal theory.

b. THE COURTS' AUSTERE RESTRICTION UPON GOVERNMENTAL POWERS

The broadened extension of religion is also defective because the universe of beliefs that theoretically could function as religion is too broad for governmental purposes. First, since anything can be an ultimate concern, anything could be a religion. Thus, a strict adherence to the Free Exercise Clause would paralyze government. It would become impossible to regulate any facet of life without infringing upon someone's religious practices. While compelling state interest does take precedence, the thought of litigating every pronouncement is daunting.

One possibility to limit the universe of religious claims may lie within Dodge's sociological dissection of religion.¹⁹³ He divides religious

¹⁹⁰Austin, *supra* note 14, at 42.

¹⁹¹*Id.* at 39.

¹⁹²*Id.*

¹⁹³Joseph M. Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 697 (1969).

phenomena into four parts: Ethical Action, Worship, Faith, and Therapy.¹⁹⁴ Faith and Therapy, he says,

should be absolutely protected by the free exercise clause, and the worship subsystem should also be protected so long as there is no demonstrable harm outside of the worship group or severe physical injury within it, and the ethical action subsystem should receive a much lesser degree of protection.¹⁹⁵

He assures us — albeit unconvincingly — that “it should be relatively easy for a court to ascertain the formal distinctions”¹⁹⁶ between the four subsystems.

At first glance, Dodge offers an attractive solution. According to Dodge, all beliefs within a religious complex are not similarly structured, and some may not be religious at all.¹⁹⁷ Christmas trees could conceivably be outlawed without conflicting with the Free Exercise Clause, since, despite their traditional place within Christmas celebrations, the trees are part of no actual Christian doctrine. The religion clauses protect one’s ability to fulfill one’s duty to one’s God; the first step, then, must be that one perceives a divinely imposed duty. Since Christmas trees are not so perceived, this custom should not be accorded the same level of protection granted the Mass which is perceived by some to be a divinely-imposed duty. Dodge’s theory,

¹⁹⁴*Id.* at 694.

¹⁹⁵*Id.* at 697.

¹⁹⁶*Id.* at 699. Lower courts had earlier not hesitated to delve into religious psychology so as to ascertain what aspects were or were not “central” to a religious belief system. *See, e.g.,* Northwest Indian Cemetery Protective Ass’n v. Peterson, 795 F.2d 688 (9th Cir. 1985). Later, however, the Supreme Court explicitly declined to make this kind of determination:

What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his personal faith? . . . As we reaffirmed only last Term, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”

Employment Div., Dep’t of Human Resources of Oregon, v. Smith, 494 U.S. 872, 887 (1990) (alteration in original) (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).

¹⁹⁷Dodge, *supra* note 193, at 698.

however, also reveals several undesirable outcomes.¹⁹⁸ Further study should determine whether these weaknesses are necessary entailments or the author's uninspired application of his own good idea.

The problems with recognizing an infinite variety of religions leap forward because many people are uncomfortable with even the limited number already recognized, and they complain that these have already hamstrung government to its detriment.¹⁹⁹ This debate concerns the relation of religion to atheism, agnosticism, and ultimately secularism and secular humanism.²⁰⁰

By implication, the courts have often found atheism to be a religion. For example, in *Young v. Southwestern Savings and Loan Association*,²⁰¹ the Fifth Circuit identified the plaintiff as "an atheist," but then in a footnote clarified that "[t]here is no question of the sincerity of Mrs. Young's religious beliefs."²⁰² The unstated assumption is that atheistic beliefs are religious beliefs.

Atheistic discourse still takes God as its subject, even if all propositions are in the negative. Nontheistic ideas do not assert any propositions whatever about supernaturalisms, either positive or negative. But to discuss

¹⁹⁸What can the author be thinking, for instance, when he declares "the Jehovah's Witnesses doctrine . . . a tragic theological mistake." *Id.* at 721. One which catches the anthropologist's eye most readily is his belief that "a primitive sect should not be given any blanket exemption from secular law — even if that law is designed ultimately to erode the traditional religion." *Id.* at 696. He also espouses the dubious opinion that one of the functions of government is "to protect people from their own gullibility," and hence fortune tellers can easily be regulated since, by his design, their individual practice entails that they are not acting in any religious capacity. *Id.* at 720.

¹⁹⁹*See, e.g., Note, Toward a Definition of Religion, supra* note 31.

²⁰⁰*Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding a Maryland test for public office requiring a declaration of belief in the existence of God unconstitutional because it invaded appellant's freedom of religion guaranteed by the First Amendment). Greenawalt writes:

[A]re atheism, agnosticism, and other negative views about claims of religious truth themselves religious? If the establishment clause is understood as barring government from sponsoring claims of truth in the domain of religion, then antireligious ideas may be understood as a subset of religious ideas.

Greenawalt, *supra* note 184, at 793 (footnotes omitted).

²⁰¹509 F.2d 140, 142 (5th Cir. 1975).

²⁰²*Id.* at 142 n.3 (emphasis added).

a topic without mention of the theistic perspective implies that theism is not necessary to its understanding. Since the religious claim is that theism is the only complete solution, to omit it is therefore tantamount to denying it, but without benefit of refutation.

If the absence of God is as religious as the presence of God, then the enforced exclusion of religion from the public schools and other public forums can be, and has been argued to be, a form of religious establishment in its own right. In Justice Scalia's dissent to the Supreme Court decision *Edwards v. Aguillard*,²⁰³ which ruled Louisiana's Creationism Act unconstitutional,²⁰⁴ the Justice asserted that one harmful effect of censoring creation science was that it violated the Establishment Clause.²⁰⁵ "If Secular Humanism is a religion established by the state, *no book* considered to be secular (for example, in science, literature, or philosophy) could be included in the public school curriculum without violating the [E]stablishment

²⁰³482 U.S. 578 (1987) (holding that the Louisiana Balanced Treatment for Creation Science and Evolution Science in Public Schools Instruction Act was unconstitutional because the Act served no identified secular purpose and primarily promoted a particular religious belief).

²⁰⁴*Id.* at 597.

²⁰⁵*Id.* at 624 (Scalia, J., dissenting). The Supreme Court has held that secular humanism is a religion. U.S. DEPARTMENT OF JUSTICE, *supra* note 43, at 27, would seem not to support this finding, but it is probably in the minority. *But see* *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994). Belief in evolution is a central tenet of that religion. Thus, by censoring creation science and instructing students that evolution is fact, public schools are now advancing religion in violation of the Establishment Clause. Justice Scalia seems to equate evolutionism with secular humanism. To be a secular humanist does require one to advocate evolutionary theory, but accepting evolutionary interpretations does not necessarily make one a secular humanist. Because evolutionary theory is normally secular and scientific except for some specific contexts, at least one court was able to find, contrary to Justice Scalia's view, that to present evolutionary theory is not to transgress the Establishment Clause. *Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980).

Representing views more in keeping with Scalia's dissent, however, John Whitehead and John Conlan offer a particularly strong apology for the traditional place of Christianity within American legal theory. John W. Whitehead and John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Applications*, 10 TEX. TECH L. REV. 1, 15 (1978). They lament the current Supreme Court approach where, "[f]rom a preferred position within the religion clauses, traditional theism has been relegated to the level of all other belief systems." *Id.* at 15. They believe that the teaching of evolution is the undoing of American society. *Id.*

[C]ause."²⁰⁶ Thus, if everything can be religion, then anything the government does can be construed as favoring one religion over another, and again the government is paralyzed, this time by the Establishment Clause. It is for these reasons that some experts²⁰⁷ have advocated a bifurcated definition of religion, and may account for the seeming backpedaling found in *Yoder*.

III. DEFINITIONS OF RELIGION: ANTHROPOLOGICAL ATTEMPTS

Our review of the legal analysis of religion showed that while progress has been made, several problems still remain unresolved. Some of these problems will find their solutions solely within the arena of legal discourse — how many definitions, for example, are required by our particular political system. Other problems, however, can never be solved by law as a self-contained intellectual discipline. Foremost is the concept of "ultimate concern." Lacking any tools of its own to investigate this category, law can only appropriate some other discipline's conclusions.

The fact alone that law must borrow from other disciplines would justify a comparative analysis between law and some other relevant discipline. Nonetheless, the strategy of borrowing from another discipline presupposes a more subtle assumption. The difficult chore of operationalizing "ultimate concern" is worthwhile only if we have some independent assurance that the lines of investigation which led us to that concept are valid, or at least not utterly devoid of reasonable support. Determining whether the "ultimate concern" standard works is worthwhile only if we first know that it is good.

