F. BOUNDARY QUESTIONS: THE RIDDLE OF DEFINING "RELIGION" AND "CHURCH"

All of the foregoing case law is predicated upon the supposition that everyone knows what is meant by "religion" and "church." By and large, that is true. The central meaning of those terms is not in doubt. They are among the better understood referents in common parlance. As with many other concepts, the problems of identification are not at the center but at the periphery, where they shade off into closely related phenomena.

Because those terms confer certain rights, privileges and protections in American law, there are many aspirants to denotation by them. The boundary questions arising from sorting out those aspirants are particularly sensitive because to deny the benefits of law to those who deserve them is unjust, while to grant them to those who do not is a mockery. Yet both have happened. Black Muslims have been characterized as a "political" movement rather than a religion,[1] and the Universal Life Church has been held to be a "church" entitled to tax exemption when, by its founder's own account, it was a palpable put-on.[2]

It might seem the simplest solution for the government to settle on a clear-cut definition of "religion" in order to resolve all ambiguities. But that could have the effect of freezing the natural development of the human search for ultimate meaning in its present forms and practices—a sharp curtailment of the religious liberty of unconventional religions of the future. For some such reasons Congress and the Supreme Court for two hundred years have refrained from trying to define "religion" or "church," though lower courts and executive agencies have done so, as will be seen.

Throughout much of the history of the nation (and of humankind), religion was defined by the *content* of its *beliefs*. It was presumed to be a relationship to a Supreme Being, despite the development of several "religions" that did not contemplate a deity, at least not one recognizable to Western traditions of a personal God, envisioned as Creator, King, Judge or Heavenly Father. This seeming anomaly was confronted by the U.S. Circuit Court of Appeals for the District of Columbia Circuit in 1957, which concluded that the Washington Ethical Society could not be denied a tax exemption merely because it did not worship a deity.[3] In the same year, an appellate court on the West Coast reached a similar conclusion in a similar case, *Fellowship of Humanity v. Alameda County*:

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1. See *Fulwood v. Clemmer*, 206 F. Supp. 370 (1962), discussed at IVE3a(1).

2. *Universal Life Church v. U.S.*, 372 F. Supp. 770 (E.D. Calif. 1974). "In public appearances after the case was decided, Mr. [Kirby] Hensley has not hesitated to proclaim that the sole purpose he had in founding the Universal Life Church was to discredit religion and to bring about the abolition of all religious tax exemptions." Whelan, Charles S., "Government Attempts to Define Church and Religion" in *The Annals*, 446:37 (1979).

3. *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957).

> The only way the state can determine the existence or nonexistence of "religious worship" [the term found in the California statute on tax exemption] is to approach the problem objectively. It is not permitted to test validity of, or to compare beliefs. This simply means that "religion" fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief.... 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. The content of the belief is of no moment. Assuming this definition of "religion" is correct, then it necessarily follows that any lawful means of formally observing the tenets of the cult is "worship," within the meaning of the tax-exemption provisions.[4]

This influential decision, which foreshadowed more eminent ones to be discussed below, set a new direction for legal identification of "religion." Rather than scrutinizing the "content of the belief," which "is of no moment," the court looked to its *function*—what it *does* (though the terms "cult," "association," and "organization" in this opinion did seem to revolve around one another in a somewhat circular fashion).

The Supreme Court of the United States was drawn to the functional approach as well. Its first steps in that direction were in the field of conscientious objection to military service. Chief Justice Charles Evans Hughes, in dissent in *U.S. v. Macintosh* (1931), suggested a semifunctional approach when he said, "The essence of religion is belief in a relation to God involving *duties superior to those arising from any human relation*."[5] In other words, it was the priority of the obligation rather than the nature of the object of veneration that was determinative, a hierarchy of values reflected in James Madison's "Memorial and Remonstrance":

> It is the duty of every man to render to the Creator such homage and such only as he believes acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society do it with a saving of his allegiance to the

4. *Fellowship of Humanity v. Alameda County*, 153 C.A. 2d at 692-693 (1957).
5. *U.S. v. Macintosh*, 283 U.S. 605 (1931), discussed at IVA5b.

> Universal Sovereign.[6]

In a subsequent case involving the exclusion of an atheist from the office of notary public because he refused to attest to a belief in God, the Supreme Court (unanimously) struck down that restriction, reiterating its *dictum* from *Everson* and expanding upon it—that "neither a state nor the Federal Government can constitutionally force a person `to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on other beliefs."[7] To this sentence was attached a historic footnote that has created more (and continuing) controversy than the decision itself: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (The controversy was over whether "Secular Humanism"—with or without capitalization—*was* a "religion" in any sense continuous with even functional criteria—a query to keep in mind as this discussion develops. It has no rites, no professional priesthood, no continuing organizational structure. It is at best a collection of snippets and snatches, omissions, implications and neglects from various philosophies and outlooks viewed with alarm by some theists, but that does not make it itself a *religion*.[8])

Torcaso paved the way for *Seeger* and *Welsh*, which applied a functional concept of religion to the Selective Service requirement of "religious training and belief," defined by the statute as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" (borrowing language from Chief Justice Hughes' dissent in *Macintosh*). The Court opined:

> 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.[9]

Thus it was the *role* the belief played in the believer's life rather than the *content* of the belief— i.e., the traditional Western conception of God—that was determinative. That theme was accentuated in a subsequent decision in which the applicant for conscientious objector status made even less colorably religious claims. The Court held that the statute

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6. Madison, J., *Memorial and Remonstrance Against Religious Assessments*, (1785), ¶ 1, quoted in Appendix to Justice Wiley Rutledge's dissent in *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947), discussed at IIID2.

7. *Torcaso v. Watkins*, 367 U.S. 488 (1961), discussed at § B2 above.

8. See *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1985), Canby, J., concurring, at 1535 ff., on "secular humanism" as a religion.

9. *U.S. v. Seeger*, 380 U.S. 163 (1965), discussed at IVA5h.

> 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 of an instrument of war.[10]

The words "religious training and belief" thus came to have a very broad meaning in the Selective Service statute, but not necessarily elsewhere.

In fact, Chief Justice Burger, writing for a nearly unanimous court in *Wisconsin v. Yoder*,[11] seemed to be cutting back on the expansive application of the term "religious" in *Seeger* and *Welsh* when he wrote,

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is "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 their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[12]

The difference may arise in part because in the Selective Service cases the court was construing a *statute* in which Congress was seeking to accommodate the exercise of individual *conscience*, which need not be "religious," inasmuch as religion has no monopoly on the formation or exercise of conscience. But the Court has never held that the Free Exercise Clause *requires* the exemption of conscientious objectors from military service. Their exemption is an act of legislative grace, and so can have a broader sweep than the concept of "religion" in the First Amendment if Congress so determines. But it seems only common sense to say, as Burger did in *Yoder*, that the *Religion* Clauses are designed to protect *religion*, not something else. This thought was expressed by Professor Laurence Tribe as well, "The Framers, whatever specific applications they intended, clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free exercise of *religion* but not, say, of philosophy or science."[13]

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10. *Welsh v. U.S.*, 398 U.S. 333 (1970), discussed at IVA5j.

11. 406 U.S. 205 (1972); "nearly unanimous" refers to the fact that the only dissenter, Justice Douglas, dissented as to two of the children involved but concurred as to the third. Justice Douglas also questioned Chief Justice Burger's effort to limit the definition of religion.

12. Ibid., at 215-216.

13. Tribe, L., *American Constitutional Law*, 2d ed. (Mineola, NY: Foundation Press, 1988), p. 1189, emphasis in original.

If that virtual tautology—"religion" means *religion*—be granted, it does not solve the problem of what the "religion" thus referred to *is*. The problem of definition remains, and with it the corollary problem of *who shall do the defining*. The latter problem can be more easily addressed. The contention is often heard from the ranks of religionists that *government* should not define what religion is. That is certainly true in the normative sense. But that is not exactly the point at issue. Insofar as the term "religion" occurs in the civil law, it is the responsibility of the civil magistrate (whether judicial, executive or legislative) to determine to what referent it applies—and, perhaps more pertinently, to what it does *not* apply.

As intimated earlier, in most cases that may not be a difficult task. Of all the applications of the term "religion" in the civil law, its appropriateness in most instances—say 90 percent—is not in doubt. No magistrate would experience difficulty in identifying the Roman Catholic Church, the Old Order Amish, the Serbian Eastern Orthodox, the Jehovah's Witnesses, the Mormons, the Hasidim, the Muslims, Buddhists, Hindus, Parsees, etc. as religions.[14] The problem arises with *new* claimants to the term that have not yet developed a historical record acknowledged as religious.

For the 90 percent of historically recognized cases, the problem is not one of definition but of *denotation*, simply pointing to the common recognition that these are what is ordinarily meant by "religion." Among the remaining 10 percent that are new claimants, many can be resolved by *derivation*; that is, they are descended or derived from existing, recognized religion(s) through schism, merger, geographical divergence or missionary parturition, and bear sufficient resemblance to their progenitor(s) to be accorded continuity of character. That might account for 9 percent of the remaining cases, leaving but 1 percent to perplex the magistrate by their lack of antecedents.

With respect to the remaining few, the civil magistrate's task is to determine whether they are enough *like* the uncontested 99 percent in significant ways to deserve the same characterization at law. But which are the *significant* modes of resemblance, and how *nearly* "like" must they be? It is with these taxonomic riddles that the courts have wrestled in a few instances, and the fact that they are few does not make them less perplexing.

1. *Malnak v. Yogi* (1979): Judge Adams' Concurring Opinion

One of the more thoughtful and persuasive efforts to address the question of what a religion is, for legal purposes, arose in the unusual circumstance of a group claiming *not* to be a religion. Courses were being given in several public high schools in New Jersey on the "Science of Creative Intelligence/Transcendental Meditation" as promulgated in a text by Maharishi Mahesh Yogi. The court found that the course was essentially religious in character and was therefore impermissible in public

14. As Chief Judge William Bauer observed with reference to a narrower question of definition, "We are masters of the obvious, and we know that the crucifix is a Christian symbol." *Gonzales v. North Twp.*, 4 F.3d 1412 (CA7 1993), discussed at § E3j above.

schools.[15] For purposes of this discussion, the pertinent aspect of that case was the concurring opinion of Judge Arlin Adams of the Third Circuit Court of Appeals in Philadelphia, which dealt with the thorny problem of defining religion. After discussing the cases referred to above, Judge Adams examined a decision dealing with one of the "new" religions.