The legal approach to definition in the United States has been independent of the anthropological or even social scientific approaches. Of the many cases reviewed for the prior section, very few, and none from the Supreme Court, cited any outside literature other than theological writings. The courts' disciplinary preferences, therefore, have been free to diverge and to arrive at conclusions which are idiosyncratic and incompatible. This potential divergence provides a test for the reasonableness of the course taken by legal analysis.

²⁰⁶Julie A. Scheib, Note, *Secular Humanism as a Religion within the Meaning of the First Amendment*: *Grove v. Mead School District*, 61 TUL. L. REV. 453, 465 (1986).

²⁰⁷See *supra* notes 28-35 and accompanying text (discussing bifurcated definitions).

Kent Greenawalt states optimistically that "what is religious for the law is [not] widely at variance with what otherwise counts as religious."²⁰⁸ Greenawalt does not, however, demonstrate the applicability of his conclusion. Law and anthropology, as he anticipated, have not significantly diverged, despite every opportunity to do so. As the following sections endeavor to demonstrate, legal scholars have invoked reasoning that echoes within social scientific corpus. The intersection of the law and anthropology is a desirable outcome. Such a conjunction of disciplines compels a conclusion that the outcome is valid by virtue of its having emerged independently from the internal workings of the disciplines' differing axioms and methods.

This validation provides our intellectual triangulation. Insight into anthropology's struggle to define "religion" enables a reexamination of the law's efforts toward this common end.

A. FOUR-PART CLASSIFICATION OF DEFINITIONS

Anthropology is formally the study of cultural man. The discipline is set apart from its nearest academic neighbors by being comparative and cross-cultural, and by relying chiefly upon participant observation for the generation of its relevant data. The literature generated by anthropologists and other social scientists shares with the legal field a confusing array of attempts to define "religion." Early attempts to bring order to this definitional chaos have produced several typologies. For instance, James Leuba offers a three-part classification, including specific intellectual functions, feelings, and will.²⁰⁹ Walter Houston Clark reports that an unsystematic survey of the members of the Society for the Scientific Study of Religion yielded definitions which fell into six broad groups (plus one "indeterminate" category): (1) concepts of the supernatural, spiritual or non-material; (2) concepts regarding ultimates or the ultimate; (3) definitions

²⁰⁸Greenawalt, *supra* note 184, at 757.

²⁰⁹Leuba states:

In the first group, a specific intellectual function or purpose is chosen as the essence of the distinguishing mark of religion; in the second, specific feelings, sentiments, or emotions are singled out as the religious differentiae; in the third, the will — this term being used in its wider meaning, to include desire, cravings, and impulses — is given the place occupied by the intellect or the feelings in the other groups.

JAMES H. LEUBA, A PSYCHOLOGICAL STUDY OF RELIGION: ITS ORIGIN, FUNCTION, AND FUTURE 24-25 (1912).

involving group concepts; (4) ideas concerning the institutional and creedal; (5) ideas emphasizing theology; and (6) ideas of interaction between the inner and outer aspects of life.²¹⁰

More typically, writers have found simple dichotomies most useful. Peter Berger, for example, distills the predominant approaches into the "*substantively* defined, in terms of the meaning contents of the phenomenon [and the] *functionally* defined, in terms of its place in the social and/or psychological system."²¹¹ Such bipartite schemes distinguish between concrete and abstract criteria. Concrete criteria, such as the presence of symbols of supernaturalisms,²¹² are those which are observed in the real world. Abstract criteria, by contrast, reside not in the real world for all to see, but in the minds and subjective experiences of the individual, the presence of which the investigator must infer from assumed relationships to real world observables. Thoughts, ideas, emotions — all of these are abstracts.

This section preserves such bifurcation, but further distinctions within each of the two groups are useful. Concrete definitions are comprised of either content or behavioral — performative criteria. Through concrete definitions the observer seeks to identify religion by what people say or do, such as going to church and joining purportedly religious organizations. The two kinds of abstract definitions are mental and functional, and are identified respectively by the person's emotional or psychological responses to religion (in other words, what it does *to* you), or by the needs fulfilled by religion (what it does *for* you).

1. CONTENT DEFINITIONS

Content definitions seek to identify religion based upon the presence of specific symbols, usually supernatural in nature. The classic example of such a definition is offered by Sir Edward Tylor: "It seems best . . . to claim, as a minimum definition of religion, the belief in Spiritual

²¹⁰Walter Houston Clark, *How do Social Scientists Define Religion?*, 47 J. SOC. PSYCH. 143 (1958).

²¹¹Peter L. Berger, *Some Second Thoughts on Substantive versus Functional Definitions of Religion*, 13 J. SCI. STUDY OF RELIGION 125, 126 (1974).

²¹²Supernaturalisms include any reference to immaterial entities or nonphysical forces. Frequent tokens are "God," "spirit," or "ghost."

Beings."²¹³ Theisms are not the only possible content definitions, but they are the most common, and herein the two will be treated synonymously.

Although Emile Durkheim is discussed more extensively in the following section, his influential distinction between the sacred and the profane is applicable here. According to Durkheim, "[a]ll known religious beliefs, whether simple or complex . . . presuppose a classification of all . . . things . . . into two classes or opposed groups[,] . . . [the] *profane* and *sacred*."²¹⁴ Two readings of the term "sacred" are possible, and differ according to whether "sacred" is assigned a content and works semantically as a synonym for "supernatural." William Paden, for example, seems to use the word in such a manner.²¹⁵ Durkheim, himself, would have overtly eschewed such an interpretation, but it is a possibility which is a logical implication of his own discussion.

By a second reading, however, "sacred" belongs not in a content category, but in an emotional one. According to Marvin Harris's interpretation of Durkheim, "all the basic concepts associated with religion . . . originate in the recurrent experience by which human beings feel the force and majesty of the social group."²¹⁶ Here, the "sacred" is identified

²¹³Edward B. Tylor, *Animism*, in *READER IN COMPARATIVE RELIGION: AN ANTHROPOLOGICAL APPROACH* 9, 10 (W.A. Lessa & E.Z. Vogt, eds., 4th ed. 1979).

²¹⁴EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 37 (Joseph Ward Swain trans., 1965) [hereinafter *DURKHEIM, THE ELEMENTARY FORMS*].

²¹⁵WILLIAM E. PADEN, *RELIGIOUS WORLDS: THE COMPARATIVE STUDY OF RELIGION* 11 (1988). Paden writes:

What characterizes religious behavior is that it takes place with reference to things that are *sacred*. If the old defining referent of religion was "God" . . . the more modern, cross-cultural term is *sacred*. As used here, the term assumes neither the reality nor unreality of what is considered sacred, but simply the fact that people do *take* certain beings, traditions, principles, or objects to be sacred and these serve in turn as the organizing points of reference for defining their world and lives. The sacred can therefore have any content, though to the adherent it is always something of extraordinary power and reality.

Id.

²¹⁶MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE* 478 (1968). In addition, Harris concluded that "[m]en collectively invent the basic categories of religion in order to explain the unseen but felt force of the collective consciousness." *Id.*

by its emotional impact, not by its content, and becomes synonymous with Rudolf Otto's "numinous," discussed below.²¹⁷

The word "sacred," therefore, is itself a problematic concept, and one which can shed little light upon the meaning of "religion." Moreover, the sacred-profane distinction that Durkheim suggests to uniquely characterize religion, necessarily fails because, as both Jack Goody²¹⁸ and Martin Southwold²¹⁹ conclude, this bifurcation of reality is not a cultural universal, and when applied inappropriately leads to many classification decisions that contravene common sense.

Some social scientists have gravitated toward content definitions, largely because of their dissatisfaction with the alternatives,²²⁰ or because their larger theoretical constructs demand content definitions.²²¹ Rodney Stark, however, offers the best defense of content definitions. In an early work, Stark advocated a scheme whereby religions were viewed as one type of value orientation, defined as those "over-arching and sacred systems of symbols, beliefs, values, and practices concerning ultimate meaning which men shape to interpret their world."²²² These systems come in two general types, or "perspective realms," the "religious" and "humanist."²²³

²¹⁷See *infra* notes 252-58 and accompanying text (discussing Otto's "numinous" definition of religion).

²¹⁸Jack Goody, *Religion and Ritual: The Definitional Problem*, 12 BRIT. J. SOC. 142 (1961).

²¹⁹Martin Southwold, *Buddhism and the Definition of Religion*, 13 MAN 362 (1978) [hereinafter Southwold, *Buddhism*].

²²⁰See, e.g., Berger, *supra* note 211, at 132-33.