> The broad reading of "religion" in Torcaso was drawn upon in Founding Church of Scientology v. United States.16 There, Scientology, a belief system providing a "general account of man and his nature comparable in scope, if not in content, to those of some organized religions," was found to be a religion for purposes of the free exercise clause. Judge Wright was willing to accept, as religious, ideas that are sufficiently comprehensive to be comparable to traditional religions in terms of content and subject matter. But it must be added that he did so only after observing that the government did not contest Scientology's religious nature, or rebut the prima facie case for religious classification made by its supporters.
>
> It would thus appear that the constitutional cases that have actually alluded to the definitional problems, like the selective service cases, strongly support a definition for religion broader than the theistic formulation of the earlier Supreme Court cases. What this definition is, or should be, has not yet been made entirely clear.
>
> **The Modern Definition of Religion**
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> It seems unavoidable, from Seeger, Welsh, and Torcaso, that the Theistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable. Under the modern view, "religion" is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology. Even theologians of traditionally recognized faiths have moved away from a strictly Theistic approach in explaining their own religions.17 Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny "religious" identification to faiths now adhered to by millions of Americans. The Court's more recent cases reject such a result.
>
> If the old definition has been repudiated, however, the new definition remains not yet fully formed. It would appear to be properly described as a definition by analogy. The Seeger court advertently declined to distinguish beliefs holding "parallel positions in the lives of their respective holders." Presumably beliefs holding the same important position for members of one of the new religions as the traditional faith

15. *Malnak v. Yogi*, 592 F.2d 197 (1979), discussed at IIIC2d(9).

16. 409 F.2d 1146, *cert.* denied, 396 U.S. 963 (1969), discussed at IIB6b.

17. Citing Altizer, T., *The Gospel of Christian Atheism* (Aurora, CO: The Davies Group Publishers, 1966), Cox, H., *The Secular City* (New York: Macmillan, 1966), Richard, R., *Secularization Theology* (New York: Herder and Herder, 1967), Gutierrez, G., *A Theology of Liberation* (Maryknoll, N.Y.: Orbis Books, 1973).

holds for more orthodox believers are entitled to the same treatment as the traditional beliefs. The tax exemption cases referred to in Torcaso also rely primarily on the common elements present in the new challenged groups...as well as in the older unchallenged groups and churches. In like fashion, Judge Wright reasoned by analogy in crediting the prima facie claim made out for Scientology.... The modern approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted "religions."

But it is one thing to conclude "by analogy" that a particular group or cluster of ideas is religious; it is quite another to explain exactly what indicia are to be looked to in making such an analogy and justifying it. There appear to be three useful indicia that are basic to our traditional religions and that are themselves related to the values that undergird the first amendment.

The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion. Thus the court was able to remark in Founding Church of Scientology:

> It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions.[18]

Similarly, one of the conscientious objectors whose appeal was coupled with Seeger, submitted a long memorandum, noted by the Court, in which he defined religion as the "sum and essence of one's basic attitudes to the fundamental problems of human existence."

Expectation that religious ideas should address fundamental questions is in some ways comparable to the reasoning of the Protestant theologian Dr. Paul Tillich, who expressed his view on the essence of religion in the phrase "ultimate concern." Tillich perceived religion as intimately connected to concepts that are of the greatest depth and utmost importance. His thoughts have been influential both with courts and commentators. Nor is it difficult to see why this philosophy would prove attractive in the American constitutional framework. One's views, be they orthodox or novel, on the deeper and more imponderable questions—the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong—are those likely to be the most "intensely personal" and important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference, and never converted into official government doctrine. The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. New

18. 409 F.2d at 1160, emphasis supplied by Judge Adams.

> and different ways of meeting those concerns are entitled to the same sort of treatment as the traditional forms.
>
> Thus, the "ultimate" nature of the ideas presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to "ultimate" questions, however, are not necessarily "religious" answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive "truth." Thus the so-called "Big Bang" theory, an astronomical interpretation of the creation of the universe, may be said to answer an "ultimate" question, but it is not, by itself, a "religious" idea. Likewise, moral or patriotic views are not by themselves "religious," but if they are pressed as divine laws or a part of the comprehensive belief-system that presents them as "truth," they might well rise to the religious level....
>
> A third element to consider in ascertaining whether a set of ideas should be classified as a religion is any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life. These formal signs of religion were found to be persuasive proofs of religious character for tax exemption purposes in Washington Ethical Society and Fellowship of Humanity, discussed supra. They are noted as well in Founding Church of Scientology, supra. Thus, even if it is true that a religion can exist without rituals and structure, they may nonetheless be useful signs that a group or belief system is religious.
>
> Although these indicia will be helpful, they should not be thought of as a final "test" for religion. Defining religion is a sensitive and important legal duty. Flexibility and careful consideration of each belief system are needed. Still, it is important to have some objective guidelines in order to avoid ad hoc justice.[19]

(Under this view of the matter, the court found Transcendental Meditation to be a religion.)

2. *Africa v. Pennsylvania* (1981)

It was not long before Judge Adams had an opportunity to try his "objective guidelines" on a very different case in which a prison inmate claimed a right under the Free Exercise Clause to a special diet consisting exclusively of raw fruits and vegetables. The prisoner, Frank Africa, was a member of the "revolutionary

19. *Malnak v. Yogi*, 592 F.2d 197 (1979), Adams concurrence.

organization," MOVE, whose activities several years later precipitated a bombing by the Philadelphia police of the group's communal residence, causing a fire that burned out several blocks of a residential neighborhood.

The trial court explored Frank Africa's beliefs at length, and the appellate court reproduced extended excerpts from the record in order to give an understanding of the plaintiff's claims. Africa claimed that MOVE was a religion and that he was a Naturalistic Minister thereof, whose religious beliefs required that he have a diet of uncooked fruits and vegetables. Judge Adams wrote the opinion for a unanimous panel of the Third Circuit.

> Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment. Judges are ill-equipped to examine the breadth and content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. "Religions now accepted were persecuted, unpopular and condemned at their inception." U.S. v. Kuch[20] Nonetheless, when an individual invokes the first amendment to shield himself or herself from otherwise legitimate state regulation, we are required to make such uneasy differentiations. In considering this appeal, then, we acknowledge that a determination whether MOVE's beliefs are religious and entitled to constitutional protection "present[s] a most delicate question"; at the same time, we recognize that "the very concept of ordered liberty" precludes allowing Africa, or any other person, a blanket privilege "to make his own standards on matters of conduct in which society has important interests." Wisconsin v. Yoder (1972).
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> * * *
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> In conducting its inquiry in the case at bar, the district court employed...[the approach] enunciated in the concurring opinion in Malnak [v. Yogi]..., [Judge Adams' own guidelines].
>
> Fundamental and ultimate questions. Traditional religions consider and attempt to come to terms with what could best be described as "ultimate" questions—questions having to do with, among other things, life and death, right and wrong, and good and evil....
>
> We conclude that the MOVE organization, as described by Africa at the hearing below, does not satisfy the "ultimate" ideas criterion. Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force. Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional

20. 288 F. Supp. 439, 443 (D.D.C. 1968), discussed at IVD2c.

equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has discovered a desirable way of life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more "traditional" theologies....

* * *

Indeed, if Africa's statements are deemed sufficient to describe a religion under the Constitution, it might well be necessary to extend first amendment protection to a host of individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas.

* * *

For purposes of the case at hand, then, it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope. As the Supreme Court declared in Yoder, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation...if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief…." (emphasis added)

Comprehensiveness. The concurring opinion in Malnak stressed that a religion must consist of something more than a number of isolated, unconnected ideas....

MOVE appears to consist of a single governing idea, perhaps best described as philosophical naturalism. Apart from this desire to live in a "pure" and "natural" environment, however—a desire which we already have deemed insufficiently religious to qualify for first amendment protection—little more of substance can be identified about the MOVE ideology. It would not be possible, we believe, on the basis of the record in this case, to place Africa's dietary concerns within the framework of a "comprehensive belief system." Expressed somewhat differently, were we to conclude that Africa's views, taken as a whole, satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies—such as economic determinism, Social Darwinism, or even vegetarianism—would not qualify as religions under the first amendment....

Structural characteristics. A third indicium of a religion is the presence of any formal, external or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations

> associated with the traditional religions. Malnak, supra, (concurring opinion).
>
> MOVE lacks almost all of the formal identifying characteristics common to most recognized religions. For example, Africa testified that his organization did not conduct any special services and did not recognize any official customs.... Given what we know about the group from the record, we are of the view that MOVE is not structurally analogous to those "traditional" organizations that have been recognized as religions under the first amendment....
>
> We hold, therefore, that MOVE is not a religion for purposes of the religion clauses. We do not conclude that Africa's sincerely-held beliefs are false, misguided, or unacceptable, but only that those beliefs, as described in the record before us, are not "religious," as the law has defined that term.
>
> As the result of our holding in this case, the Commonwealth of Pennsylvania is not required under the first amendment to supply Frank Africa with a special raw-food diet. Such a consequence, however troubling, follows directly from our declaration that MOVE is not a religion. We do not mean to suggest, however, that...special accommodations cannot be made in this instance for a prisoner who obviously cares deeply about what food he eats. Nonetheless, as a matter of constitutional law, the Commonwealth prevails.[21]

(One significance of this case is that in it the views expressed in Adams' *Malnak* concurrence became the law of the Third Circuit.)

3. *American Guidance Foundation v. U.S.* (1980)

A useful supplement to the foregoing is provided by Judge Gerhardt Gesell's opinion in a case involving a nonstock nonprofit corporation claiming to be a "church" for tax purposes. Judge Gesell was not a newcomer to the question of what constitutes "religion." He was the trial judge in *U.S. v. Article or Device*[22] (the trial of the E-Meter of Scientology that followed after *Founding Church of Scientology v. U.S.*[23]) and *U.S. v. Kuch*[24] (trial of "Eclatarians" charged with illegal use of hallucinogens), and so had some experience of unusual "religious" claims.

> AGF [American Guidance Foundation] was organized under Pennsylvania law by Robert Seyfried in 1972. Originally chartered as an educational organization, it successfully sought IRS exemption under section 501(c)(3) of the Internal Revenue Code. In late 1974, plaintiff "became a church" by unanimous consent of its directors, who then included Mr. Seyfried, his wife, his mother, his sister and his brother-in-law. Throughout its existence, AGF has consisted of Mr. Seyfried and at

21. *Africa v. Pennsylvania*, 662 F.2d 1025 (1981).
22. 333 F. Supp. 357 (1971), discussed at IIB5c.
23. 409 F.2d 1146 (1969), discussed at IIB5b.
24. 288 F. Supp. 439 (1968), discussed at IVD2c.

most five members of his immediate family. Since August, 1977, the only members have been Seyfried, his wife and their minor child. Mr. Seyfried, who graduated from Philadelphia College of the Bible in the 1950's and teaches in the Philadelphia school system, is presently plaintiff's one commissioned "Christian Worker." He "regularly ministers to the AGF congregation," through worship services conducted in the Seyfried's apartment....

AGF's code of doctrine and discipline is "contained in the Old and New Testaments." Record evidence as to the nature of plaintiff's tenets or creed is generalized and largely uninformative.... AGF also advertises in the Philadelphia Yellow Pages and has a recorded religious message on telephone tape....

It is well to begin by stating what is not at issue. The IRS concedes that plaintiff is a religious organization, qualifying for exemption under sections 501(c)(3) and 509(a) of the Code.... Difficult issues involving what constitutes sincere religious belief or practice, and how to avoid enforcing religious orthodoxy through the tax laws need not be faced. The narrower question presented here is whether this religious organization qualifies as a "church," as that term has been construed by the service and the courts.