²²¹See, e.g., MELFORD SPIRO, *CULTURE AND HUMAN NATURE: THEORETICAL PAPERS OF MELFORD SPIRO* (Benjamin Kilborne & L.L. Langness eds., 1987). For a more detailed discussion of Spiro, see *infra* notes 270-82.

²²²CHARLES Y. GLOCK & RODNEY STARK, *RELIGIONS AND SOCIETY IN TENSION* 9 (1965).

²²³Glock and Stark explain:

In one realm, all value orientations include some statement affirming the existence of a supernatural being, world, or force, and predicate their ultimate solutions on this assumption. We shall call these *religious perspectives*. Value orientations in the second realm do not posit a supernatural, but limit their statements about ultimate meaning to the material world, although often to past or future versions of it. We may refer

Many recognize Stark's distinctions between religious and humanist perspectives, but still refer to both perspectives as religions, distinguishing between the supernatural and the secular. In a later work, however, Stark expressly argued against this reading, stressing that his scheme is better because it is theoretically productive.²²⁴ According to Stark, moreover, the religious and humanist perspectives are not merely variant value orientations; rather, the former is hierarchically superior to the latter.²²⁵

Introducing new terminology, Stark defines religions as "systems of general compensators based on supernatural assumptions."²²⁶ By "compensator," Stark refers to the substitutes "for rewards that are unavailable to many, and for those not directly available to anyone."²²⁷ Stark argued that while not all compensator systems need be supernatural and thereby religious, those which are not supernatural are demonstrably inferior.²²⁸ Failure to make this distinction by refusing to restrict religion to supernaturalisms, Stark suggests, prevents one from observing the many patterns of involvement with value orientations.²²⁹ Hence, he adamantly asserts that "a religion lacking supernatural assumptions is no religion at all."²³⁰

If content definitions of religion are to be criticized, Stark at least allows the criticism to occur on meaningful ground. By venturing as far as

to this second type as *humanist perspectives*.

Id. at 10-11.

²²⁴Rodney Stark, *Must All Religions Be Supernatural?*, in *THE SOCIAL IMPACT OF NEW RELIGIOUS MOVEMENTS* 159, 163 (Bryan Wilson ed., 1981) [hereinafter Stark, *Supernatural*].

²²⁵*Id.* at 161.

²²⁶*Id.* at 162.

²²⁷*Id.* at 160-61. In addition, Stark explains that "humans will often exchange rewards of considerable value over a long period of time in return for compensators, in the hope that a reward of immense value will eventually be forthcoming in return." *Id.* at 161.

²²⁸*Id.* at 163.

²²⁹Stark argues that his distinction between supernatural religious and secular value orientation enables him to make predictions about "the decline of liberal denominations, secularization as a self-limiting and unstable phenomenon, [and] new religious as the expected response to secularization of older faiths." *Id.* at 160.

²³⁰*Id.* at 159.

he does along his line of thinking, Stark has left far behind his original conception of religion.²³¹ Within his formulation, if real religion is effective religion, then supernaturalisms are less important than *belief* in supernaturalisms, since it is one's willingness to accept the compensators which renders the benefit. Supernaturalisms are not better because they are supernatural, but because their being supernatural somehow contributes to their being more believable and acceptable as compensators for postponed rewards, probably because, by virtue of being supernatural, they are thereby less falsifiable.

Most of the phenomena which Stark cites²³² can be accounted for by a continuum of religious efficacy independent of form. His defense of the definition of religion as necessarily supernaturalistic fails not because it is wrong, but because it is superfluous to his more substantial and valuable suggestions.²³³ In the context of advocating a content definition, he speaks in terms of functions and beliefs. This transition should immediately suggest the inadequacy of his initial assertion that content is the crucial element for this category.

2. BEHAVIORAL — PERFORMATIVE DEFINITIONS

The second type of definition specifying concrete criteria is the behavioral — performative. These definitions attempt to identify religion by

²³¹Stark himself states:

In past essays, I have argued that to lump together supernatural and naturalistic faiths is to make it needlessly difficult to explore conflicts between the two or to pursue the rather different capacities present in each. Now I am prepared to go much farther. . . . I maintain that there can be no wholly naturalistic religion: a religion lacking supernatural assumptions is no religion at all.

Id.

²³²Stark examines several empirical phenomena such as declining church membership, geographic patterns, and other social developments that have lead to the creation of non-traditional religious organizations. *Id.* at 163-75.

²³³Stark's more valuable suggestions, including his dual emphasis that (1) people seek out religious forms which are psychologically satisfying; and (2) not all religious forms are equal in their ability to meet these needs for individuals, would greatly advance studies of religious conversion, if they were taken more seriously. *See generally id.*

what people do, that is, through their "rituals."²³⁴ Whatever else is entailed by religion, behaviors are its most salient features. Religions would have little need for legal protection if actions were not part of their essence.²³⁵ The anthropologist, who is nothing if not an observer, also tends to emphasize behaviors and to reduce religion down to ritual.²³⁶

Durkheim's multifaceted approach to religion also highlights this behavioral dimension. In his 1915 masterwork, *The Elementary Forms of Religious Life*, Durkheim concludes that "[i]n all history, we do not find a single religion without a Church," "church" having been defined immediately before as "common practices."²³⁷

Searching for a usable definition of religion, Durkheim would like very much to rely on external behavior.²³⁸ Unfortunately, as he so rightly points out, ritual, even if it is typical of all religion, does not characterize *only* religion.²³⁹ Looking for something distinctive about religious rituals, Durkheim is drawn toward their compulsory nature. While morality and law

²³⁴A ritual is any behavior set which is repeated, usually with expectation that ritual performance will either bring good things, or avert bad ones. Thanksgiving dinners can include many rituals, for example, specific food items, as can one's morning ablutions.

²³⁵The belief-action dichotomy developed by Reynolds and Davis, see *supra* note 49, argues that beliefs have inviolate protections, but the actions motivated by these beliefs have no such guarantee.

²³⁶MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 65 (1984) ("In dropping both the words Sacred and Magic, Radcliffe-Brown seemed to restore the thread of continuity between secular and religious ritual. . . . Now we have got to the position in which Ritual replaces Religion in anthropologists' writings.").

²³⁷DURKHEIM, THE ELEMENTARY FORMS, *supra* note 214, at 44. Religion for Durkheim is synonymous with public ritual.

²³⁸"There is a category of religious facts which is commonly accepted as being especially characteristic of religion and which as a result ought to give us what we are looking for [a definition], namely ritual." Emile Durkheim, *Concerning the Definition of Religious Phenomena*, in DURKHEIM ON RELIGION: A SELECTION OF READINGS WITH BIBLIOGRAPHIES 87-88 (W.S.F. Pickering ed., 1975) [hereinafter Durkheim, *Concerning the Definition*].

²³⁹"There are no social practices . . . which do not have the same characteristic. . . . If we have been unable to make it the prime element of our definition, it is because, considered by itself and in its intrinsic characteristics, it is indistinct from morality and law." *Id.* at 88, 91.

are said by Durkheim to compel obligatory *practices*,²⁴⁰ religious ritual demands obligatory *beliefs* or *representations*.²⁴¹ Thus, "phenomena held to be religious consist in obligatory beliefs, connected with clearly defined practices which are related to given objects of those beliefs."²⁴²

Durkheim's approach is flawed in much the same way as was Stark's. In an effort to be thorough, Durkheim takes with one hand what he has given with the other; he concedes that not all religious phenomena are of the character he has specified.²⁴³ While he seeks to minimize individualistic religion when compared to his socially cohesive and obligatory religion, Durkheim does not shirk from naming the former a "religion." Indeed, having warned that individualistic religion can be only a "secondary consideration," he amends his definition, so that, "[i]n addition, the optional beliefs and practices which concern similar objects or objects assimilated into the previous ones, will also be called religious phenomena."²⁴⁴

The combined effect is that religion consists of those beliefs and practices, both optional and obligatory, which are directed toward sacred objects.²⁴⁵ In other words, any belief, and any practice, so long as it is directed toward the sacred, is religious. By overspecification, Durkheim's defining criteria cancel themselves out, leaving an ambiguous and unintended emphasis upon the object of religion. Consequently, an analysis of

²⁴⁰*Id.* at 90.

²⁴¹*Id.*

²⁴²*Id.* at 93.

²⁴³Durkheim states:

If one does not want to be open to grave misunderstanding, it is necessary to be aware of confusing a free, private, optional religion, fashioned according to one's own needs and understanding, with a religion handed down by tradition, formulated for a whole group and which it is obligatory to practice.

Id. at 96.

²⁴⁴*Id.* at 98.

²⁴⁵It is true one can avoid all these difficulties if one says in a general way that ritual is the totality of practices concerned with *sacred things*; even if there are rites without gods, the objects to which they refer are always by definition of a religious nature. *Id.* at 88.

Durkheim's work leads to divergent readings of "sacred" and something that looks very much like a content definition.

Like Stark, Durkheim has unintentionally changed focus. He states initially that "only the exterior and apparent form of religious phenomena is immediately accessible to observation; [and that] it is to this therefore that we must apply ourselves."²⁴⁶ Applying this method, Durkheim constructs his definition by examining ritual and isolating "obligatoriness" as a defining attribute.²⁴⁷ The quality of being obligatory, however, is not "external and apparent," nor is it "immediately accessible to observation" because obligatoriness is a state and not an event.²⁴⁸ Again, as was concluded with Stark, this change in emphasis may indicate the original definitional strategy's weakness.

3. MENTAL DEFINITIONS

Rather than appealing to one's senses, pursuant to the concrete strategy, abstract definitional criteria are not directly perceivable. These variables exist only in the subjective experience of the individual and often refer to states of being. Empirical indicators, such as observed behaviors, are held to be important only to the extent which they presumably signify the operation of unobservable variables and processes. The first of two categories within this class are mental definitions.

Although encompassing a wide variety of elements, mental definitions have in common the assumption that what makes religion "religion" exists in one's mind. That definition, of course, varies. To some, religion is an emotion; to others, it is a belief; to still others, it is an outcome of psychodynamic processes.

a. EMOTIONAL CRITERIA

Among those who regard religion as foremost an emotion are Erich Fromm, who dissects the religious experience into wonder, concern, and an attitude of oneness,²⁴⁹ and William James, who defined religion as an

²⁴⁶*Id.* at 87.

²⁴⁷*Id.* at 87-93.

²⁴⁸*Id.*

²⁴⁹ERICH FROMM, *PSYCHOANALYSIS AND RELIGION* 94-95 (1950).

apprehended "*relation to . . . the divine*."²⁵⁰ James clarified that what is divine is whatever "the individual feels impelled to respond to solemnly and gravely, and neither by a curse nor a jest."²⁵¹

Rudolf Otto epitomized the emotional approach in *The Idea of the Holy*.²⁵² When defining religion Otto attempted "to analyze . . . the *feeling* which remains where the *concept* fails."²⁵³ The concept of deity, he explained, is partly rational, and partly irrational.²⁵⁴ The rational deity usually receives the emphasis because language is designed to convey rational meanings.²⁵⁵ "[H]ence[,] expositions of religious truth in language inevitably tend to stress the 'rational' attributes of God."²⁵⁶ The core of religion, however, resides not in the rationalizations, but in the ineffable "holy," shorn of its intellectualized content.²⁵⁷ Otto intended to "invent a special term to stand for 'the holy' *minus* its moral factor or 'moment', and . . . minus its 'rational' aspect altogether."²⁵⁸

²⁵⁰WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31-32 (1916).

²⁵¹*Id.* at 31, 38. James's definition is cited approvingly and repeatedly by the Second Circuit. See, e.g., *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984) (citing with approval James's definition of religion); *United States v. Sun Myung Moon*, 697 F.2d 301 (2d Cir. 1983) (citing James in support of the court's position that a broad, more subjective definition of religion is necessary in protecting the constitutional right to the free exercise of religion).

²⁵²RUDOLF OTTO, *THE IDEA OF THE HOLY* (2d ed. 1950).

²⁵³*Id.* at xxi. The general thrust of Otto's argument is that whatever we can say about god rationally, there is a greater aspect to the deity which is ineffable. A direct encounter with the deity, which Otto says is necessary to understand him, is the only way to gain knowledge of the irrational, numinous aspect of deity. *Id.* at 8.

²⁵⁴*Id.* at 3.

²⁵⁵*Id.*

²⁵⁶*Id.* at 2.

²⁵⁷*Id.* at 4-5.

²⁵⁸*Id.* at 6. Otto stated:

It will be our endeavor to suggest this unnamed Something to the reader as far as we may, so that he may himself feel it. There is no religion in which it does not live as the real innermost core, and without it no religion would be worthy of the name. . . .

The advantage of emotional definitions such as Otto's is that they underscore the importance which people attach to their religions. Any theorizing which does not allow, much less account for this affective dimension has missed something vital. That lack would correctly qualify as a fatal omission for any proposed definition of religion.

As early as 1912, however, James Leuba identified the flaw in Otto's strategy. "The truth of the matter is . . . that each and every human emotion and sentiment may appear in religion, and that no affective experience as such is distinctive of religious life."²⁵⁹ There exists, in other words, no emotional experience which is evoked only in the religious context.²⁶⁰ The emotions proposed, then, must be present in greater or lesser degrees in religion than in other institutions or beliefs, an approach which, thus far, has escaped clear articulation, much less reliable operationalization.

b. COGNITIVE CRITERIA

The second category under the heading of mental definitions is the cognitive, and refers to those propositions in which one "believes," "has faith," or to which one is "committed." While many writers imply the presence of beliefs,²⁶¹ few formally advocate belief as a defining quality of religion.²⁶²

While it is unclear why social scientists have not exploited the state of believing more often, there are serious obstacles to its utility in identifying a unique culture set. If believing or having faith is to be restricted to religion, then other sets formally defined by the social sciences must exclude this variable. The possibilities of this, however, are minimal. In 1931, Kurt

. . . I shall speak, then, of a unique 'numinous' state of mind, which is always found wherever the category is applied.

Id. at 6-7.

²⁵⁹LEUBA, *supra* note 209, at 37.

²⁶⁰See Wilhelm Keilbach, *Psychology of Religion*, in 5 SACRAMENTUM MUNDI: AN ENCYCLOPEDIA OF THEOLOGY 278, 279 (1970).

²⁶¹See *supra* note 213 and accompanying text (discussing Tylor's minimal definition).

²⁶²Of twenty-nine definitions identified for inclusion within the mentalist category, none emphasize beliefs at the expense of other, usually emotional criteria. Cf. James M. Donovan, *Defining Religion: Death and Anxiety in an Afro-Brazilian Cult*, Appendix I, (1994) (unpublished Ph.D. dissertation, Tulane University) [hereinafter Donovan, *Afro-Brazilian Cult*].

Gödel "showed that [Whitehead and Russell's] *Principia*, or any other system within which arithmetic can be developed, is *essentially incomplete*. In other words, given *any* consistent set of arithmetical axioms, there are true arithmetical statements that cannot be derived from the set."²⁶³ These problematic statements fall outside the system, and must be accepted on faith alone.

Such necessary incompleteness applies to any formal system. Nonetheless, as J. van Heijenoort notes, "all sciences other than mathematics are so remote from a complete formalization that [Gödel's] conclusion remains of little consequence outside mathematics."²⁶⁴ Still, since that degree of formalization is the ideal state toward which sciences aspire, the implication is that all such systems have some form of this belief component.

Yet few people today would regard mathematics as a religion, at least simply because it has inherently unprovable assumptions taken utterly on faith. Thus any attempt to apportion cultural reality into those parts which necessarily include beliefs and those which do not must fail since, to the extent that both the divided reality and the act of dividing partake of belief-grounded systems, everything becomes religious. However important believing is to religion, believing cannot be any more the heart of religion than could ritual.²⁶⁵

The most that can be ventured is that, if beliefs are organized hierarchically, religious beliefs are cognitively superior.²⁶⁶ Assuming that all beliefs lower than belief "X" in the hierarchy cannot overtly contradict X, then "religion" is that belief which, by being at the top of the hierarchy, forces every lower belief to comply. This view is perhaps one way of capturing the dimension of "commitment" which also arises during efforts to characterize religion.²⁶⁷

²⁶³ERNEST NAGEL & JAMES R. NEWMAN, GÖDEL'S PROOF 58-59 (1958).

²⁶⁴J. van Heijenoort, *Gödel's Theorem*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 348, 356 (Paul Edwards, ed., 1967).

²⁶⁵This discussion supplements that already offered above, relative to Austin's attempt to make "faith" the applicable legal standard. See *supra* notes 190-92 and accompanying text.

²⁶⁶Being "superior" does not refer to having content on the broadest, cosmic, universal, or ultimate level. Rather, it refers to the priority which it carries, and influence which it exerts, over the subordinated belief structures.