Although it is settled that Congress intended a more limited concept for "church" than for the previously identified "religious organization," Congress has offered virtually no guidance as to precisely what is meant.... One court concluded after thorough review of the relevant statutes and regulations that what is "church" must be determined in light of general or traditional understandings of the term. De La Salle Institute v. United States.[25] Such understandings are not easily achieved for at least two reasons. There is no bright line beyond which certain organized activities undertaken for religious purposes coalesce into a "church" structure. And the range of "church" structures extant in the United States is enormously diverse and confusing. See generally Whelan, `Church' in the Internal Revenue Code: The Definitional Problems, 45 Ford. L. Rev. 885 (1977).

Faced with the difficult task of determining whether or not religious organizations are in fact churches, the IRS has developed fourteen criteria which it applies on an ad hoc basis to individual organizations. While some of these are distinctly minor, others, e.g. the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of central importance. The means by which an avowedly religious purpose is accomplished separates a "church" from other forms of religious enterprise.... At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is

25. 195 F. Supp. 891 (N.D. Cal. 1961). This was the decision that found the Christian Brothers Winery not to be "church" because its proprietors did not engage in "ministration of sacerdotal functions" (being unordained, they did not celebrate Mass).

> reasonably available to the public in its conduct of worship, its education instruction, and its promulgation of doctrine, it cannot fulfill this associational role.
>
> Plaintiff fails to satisfy the standard. Mr. Seyfried and his wife pray together in the physical solitude of their home. They do not constitute a "congregation" within the ordinary meaning of the word. AGF has made no real effort to convert others or to extend its membership beyond the immediate Seyfried family. Its telephonic religious message hardly qualifies as dissemination of a creed or doctrine. Its "religious instruction" consists of a father preaching to his son. Its "organized ministry" is a single self-appointed clergyman. Its "conduct of religious worship" does not extend beyond the family dwelling, which is used primarily for non-religious purposes. Rather than ministering to a society of believers, plaintiff is engaged in a quintessentially private religious enterprise... AGF fails to qualify under the threshold indicia of communal activity necessary for a "church...." Private religious beliefs, practiced in the solitude of a family living room, cannot transform a man's home into a church.[26]

This case is instructive for two reasons: it posed the difference between "religion" or "religious organization" and "church" (on which, more later), and it introduced the Internal Revenue Service's famed 14-point description (not definition) of a "church." It also taught that a regimen of family devotions does not make a "church," at least not for purposes of the Internal Revenue Code.

4. The IRS 14-Point Description of "Church"

For a number of years it was rumored in some church circles that the IRS was "defining" religion by use of a "secret" 14-point definition that appeared, not in the statute nor the regulations, but in a handbook for internal use by IRS agents (which is not what "Internal" is supposed to mean in the title of that service). Reference to this 14-point schema emerged in a speech by then Commissioner of Internal Revenue Jerome Kurtz in 1978, from which Judge Gesell extracted the 14 points in a footnote in the opinion described immediately above. A more recent official publication lists them in their 1987 form.

> The terms "religious" and "church" are not defined in either the Internal Revenue Code or Treasury regulations. For administrative purposes, the IRS has formulated certain criteria to which it refers in ascertaining whether a religious organization constitutes a church. The IRS position is that, in order to qualify as a church for Federal income tax purposes, an organization must satisfy at least some of the following criteria:
>
> (1) a distinct legal existence;
> (2) a recognized creed and form of worship;
> (3) a definite and distinct ecclesiastical government;

26. *American Guidance Foundation, Inc. v. U.S.*, 490 F. Supp. 307 (1980).

> (4) a formal code of doctrine or discipline;
> (5) a distinct religious history;
> (6) a membership not associated with any other church or denomination;
> (7) a complete organization of ordained ministers ministering to the congregations and selected after completing prescribed courses of study;
> (8) a literature of its own;
> (9) established places of worship;
> (10) regular congregations;
> (11) regular religious services;
> (12) schools for the religious instruction of the young;
> (13) schools for the preparation of its ministers;
> (14) any other facts and circumstances that may bear upon the organization's claim to church status.[27]

The Service made clear in this handbook that no single factor was controlling and several might not be present in an organization that might nevertheless qualify as a church. The fourteenth item was not a criterion but an open-ended proviso that Judge Gesell did not include in his footnote; he arrived at 14 criteria by dividing No. 7 above into two parts. That could profitably be done with some of the others that are two-dimensional: in No. 2, a "creed" is rather different from a "form of worship"; in No. 4, "doctrine" is not the same as "discipline," but is more closely related to "creed." What is a "*complete* organization of...ministers," as distinguished from an *incomplete* one? A "*definite*...ecclesiastical government," as distinguished from an *indefinite* one? A "*recognized* creed," as distinguished from an *unrecognized* one? Perhaps these are quibbles, but words should have some clear significance if they are to be used in such a fateful formulation.

The list has some other shortcomings that are more substantive. For one thing, it appears to describe "church"-as-*denomination* rather than "church"-as-*congregation*, since a "church" that as yet has only one congregation, or is one of a rigorously congregational polity with no structure broader than the local group, might well not have "a complete organization of...ministers" or "schools for [their] preparation," though it might have "prescribed courses of study" for that purpose (as the Methodist Church did before it developed theological seminaries, and still does as a seldom-used alternative to seminary training).