²⁶⁷Cf. Jerome Tobacyk, *Death Threat, Death Concerns, and Paranormal Belief*, in PERSONAL MEANINGS OF DEATH: APPLICATIONS OF PERSONAL CONSTRUCT THEORY TO CLINICAL PRACTICE 115 (1984).

c. PSYCHODYNAMIC CRITERIA

Analogous to the first two definitions, the third and final type of mental definition emphasizes the mindset of the informants. This definition differs, however, in attributing the emotions and beliefs explicitly to underlying psychodynamics. Sigmund Freud's *The Future of an Illusion* is, of course, the prototype of this approach.²⁶⁸ Freud concluded this essay with his famous statement that "[r]eligion would thus be the universal obsessional neurosis of humanity."²⁶⁹

Among anthropologists, Melford Spiro, in particular, has amassed an impressive body of work in this category.²⁷⁰ At first glance, he might appear to be a classic representative of the content strategy of definition because he defines "religion" as "an institution consisting of culturally patterned interaction with culturally postulated superhuman beings."²⁷¹ Spiro attempts to credit this emphasis upon the superhuman dimension to the legitimate respect which must be paid to "the criterion of intra-cultural intuitivity; at the least, [the definition] should not be counter-intuitive."²⁷²

It is unclear, however, whether Spiro's definition passes his own test. According to William Herbrechtsmeier, "the 'superhuman' concept wreaks

²⁶⁸Freud writes:

[Religious ideas], which are given out as teachings, are not precipitates of experience or end-results of thinking: they are illusions, fulfillments of the oldest, strongest and most urgent wishes of mankind. The secret of their strength lies in the strength of those wishes. As we already know, the terrifying impression of helplessness in childhood aroused the need for protection — for protection through love — which was provided by the father; and the recognition that this helplessness lasts throughout life made it necessary to cling to the existence of a father, but this time a more powerful one. Thus the benevolent rule of a divine Providence allays our fear of the dangers of life.

SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 30 (1961).

²⁶⁹*Id.* at 43.

²⁷⁰*See generally* SPIRO, *supra* note 221.

²⁷¹*Id.* at 197.

²⁷²*Id.* at 192.

havoc within the belief system of Buddhism,²⁷³ emphasizing the wrong thing in Mahayana²⁷⁴ versions and relegating Theraveda²⁷⁵ schools out of religion altogether, both results going against the grain of 'intracultural intuitivity.'²⁷⁶ Even more perplexing is the impact of Spiro's standard does to such Protestant theologians as Paul Tillich.²⁷⁷

Spiro did not arrive at his formulation unmotivated. The psychodynamic edifice which he constructs is possible only if religion is restricted to those culture sets which profess an active belief in superhumans. This relationship may have influenced his unique choice of terms. A broader definition would have rendered his explanatory model inadequate.

In attempting to explain "why religious actors believe in the reality of the mythicoreligious world,"²⁷⁸ Spiro first notes the benefits which can be rendered by participation in the system: "religion is the cultural system *par excellence* by means of which conflict-resolution is achieved," and serves as

²⁷³See W.L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 72 (1980) (defining Buddhism as "[t]he religion founded by Gautama Buddha in the 6th century B.C., [a]rising in the Eastern provinces, far from the Indus Valley, [in the] center of [the] Vedic culture.")

²⁷⁴Mahayana Buddhism emphasizes a belief in the *bodhis attva*: "the savior who[,] with universal love for all beings[,] postpones nirvana in order to work through countless additional rebirths for their salvation." *Id.*

²⁷⁵Theraveda or Hinayana Buddhism "makes it clear that there is no God; and hence the burden of salvation belongs to the individual alone." *Id.*

²⁷⁶William Herbrechtsmeier, *Buddhism and the Definition of Religion: One More Time*, 32 J. SCI. STUD. OF RELIGION 1, 1 (1993) (utilizing several non-theistic Buddhist religions to argue that "the belief in an reverence for superhuman beings cannot be understood as the chief distinguishing characteristic of religious phenomena").

²⁷⁷Herbrechtsmeier states:

While we would not want to say that Bultmann and Tillich were proponents of a nontheistic religion, their understanding of God was so sophisticated that to describe it as reverence for "superhuman beings" . . . would be the grossest of distortions.

Id. at 9.

²⁷⁸SPIRO, *supra* note 221, at 183. "Mythicoreligious" beliefs are beliefs that refer to unreal worlds of great significance, such as the "dream time" of Australian aborigines.

"a highly efficient culturally constituted defense mechanism."²⁷⁹ Not just any system, however, will elicit the necessary emotional reaction from the participant; it must partake of a "correspondence between the symbols in which cultural doctrines are represented and their representation as beliefs in the minds of social actors."²⁸⁰ Every different psychology will require a unique religious form to elicit the desired response of committed belief. For religion to be effective, then, a match must exist between the institution and some level of the psychology of the person; the benefits rendered by participation in the institution motivate the individual to seek out such a match.²⁸¹

Having been developmentally equipped with a symbolic vocabulary for superhuman beings, Spiro suggests that such a vocabulary is used to provide the necessary match between the person and the social institution *via* the former's projections. It also might be surmised that the match is not

²⁷⁹*Id.* at 159. The benefits include the opportunity to vent emotional conflicts and avoid abnormal behavior:

[A]bnormal behavior can be expected to appear under one of these conditions: (1) when emotional conflict is idiosyncratic, so that cultural means are not available as potential bases for culturally constituted defense mechanisms; (2) when emotional conflict is modal, and cultural means are available for conflict resolution, but these means have been inadequately taught or inadequately learned; (3) when under conditions of rapid social change, culturally constituted defense mechanisms are unavailable, either because older institutions have been discarded or because the new situation creates a new set of conflicts.

Id.

²⁸⁰*Id.* at 183.

²⁸¹Spiro writes:

The theory, briefly, states that it is in the context of the family that the child experiences powerful beings, both benevolent and malevolent, who — by various means which are learned in the socialization process — can sometimes be induced to accede to his desires. These experiences provide the basic ingredients for his personal projective system which, if it corresponds (structurally, not substantively) to his taught beliefs, constitutes the cognitive and perceptual set for the acceptance of these beliefs. Having had personal experience with 'superhuman beings' and with the efficacy of 'ritual', the taught beliefs reenforce, and are reenforced by, his own projective systems.

Id. at 202 (citations omitted).

fortuitous, that the institutions assumed their current form as a direct result of the participant's projective systems. Thus, in some sense, the experience of being a helpless child "causes" religion, or at least specific religious forms. Religion is therefore explained, at least in part, as being the culturally appropriate outlet for the ambivalent emotions one experiences toward one's parents during infancy and childhood.²⁸²

There is clearly much profit to be derived from the psychodynamic approach. For example, such an approach allows Spiro to predict accurately that "religious beliefs will vary systematically with differences in family (including socialization) systems."²⁸³ It, however, is entirely possible that all those who rely on Freud for this point are overreaching themselves. As W.W. Meissner suggests:

The weight of the argument supports no conclusion further than that religion often serves as a matrix within which the displaced fantasies of infantile residues find expression. It is another matter to say that such projections serve an originative function as well.²⁸⁴

In addition, if the psychodynamics identified by Freud, and adopted by Spiro, do not in fact generate religion, then their necessary presence is unestablished, rendering their utility as definitional criteria dubious.

4. FUNCTIONAL DEFINITIONS

Functional definitions often include terms that remind one of emotion or behavior definitions. This category, however, stresses the fact that religion is a solution to a problem, fulfilling some need which, if ignored, would redound to the detriment of the organism. Religion, in other words, is identified by the needs of its adherents.²⁸⁵

As a class, functional definitions are "ipsative."²⁸⁶ What, then, is the

²⁸²SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 20-21 (1961).

²⁸³SPIRO, *supra* note 221, at 203.

²⁸⁴W.W. MEISSNER, PSYCHOANALYSIS AND RELIGIOUS EXPERIENCE 60 (1984).

²⁸⁵*Cf.* JOHN DEWEY, A COMMON FAITH 14 (1934).

²⁸⁶Andrew J. Weigert, *Whose Invisible Religion? Luckmann Revisited*, 35 SOC. ANALYSIS 181, 184 (1974). Weigert explains:

unique religious task? "Religious faith," Bronislaw Malinowski writes, "establishes, fixes, and enhances all valuable mental attitudes, such as reverence for tradition, harmony with environment, courage and confidence in the struggle with difficulties and at the prospect of death."²⁸⁷ While religion augments positive mentalisms, it has more of a profound effect by minimizing the negatives. Many cults and rituals embody and maintain anxiety-reducing beliefs. These beliefs have an immense biological value.²⁸⁸ As Clyde Kluckhohn observes, Malinowski's model would explain religious adherents' "unremitting toil and steadfastness of purpose," despite the lack of obvious benefits; "those individuals whose lives and work are ostensibly devoid of reward in the usual sense of the term are nevertheless reinforced and sustained by the gratification that comes from reduction of conscience-anxiety, or guilt."²⁸⁹

Clifford Geertz categorizes the conscience — relief definitions as "confidence theories,"²⁹⁰ and offers a complicated definition for religion. Geertz's definition focuses on the creation of moods through a system of symbols.²⁹¹ According to Geertz, these "moods" provide a perception of

A functional ipsative definition is one in which the specificity, substantive content, and label for a social phenomenon are predicated on the basis of a function identified and categorized by the investigator. The investigator categorizes and labels a function, and the function "ipsatizes" the labeling of the phenomenon. . . . Thus, whatever specific substantive content the investigator locates as performing that function is religion.

Id.

²⁸⁷BRONISLAW MALINOWSKI, *MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS* 89 (1948).

²⁸⁸*Id.* at 89-90. For a description of the negative effect of chronic anxiety on the organism, see Donovan, *Afro-Brazilian Cult* *supra* note 262, at chp. 5. The health benefits of any practice which reduces the level of this anxiety would translate into higher quality of life. *Id.*

²⁸⁹CLYDE KLUCKHOHN, *MIRROR FOR MAN: THE RELATION OF ANTHROPOLOGY TO MODERN LIFE* 214 (1985).

²⁹⁰Clifford Geertz, *Religion: Anthropological Study*, in 13 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 398, 401 (David L. Sills, ed., 1968) [hereinafter Geertz, *Anthropological Study*].

²⁹¹CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 90 (1973) [hereinafter GEERTZ, *THE INTERPRETATION*].

reality and general order to human existence.²⁹² In other words, "[i]n religious belief and practice a people's style of life, what Clyde Kluckhohn called their '*design for living*,' is rendered intellectually reasonable,"²⁹³ and it is imperative that religion perform this function.²⁹⁴

As would be expected from a functional ipsative definition, Geertz's definition encompasses much that is not routinely studied by anthropologists under the rubric of religion.²⁹⁵ Both Berger and Spiro view the unorthodox nature of Geertz's approach as the weakness of functional definitions. Tillich, however, would agree with Geertz.²⁹⁶ On the other hand, Geertz would exclude cultural data that others would unequivocally include within religion.²⁹⁷

Talal Asad judges Geertz's essay "[as] perhaps the most influential, certainly the most accomplished, anthropological definition of religion to

²⁹²*Id.* Geertz writes:

(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men [and women] 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.

Id.

²⁹³Geertz, *Anthropological Study*, *supra* note 290, at 406.

²⁹⁴Geertz states:

Man depends upon symbols and symbol systems with a dependence so great as to be decisive for his creatural viability and, as a result, his sensitivity to even the remotest indication that they may prove unable to cope with one or another aspect of experience raises within him the gravest sort of anxiety.

GEERTZ, *THE INTERPRETATION*, *supra* note 291, at 99.

²⁹⁵Geertz's own discussion illustrates this point: "A man can indeed be said to be 'religious' about golf, but not merely if he pursues it with passion and plays it on Sundays: he must also see it as symbolic of some transcendent truths." *Id.* at 98.

²⁹⁶See Tillich, *supra* note 109, at 36.

²⁹⁷Geertz writes, "if [religious ritual] is truly automatic or merely conventional it is not religious." GEERTZ, *THE INTERPRETATION*, *supra* note 291, at 113.

have appeared in the last two decades."²⁹⁸ Despite its intellectual attractiveness, however, it provides a practically useless standard by which to identify religion. Having elaborated at great lengths as to what religion is conceptually, and what it does psychologically and socially, he never tells us how to recognize it in the field. How, for instance, are we to know whether golfing is or is not "symbolic of transcendent truths," or whether church attendance is "truly automatic or merely conventional?"

Despite the infirmities of the functional approach, there is substantial reason to continue Geertz's line of investigation. While no consensus exists that the phenomena collocated by functional definitions are "religion," few have argued that the collection of instances identified by functional definitions as "religion" is anthropologically meaningless. Hence, the functional approach appears as the most workable definition examined thus far.

B. CONJUNCTIVE AND GENERATIVE DEFINITIONS

None of the four major social scientific definitions reviewed, when strictly applied, are without significant limitations. Stated most simply, those definitions which can be operationalized are theoretically meaningless, and those which are most meaningful have not yet been operationalized.

The largest effort has attempted to insert meaning into operational strategies. Toward this end, many writers propose definitions which combine the four types in various ways.²⁹⁹ Hence, because each of the four definitional strategies discussed includes an observation of high intuitive relevance, any definition which receives broad consensus will incorporate features of content, behavior, psychologism, and function.

All approaches to combination, however, are not equivalent. There are two types. The first method attempts to join the different dimensions as though stringing separate, independent beads onto one string. Religion here is X, Y and Z, with no necessary interrelationship between the variables other than their co-occurrence within the category; this approach may be termed the "conjunctive."³⁰⁰

The "generative" approach is the alternative combinatory method. This approach includes two or more of the four major definitional approaches

²⁹⁸Talal Asad, *Anthropological Conceptions of Religion: Reflections on Geertz*, 18 MAN 237 (1983).

²⁹⁹In fact, most of the definitions cited herein are actually of this kind.

³⁰⁰See Wesley Raymond Wells, *Is Supernaturalistic Belief Essential in a Definition of Religion?* 8 J. PHIL. 269, 270-71 (1921); JAMES, *supra* note 250, at 31.

and interprets them hierarchically. The definitional approaches that appear at the bottom of the hierarchy are said to be present due to the implications of the first; the higher criterion, in other words, generates the others.³⁰¹

A generative definition entails fewer independent variables, since the presence of other dimensions are motivated by the features of the first. Conjunctive definitions, by contrast, while attempting to cover the same empirical territory, do so by the less convincing method of arbitrarily concatenating elements. Generative definitions, therefore, are preferred according to a standard of theoretical coherence and consistency.

It is difficult to see how content definitions can be used generatively. No necessary, or even likely, implications can be drawn about behavior, emotions, or function simply from the fact that supernaturalisms are invoked. Similarly, behavior and the "mental" facets of religion seem limited in their theoretical entailments despite recurring correlations with the other major definitional approaches. Only the functional approach holds promise of being truly generative.

For example, assuming function X, as Stark suggested, supernaturalisms could be exceptionally proficient at fulfilling this function.³⁰² This cognitive preference for ultimate compensators might then be reinforced by Spiro's psychodynamic scheme.³⁰³ Religions could thereby preponderantly include such supernaturalisms as those patterned after child-parent interactions.

If function X falls within Geertz's "confidence theories,"³⁰⁴ then characteristic emotional accompaniments could be expected with the fulfillment of the function. This expectation feeds back into the content consideration, for it would make sense that supernaturalisms are highly effective where the function is related to death and other existential issues.

Finally, where X is essential to the individual's and society's healthy functioning, social ritual and other behavior sets can be expected to serve as reinforcers maintaining confidence in, and adherence to the symbol system underlying the function. Movement away from a functional statement of religion to one of every other major definitional approach becomes possible. The generative functional definition of religion, therefore, appears to be the

³⁰¹See, e.g., MONIQUE AUGRAS, *O DUPLO E A METAMORFOSE: A IDENTIDADE MÍTICA EM COMUNIDADES NAGÔ* 14 (1983).

³⁰²Stark, *Supernatural*, *supra* note 224, at 159 (stating that all religious perspectives include some statement affirming the existence of a supernatural being, world, or force).

³⁰³See SPIRO, *supra* note 221, at 158-59.

³⁰⁴See Geertz, *Anthropological Study*, *supra* note 290, at 400-02.

strategy most compatible with common sense expectations of "religion," as well as with the more rigorous criteria demanded for scientific attention.

IV. COMPARING THE LEGAL AND THE ANTHROPOLOGICAL

Law and anthropology have each addressed the problem of how to define and identify religion without any acknowledged cognizance of the other. This unfortunate isolation, however, could potentially fill two voids in legal reasoning. First, such disciplinary independence can provide some independent verification that the legal trends identified are attributable less to idiosyncratic disciplinary biases than to features entailed by the problem. Second, the social sciences may be able to do what law has thus far failed to accomplish, articulate an intellectually acceptable definition which is also methodologically operationalizable.