Item No. 6—"a membership not associated with any other church or denomination"—is certainly characteristic of many religious bodies in the United States today, but by no means all. Mutual exclusivity is not characteristic of many Eastern religions, Native American religions, Scientology, and others. While it does describe an attribute of many churches, its presence is no more probative than its absence for purposes of these criteria, which is not as true of the other items.

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27. Joint Committee on Taxation, *Overview of Tax Rules Applicable to Exempt Organizations Engaged in Television Ministries* (JCS-21-87), October 5, 1987, p. 3, quoting from IRS Manual 7(10)69 *Exempt Organizations Examination Guidelines Handbook*, Sec. 321.3 (April 5, 1982).

The most pervasive defect of the list is its *circularity*. In looking at an organization claiming to be a church, an agent may not be greatly helped by advice to look for "a definite and distinct *ecclesiastical* government," "a distinct *religious* history," "regular *religious* service," or "schools for the *religious* instruction of the young." Many such organizations may have their own systems of internal governance, a history, regular gatherings to pursue its purposes, and some arrangements for instruction of the young, but whether they are *religious* is the question being asked, not the answer. If the organization *is* a church, then its government will indeed be "ecclesiastical." If it *is* religious, then its history, services and instructions will undoubtedly be "religious" too. If it isn't, they won't. One has to look further for the basic answer, not just at these surface observables. They are potentially useful (after some refinements) as a set of rebuttable presumptions, a first-level screen for sorting out the obvious cases. If an organization has all or most of these traits—and has had them for some time prior to its application—then it is probably a church (unless something turns up to indicate that it is a clever simulacrum). If it does *not* have all or most of them, then it is probably *not* a church, but may submit further evidence to rebut that presumption. (What kind of evidence that might be will be considered below.)

A more usable set of criteria might be the following:

1. *A discrete legal existence* (this is not a determinant of churchliness but a legal threshold to ascertain whether the IRS is dealing with an independent and integral legal entity. Incorporation is one easy way of determining this question, but not the only way. A single corporation is a unitary body, but there are "unincorporated associations" as well that have chosen not to incorporate, such as the Episcopal Church);

2. *A definitive creed or statement of doctrine* (this would be a document summing up the tenets or beliefs of the group);

3. *A normative code of practice and behavior* (this would be a set of standards for the conduct of adherents, whether moral, dietary, sumptuary, ritualary, or a combination of these; adherents would be generally expected to adhere to these standards—or to attain them as ideals—such as doing no harm to others, not engaging in sexual promiscuity [moral], not eating pork or shellfish [dietary], not wearing makeup, fancy clothes or jewelry [sumptuary], fasting during Lent, not working on Sabbath, not touching a menstruating woman [ritualary]);

4. *A system of internal governance and discipline* (this would be a set of arrangements for institutionalizing leadership and effectuating adherence to the doctrinal and/or disciplinary standards of the group, such as a vestry, board of deacons, session, presbytery, synod, diocese, consistory, conference, council, etc.);

5. *A history of descent or derivation from prior religious bodies or of establishment by an inspired and venerated founder*;

6. *One or more clergy, i.e., spiritual leaders, ordained, certified or commissioned to give full-time (or most-time) guidance to the organization*;

7. *A literature designed to expound and explain the history, doctrines, disciplines, norms and governance of the organization*;

8. *Places set aside for regularly scheduled worship, rites, ceremonies and other communal observances in furtherance of the organization's purposes and teachings*; (the premises could be used for other, secondary purposes, but would not be primarily residential, commercial or industrial)[28];

9. *One or more congregations, i.e., bodies of adherents (not all of one family) drawn together by fealty to the beliefs, practices and purposes of the organization*;

10. *Regularly scheduled services of worship or communal observance for the congregation(s) throughout the year in the locations dedicated to such use* (see # 8 above);

11. *Schools, courses or continual occasions for the instruction of neophytes, catechumens or members in the beliefs, practices and purposes of the organization*;

12. *Schools, courses, or continual occasions for the instruction and training of clergy and/or other leaders of the organization in its beliefs, practices and purposes*;

13. *A system whereby the adherents (and others) support the organization chiefly by voluntary contributions designed to maintain its operations and to advance its beliefs, practices and purposes* (this is an element not included in the IRS list and perhaps not pertinent in countries with an established church supported by taxes, but it is an *essential attribute* of a church in the United States and would exclude organizations whose *main* source of support is something other than voluntary contributions, such as business profits, rents, sales, games of chance, pyramid schemes, franchises or fees for services).

Whether three or thirteen, these "observables" might serve to put some flesh on the bones of Judge Adams' third element in his set of "useful indicia,"—"any formal, external or surface signs that may be analogized to accepted religions." He cautioned that "a religion may exist without any of these signs," which may be an overstatement, since it is hard to imagine a religion existing for long without *any* of them, but certainly *some* would be dispensable. Nevertheless, they remain in the class of "external or surface signs" and do not reach the much more profound and determinative qualities pointed to in his first two indicia, discussed below.

5. The Essential Function of Religion

This work has been dealing throughout with religion as an organization or activity that has certain special protections (and certain special disabilities) in the law, but has not devoted much attention to *why that should be*. Why did the Framers, as Professor Laurence Tribe suggests, consider religion "something special" and enact "that vision into law by guaranteeing the free exercise of *religion* but not, say, of philosophy or science"?[29] And does their vision still hold true today?

Some might say that religion is the means by which human beings relate themselves to their Creator and seek to do their Maker's will. From that standpoint,

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28. "Industrial" is not as far-fetched as it may seem; at least one industrial firm, the Townley Manufacturing Co. in Arizona, makers of mining equipment, claimed to be a religious organization for purposes of requiring all employees to attend religious services on company time, but the claim was rejected by the Ninth Circuit Court of Appeals, *Townley Mfg. Co.v. EEOC*, 859 F.2d 610 (1988).