A. INDEPENDENT VERIFICATION OF THE LEGAL TREND TOWARD A STRUCTURAL — FUNCTIONALIST UNDERSTANDING OF RELIGION

The legal definitions of religion match precisely the four major anthropological definitions.³⁰⁵ Importantly, no decision offers a completely

³⁰⁵For examples of cases utilizing a content definition, see *United States v. Macintosh*, 283 U.S. 605 (1931) (declaring that religious freedom acknowledges "the duty of obedience to the will of God"); *Davis v. Beason*, 133 U.S. 333 (1890) (defining religion as "one's view[] of his relations to his Creator"); *George v. United States*, 196 F.2d 445 (9th Cir. 1952) (characterizing religion as "couched in terms of the relationship of the individual to a Supreme being"); *Berman v. United States*, 156 F.2d 377, 380 (9th Cir. 1946) ("Faith in a supreme power above and beyond the law of all creation mollifies our fears and satisfies our longings."). For cases utilizing a performative definition, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (declaring that religion entails the right to freely exercise religious beliefs); *Womens Services v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979) ("[Religion is] limited at least to a belief of an adherent to an organized, nontheistic group."); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. 1957) (defining religion as "the service and adoration of God or a god as expressed in forms of worship").

For cases utilizing a mental definition, see *United States v. Ballard*, 322 U.S. 78 (1944) (declaring that religion "embraces the right to maintain theories of life and of death and of the hereafter"); *Malnak v. Maharishi Mahesh Yogi*, 592 F.2d 197 (3d. Cir. 1979) (declaring that religion "now includes mere affirmation of belief in a supreme being"); *Berman*, 156 F.2d at 380 (stating that faith carries on beyond all understanding).

For cases utilizing a functional definition, see *United States v. Welsh*, 398 U.S. 333 (1970) (arguing that religion encompasses beliefs occupying "a place parallel to that filled by . . . God"); *United States v. Seeger*, 380 U.S. 163 (1965) (asserting that religion is a belief in a relation with a "Supreme Being involving duties superior to those arising from

novel approach to the problem of defining and identifying religion, that is, one not found in anthropology. The social scientific typology is comprehensive, and is able to organize the data from an independent discipline without any unseemly "remainders."³⁰⁶ Thus, whatever the Supreme Court decides religion is, it will take a form previously analyzed.

While the Court has handed down decisions utilizing each approach, it has not done so randomly. *Macintosh* was the last decision favoring a content definition.³⁰⁷ At no time after 1930, then, was a content criterion considered legally viable.

The mental definitional approach was the next avenue selected. In 1943, the *Ballard* Court attempted to incorporate psychological states such as sincerity or having faith.³⁰⁸ As Herman summarizes, "[t]he *Ballard* case . . . heralded the movement toward a content-free definition of religion."³⁰⁹ While the Court continued to maintain a sincerity standard, it was less a

any human relation"); *United States v. Kauten*, 133 F.2d 703 (2d. Cir. 1943) ("Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow men and to his universe.").

Technically, the decisions that utilize a functional definition speak only in terms of structure, and not of function. Structure, however, has always had an intimate relationship with function, as is most evident in whole schools of architectural design, such as in the adage that form should follow function. For our purposes, psychological place (structure) confers importance and powers to the place-holder (function). Structure and function are thereby immediately translatable one into the other; to know the one allows you to know the value of the other. By ruling in favor of psychological structure, then, these decisions can, even must be read as favoring functional standards. Thus, one may refer to "psychological *function*" when analyzing legal definitions, even though this language never appears in the analyzed texts. See Note, *Toward a Constitutional Definition*, *supra* note 31, at 1061 (emphasis added).

³⁰⁶The closest that the courts come is when, as in *Yoder*, a religion candidate expects a historical dimension to appear within the courts definition. See Dodge, *supra* note 193, at 714 (concluding that, to enjoy First Amendment protections, "the religious group (and also the particular practice involved) should . . . have a history of, let us say, more than a generation."). For purposes of our classification, however, history can be parsed as serial performances, so *Yoder* is not as exceptional as it might at first appear.

³⁰⁷*MacIntosh*, 283 U.S. at 626-27 (holding an applicant for United States citizenship could be denied for not pledging allegiance to the county and willingness to fight if drafted).

³⁰⁸*Ballard*, 322 U.S. at 88 (holding that district court properly excluded all questions regarding the validity of the defendant's religious beliefs from jury consideration).

³⁰⁹Herman, *supra* note 82, at 92.

definition than a building block. In the late 1960s, with *Seeger* and *Welsh*, the Court arranged these blocks into a functional definition.³¹⁰ Chronologically, the final strategy came two years after *Welsh*, when, in 1972, the Court decided *Yoder*. In *Yoder*, the Court introduced organizational elements of the performative approach to justify why the Amish, but not social philosophers, were entitled to exemptions from generally applicable laws.³¹¹

A favored judicial strategy to defining religion certainly does not include the content or mental approaches utilized by certain anthropologists. The courts' rejection of supernaturalisms and mentalisms is far from whimsical, since the social sciences also investigated these possibilities, and also found them wanting.³¹² The legal definition of religion, therefore, must follow either the performative or the functional approach. The Court's decision in *Yoder* supports the performative approach because it is chronologically the last decision to offer a definition of religion, made with full knowledge that it in some way undermined the principles outlined in *Seeger* and *Welsh*. The performative standard suggested by *Yoder* is also administratively more workable than that under a functional scheme. The ipsative nature of functional definitions, moreover, generates the threat of too-severely restricting governmental powers. Unless some defensible limit is found, functional definitions might yield to performative ones on the sole ground of practicality.

The most persuasive argument favoring performative standards, however, is the fact that *Yoder* was explicitly a First Amendment case,³¹³ where *Seeger* and *Welsh* merely construed statutory language.³¹⁴

³¹⁰*United States v. Welsh*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

³¹¹*Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

³¹²See *supra* notes 213-33 & 249-84 and accompanying text (discussing anthropological definitions of religion).

³¹³*Yoder*, 406 U.S. at 207.

³¹⁴*Welsh v. United States*, 398 U.S. 333, 335 (1970) (interpreting § 6(j) of the Universal Military Training and Service Act); *United States v. Seeger*, 380 U.S. 163, 165 (1965) (same).

Nonetheless, if the Court intended to overrule *Seeger* and *Welsh*, it could have done so with more direct language.³¹⁵

Frazee v. Illinois Department of Employment Security,³¹⁶ represents a negative vote against *Yoder*. In *Frazee*, the Court rejected explicitly "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."³¹⁷ This result undercuts the preferred treatment *Yoder* seemed to reserve for organizations with extended histories.³¹⁸ The functional approach, finally, has in its favor the fact that the "parallel place" criterion is explicitly a test handed down by the Court, while nothing so blatant is found in *Yoder*.³¹⁹ There seems no clear legal ground for choosing between these two definitional strategies.

Anthropology struggles with this same problem. From that work, we learn that the functional approach should prevail. Using Durkheim's work as an example, it does not seem possible to defend a behavioral standard without recourse to more fundamental levels.³²⁰ To avoid such intellectual inconsistencies, performative criteria are rarely offered within anthropology as explicit definitions. Whatever the importance of ritual to religion, the two are clearly distinct and the one never necessarily entails the other. One quickly encounters non-religious rituals, as well as ritual-less religions. Graduation ceremonies, for example, would instance the former, and Thoreau's philosophy the later.

³¹⁵As one commentator suggested:

[I]t is unclear how much weight *Yoder* carries in determining the scope of "religion." Since the state did not dispute the religious nature of the Amish practices, the definition of religion was not at issue, and the [relevant] statement was dicta. As a result, *Yoder* should not necessarily be read as a rejection of the *Seeger* approach in constitutional cases.

Benjamin Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 539 (1989).

³¹⁶489 U.S. 829 (1989).

³¹⁷*Id.* at 834.

³¹⁸*Wisconsin v. Yoder*, 406 U.S. 205, 216 (1971).

³¹⁹*See Welsh v. United States*, 398 U.S. 333, 339-40 (1970); *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

³²⁰*See* DURKHEIM, *THE ELEMENTARY FORMS*, *supra* note 214, at 44, 87-98.

The courts have found their way, independently, to see the need to define religion as a function. Both anthropology and the courts elaborated this function as being related to the existential realities of human living. Likewise, they both allow for religion to appear in nontraditional forms. It is this new expansiveness of religion, shocking to some, which might account for the later backtracking demonstrated by *Yoder's* limited definition of religion.³²¹ *Yoder*, however, should be read as a momentary, temporary deviation from a steady approach to functionalism instead of an effort to strike off in new directions.

B. PROPOSED DEFINITION AND ITS POTENTIAL OPERATIONALIZATION

The best definition of religion is a generative functional one. The focus of such a definition is upon existential concerns. A candidate definition, then, may be phrased like this:

The definition of "religion" is any belief system which serves the psychological function of alleviating death anxiety.

This definition fits the expected description, and complies with the criteria required of a well-constructed definition.³²²

Whether this definition can be operationalized remains unclear. The candidate definition, however, identifies the critical element — death anxiety — and reliable and valid instruments, such as Templer's Death Anxiety Scale,³²³ exist to measure this dimension. The tools exist to accomplish the needed goal, even if they have not yet been successfully combined.

The most reliable route, however, is also the most cumbersome: one could measure levels of death anxiety both before and after exposure to the candidate belief system. If the after condition does not show significant drops in anxiety level, perhaps the system is not really that person's religion. Such a methodology is vulnerable to all the criticisms of psychological

³²¹See *Yoder*, 406 U.S. at 215-16 ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing everyone to make his own standards on matters of conduct in which society as a whole has important interests." (footnote omitted)).

³²²Cf. Donovan, *Afro-Brazilian Cult*, *supra* note 262, at chp. 3.

³²³See generally Donald I. Templer, *The Construction and Validation of a Death Anxiety Scale* (1969) (unpublished Ph.D. dissertation, University of Kentucky).

testing,³²⁴ as well as to concerns about the intrusive nature of the examination.³²⁵ Ideally, one should be able to gauge religious devotion without the subject becoming aware of the inquiry because that awareness might skew the inquiry's outcome.

The heart of the religious inquiry is identifying a person's true belief. Raziel Abelson's conclusion that belief entails tentative truth claims is one possible solution.³²⁶ Under such an approach, there would exist a "positive correlation between the perceived probability of a proposition being true and the strength of commitment to act on it."³²⁷ If the principle that "[a]ppropriate behavior — linguistic and other — is the evidence for someone understanding a certain proposition, as it is for believing it"³²⁸ is accepted, then several approaches to discern people's actual beliefs appear.

In Rio de Janeiro, Brazil, for example, alleged spirits are nigh ubiquitous, from Umbanda offerings in the city streets, to Candomblé rituals in the outskirts. Still, it can be difficult for the anthropologist field worker to ascertain whether any particular individual does or does not believe in the

³²⁴Cf. LEE J. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* (4th ed. 1984).

³²⁵Cf. James M. Donovan, *Relating Psychological Measures to Anthropological Observations*, 10 J. SOC. BEHAV. & PERSONALITY 465 (1995) [hereinafter Donovan, *Relating Psychological Measures*].

³²⁶Raziel Abelson, *The Logic of Faith and Belief*, in RELIGIOUS EXPERIENCE AND TRUTH: A SYMPOSIUM 116 (Sidney Hook, ed., 1961).

³²⁷James M. Donovan, *On the Nature of Belief*, 93 AMER. ANTHROPOLOGIST 690 (1991) [hereinafter Donovan, *On the Nature*]. We may contrast this understanding of belief with that of faith: "Faith that" is also a tentative truth claim, but entails strong commitment to act on its supposed truth *regardless* of the perceived probability of its actually being true. Cf. Abelson, *supra* note 326, at 121.

³²⁸SHIVESH CHANDRA THAKUR, RELIGION AND RATIONAL CHOICE 64 (1981); cf. JAMES, *supra* note 250, at 444 ("Beliefs, in short, are rules for action."); D.Z. Philips, *Postscript*, in REASON AND RELIGION 134 (Stuart C. Brown, ed., 1977) ("Clearly, a man's commitment to God shows itself in the language he uses, not only about God, but about the world and in his general behavior. That he is able to have such a commitment depends on there being a shared language and shared practices in which he can partake."); Martin Southwold, *Religious Belief*, 14 MAN 628, 630 (1979) ("What people say in understandable exasperation ought not be interpreted, or reported, as their established dogma, still less as what they believe."). But see Michael Wyschogrod, *Belief and Action*, in RELIGIOUS EXPERIENCE AND TRUTH: A SYMPOSIUM 180, 182 (Sidney Hook, ed., 1961) ("The relation between a proposition referring to a man's belief and one referring to his actions is never one of logical entailment. No proposition in the form 'x believes p' is ever contradictory to the proposition 'x does c' where c is any given conduct.").

spirits. Absent a direct interrogative, which may or may not be answered truthfully, how can the anthropologist plumb the religious infra-structure of his or her informant? One possible way might be through analyzing grammar. Some languages require the speaker to mark the degree of certainty about facts referenced by speech, as Elinor Ochs observes about Samoan.³²⁹ As another example, the American Indian language of Wintu has as fundamental categories of its verb system subjectivity versus objectivity, and knowledge versus belief. For example:

The sentence "Harry is chopping wood" must be translated in five different ways, depending upon whether the speaker knows this by hearsay, by direct observation, or by inference of three degrees of plausibility.³³⁰

Portuguese marks similar considerations in its conditionals. If a proposition "is either contrary to fact in the present or doubtful in the future, then a verb takes the imperfect subjunctive; otherwise, it takes the future subjunctive."³³¹

The phrase "If I should see a ghost" could therefore take either one of two forms, depending on whether the speaker viewed it likely or not that one could see a ghost: "Se eu visse um espírito"³³² if the event is unlikely, or "Se eu vir um espírito"³³³ if it is likely. This language difference should appear between Catholics on the one hand, who do not profess an "official" belief in spirits, and Brazilian Kardecists and Candomblé members, who do believe in spirits.³³⁴ The advantage of this linguistic approach is that it is

³²⁹Elinor Ochs, *Indexicality and Socialization*, in *CULTURAL PSYCHOLOGY: ESSAYS ON COMPARATIVE HUMAN DEVELOPMENT* 287, 297 (James W. Stigler, Richard A. Shweder & Gilbert Herdt eds., 1990).

³³⁰KLUCKHOHN, *MIRROR FOR MAN: THE RELATION OF ANTHROPOLOGY TO MODERN LIFE* 160, 164 (16th ed. 1969).

³³¹E.C. HILLS, J.D.M. FORD, & J. DE SIQUEIRA COUTINHO, *A PORTUGUESE GRAMMAR* 182 (1925).

³³²"If I were to see a spirit"

³³³"If I should see a spirit"

³³⁴See DAVID J. HESS, *SPIRITS AND SCIENTISTS: IDEOLOGY, SPIRITISM, AND BRAZILIAN CULTURE* (1991) (discussing the comparative spirit beliefs of Brazilian religions).

totally unobtrusive other than for steering the conversation onto certain topics of interest.³³⁵

Sociolinguistics, then, might be one way to achieve what is needed: a reliable, defensible method by which to identify personal religious belief systems. It is not inconceivable that courts will refer persons to psychologists of religion to ascertain belief states and hierarchies, as they do to determine mental health.

V. CONCLUSION

Clearly, there is no definitive definition of religion. The bulk of jurists faced with the task of developing a definition of religion, favor the functional interpretation over simple performative and organizational criteria. Expecting a functional definition to be also generative, future opinions should be able to tie the psychological function of religion more meaningfully to performative and exterior indicators than has thus far been the case.

The social sciences and the field of law have independently converged toward some sort of functional understanding of religion, allowing both fields to rest more secure in their conclusions. Both, however, have had difficulty operationalizing this intellectual understanding of a psychological function into objective and reliable indicators.

Anthropology, however, seems better equipped to resolve this problem. By combining the tools of psychology, sociology and sociolinguistics, for example, anthropology can investigate both the objects of true belief, and the effects of that belief upon the individual and society. Law, on the other hand, has no such tools or methods to investigate these problems. Instead, law can only decide what research outcomes produced by others, such as anthropologists, will be appropriate for resolving legal issues.

The first step, then, is for the social sciences to study these questions further. The legal discipline will then have to evaluate the results, and decide how they might be applied to resolve legal problems. Continued

³³⁵For other comments upon the effect of religious beliefs on linguistic variables, see Charles A. Garfield, *Consciousness Alteration and Fear of Death*, 7 J. TRANSPERSONAL PSYCH. 147, 155 (1975); David A. Snow & Richard Machalek, *The Sociology of Conversion*, 10 ANN. REV. SOC. 167, 173-75 (1984); Peter G. Stromberg, *Ideological Language in the Transformation of Identity*, 92 AM. ANTHROPOLOGIST 102 (1990); Peter G. Stromberg, *Symbols into Experience: A Case Study in the Generation of Commitment*, 19 ETHOS 102 (1991).

The appearance of affective words has been shown to be an indicator of high death anxiety and this relationship perhaps could be used not to identify religions, but rather to identify individuals who are unhappy or unfulfilled by their nominal religious affiliations. See Templer, *supra* note 323, at 25.

communication between the two disciplines will allow lawyers to enjoy the benefits of others' research, and thereby resolve many of the law's conundrums.