29. Tribe, *American Constitutional Law*, *supra,* 2d ed., p. 1189, emphasis in original.

there is no other human enterprise like it, and it deserves its unique status in law for that reason alone. But not all people hold that view, and while they might be willing to indulge their believing neighbors' sensibilities to some extent, sheer altruism is not as good a basis for legal solicitude toward other people's interests as would be a common interest shared by all, believers and nonbelievers alike. For instance, all members of society have a strong interest in the stability of the family, whether they happen to be married or not, whether they happen to be parents or not, because the institution of the family (whatever form it may take in a given society) is crucial to the process of the care and socialization of children, and thus to the survival of society as a whole.

Likewise, all members of society have a strong interest (whether they realize it or not) in the fulfillment of the function of religion, since it, too, is essential to the survival of society as a whole. Like the family, religion is a universal attribute of human societies. Talcott Parsons, a leading social theorist, has written, "There is no known society without something which modern social scientists would classify as a religion.... Religion is as much a human universal as language."[30] Because most people have only a mild need for religion most of the time, and some people may feel no need for it at all, they may tend to think of religion as an optional, peripheral, or even dispensable, sort of activity. For (some) individuals it may be, but for society it is not.

The reason is that religion performs an essential function necessary to society's survival, just as does the family. That function is *explaining the ultimate meaning of life*. Regardless of its particular content of rites, structures, symbols or doctrines, or what deity or deities, if any, it may worship, it is telling its adherents about the nature of reality and the purpose of existence—why we are here and what we are to be and do—and acting out the embodying dramas of earthly pilgrimage, aspiration and attainment.

Why is that important? Because it answers the second oldest question of human experience. If the oldest question is "How do I survive?" the second oldest is "Why do bad things happen to me/those I love"? Every human being confronts experiences that are both unsatisfactory and technologically unmanageable (that is, they hurt, and they cannot be changed by human manipulation): failure, handicap, defeat, loss, chronic or serious illness, bereavement, the prospect of death. Those are the experiences that press the need to know "what is the reason for it all?" Religion tries to provide answers to that question, offering the widest and deepest concepts the mind can grasp, so that the suffering of the moment can be seen in a broader perspective of greater good or longer purpose or firmer reality. (Religion is not limited to "explaining" life's hurts and harms; those are just the circumstances in which the felt need for religion can be most insistent.)

Such "explanations" of the ultimate meaning of life may be theistic or nontheistic, naturalistic or supernaturalistic, ascetic or orgiastic, activistic or quietistic, arcane or prosaic, conventional or bizarre. If they help believers to rise up each morning with

30. Parsons, T., Introduction to Weber, Max, *Sociology of Religion* (Boston: Beacon Press, 1963), pp. xxvii, xxviii.

hope, to get through the day somehow with purposiveness and resilience, to lie down at night with some sense of satisfaction and fulfillment, they are performing for those believers the function of religion, whatever non-believers may think or however implausible those beliefs may seem to others. Not all churches, synagogues, mosques or temples perform that function well for all believers all the time, and some people may get what snatches of ultimate meaning they may have from other sources, including some that may not be conventionally "religious." Yet whatever the source, the *function* being served is still essentially *religious*.

Unless a society provides moderately effective ways of meeting most of its members' meaning-needs most of the time, it will be in peril. Persons who cannot find some kind of more or less satisfying answers to their deepest inward pangs of spiritual hunger, which can be quite intense,[31] are apt to succumb to despair, bitterness, resentment, anomie, or to fall into one or another of the escapisms, derangements or addictions that are the increasingly prevalent maladies of meaninglessness besetting society today. Such persons are often a hazard to themselves and others, sometimes resorting to impulsive or desperate acts of violence, crime or suicide.

Some people in this plight get caught up in a religion that relieves their distress and provides the needed structure for their lives; others do not. The same mode of "explanation" does not work for all. Some will resonate to a mystical appeal, others to an emotional one. Some may want to escape from "the world" while others may want to "save" it. Fortunately, there are many varieties of religion in this society, and almost anyone should be able to find one that suits. That is one reason for religious liberty: to foster as wide a range of religious "answers" as possible. It is not the content or the initial appeal of a religion, however, that makes it functionally effective, but its *cost* to the believer, not so much in money (which is cheap in this market), but in exertion, devotion, commitment—*human energy*. The more a religion *demands* of its adherents, the more convincing it will be to them. The less *effort* it requires, the less *effect* it will have—in their lives and others.

6. Why "Establishment" Doesn't Work

So it is of important practical *secular* concern to any society to optimize the conditions under which one or more effectively functioning religions can flourish. In the past that was usually done by setting up one favored faith as the "official religion," showering its leaders with prestige, perquisites and emoluments, requiring all subjects to adhere to that persuasion (or profess to do so) and suppressing all others. That arrangement was called Establishment, and it didn't work very well for at least five reasons:

1. The people who set up the established religion, and whose own religion was invariably the one so favored, were the "haves" in that society—the people on top. The people who had the greatest need for the function of religion because they had the largest proportion of experiences that were both unsatisfactory and unchangeable

31. See Peter Berger's description of the nightmare of meaninglessness in *The Sacred Canopy* (Garden City, N.Y.: Doubleday, 1967), pp. 220-227.

were the "have-nots"—the people on the bottom. The established religion was of little use to them because it didn't "explain" *their* lives.

2. In fact, the very act of "establishing" it as the official, respectable, "required" faith that embraced and endorsed the *status quo* made it part of the problem that needed to be "explained" to the have-nots.

3. Furthermore, the established religion tended to lose much of its persuasive power even among the haves, since the quality of religion that makes it convincing is its *cost*, and the effect of establishment was precisely to take the cost *out* of religion, to make it easy, relaxed, respectable.

4. In addition, the effect of prosperity, security and deference upon the functionaries of the established religion seemed to be to make them, not more productive, but more pompous and indolent. As a result, the established faith began to alienate its own adherents, who turned to competing faiths that had not (yet) lost their diligence and zeal—often the new "cults" that sprang up among the have-nots.

5. The response of the established faith to such competition from below was seldom increased vigor and evangelistic zeal but rather suppression and persecution, which produced resentment and greater vitality in the suppressed groups, but in the suppressors that characteristic blend of arrogance and debility that unmerited privilege fosters.

Force is of little avail in trying to spread religion or to stop its spread, and often generates resistance and emigration, contributing to the population of more hospitable climes, such as the American colonies and the early United States.[32] After centuries of costly trial and error, some governments concluded that the best way to handle the "problem" of ensuring the availability and vitality of the religious function is to *leave it alone*, neither preferring nor suppressing, neither helping nor hindering (since for government to try to "help" is still to hinder). Fortunately, that was the course chosen by the Founders of this nation, among the first in the world to do so (though they may not have analyzed the situation in these terms). They made admirably gingerly provisions for the *self*-propagation of the religious function on these shores without governmental sponsorship, favoritism, entanglement or duress, and they set forth those provisions in the Free Exercise and Non-Establishment Clauses of the First Amendment, under which religion has flourished as nowhere else in the Western world.

And the "religion" referred to in those clauses is that which performs the unique and essential function of *explaining the ultimate meaning of life to its adherents* (and not necessarily to anyone else). That characterization bears some resemblance to the first two "indicia" of Judge Adams' formulation in *Malnak v. Yogi* and *Africa v. Pennsylvania*, *supra*; that is, (1) "religion" deals with the "fundamental questions," the "ultimate concerns" of human existence—"the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong," the nature of good and evil, etc.—what might be called *ultimacy*; and (2) "religion" also deals with more than one or a few such concerns; it offers an all-embracing conceptual framework that

32. See ¶¶ 9 and 10 of Madison's *Memorial and Remonstrance.*

encompasses the broadest reaches of human perplexity and wonder, anxiety and reassurance, vision and conjecture—what Adams called *comprehensiveness*.

If there is any fault to be found with Judge Adams' first two indicia, it is that they seem a little intellectualized and disembodied. He speaks of "ideas" and "concepts" in a way that would be equally applicable to a seminar in philosophy, which may deal with the same subject matter but is not a *religion*. The difference is that a religion does not just offer an opportunity to *think* about or *talk* about such ideas, but calls its adherents to *believe* them, and in consequence to *be* and *do* what they otherwise might not have been or done. It makes *demands* upon them, to which they respond with commitment and devotion. It *costs* them something in adherence, exertion, even suffering and sacrifice. "Ideas" that do not have such consequences in allegiance and action are what the Quakers rightly disparage as mere "notions" because they are only intellectual playthings to be toyed with, bandied about and then put back on the shelf.

7. Minimal Dimensions in Space and Time

Furthermore, "religion" necessarily has dimensions in space and time. It is by nature *collective*. As Tribe observed, "Any attempt to constitutionalize the relationship of the state to religion must address the fact that much of religious life is inherently associational"....[33] Though a religion may take its inception from an inspired teacher, prophet, seer or guru, it does not become a *religion* until his vision finds its followers—in sufficient number and with sufficient persistence to be visible on the radarscope of social realities. There is no such thing as an *individual* religion (limited to one individual) or an *instant* religion (limited to one moment in time). The lifespan of a bona fide *religion* is measured in centuries, if not millennia, and its adherence in hundreds or thousands, often millions. Of course, it may become "visible" sooner and smaller, but not just two or three months after a handful of four or five people begin a new cultic practice together. It must have a *continuing body of adherents* that has endured the crises, doldrums, tensions and attritions that beset all organizational beginnings and has survived them long enough to demonstrate that it is more than a chance confluence of flotsam on the tossing seas of organizational concourse.

What that number or length of time should be is a subject for further exploration and negotiation. A threshold number is a test not unknown to religion. A *minyan* of ten men is necessary for most of the elements of an Orthodox Jewish religious service (Conservative Jews will permit some of the ten to be women). Likewise, there are numerical quanta in law: quorums for a deliberative body to conduct business, number of signatures on petitions to put a candidate or referendum measure on the ballot, etc. And there are time-conditioned categories in law as well: the number of years needed for attaining majority, establishing residence, tolling the presumption of death or recognition of common-law marriage, and many others. Since most religious bodies have a lifespan of centuries, a decade is like the winking of an eye on the scale of religion. Surely several decades are needed to discern whether a would-be "religion"

33. Tribe, *American Constitutional Law*, *supra,* 2d ed., p. 1155.

has begun to come into existence. Prior to that time it enjoys some protections in law as a "voluntary association" or even a "religious organization," but it remains only an *invitation* to religion until time demonstrates whether the invitation is being *accepted*.

The perplexed civil magistrate confronted with the puzzle of a group claiming to be a "religion" or a "church" must decide one way or the other, but on the basis of what evidence and what criteria? Should the magistrate consult existing and recognized churches for their assessment of the newcomer? They are often the least likely to recognize in an upstart competitor the legitimacy of new forms of the religious enterprise. Should the magistrate consult learned scholars in the sociology of religion? They do not necessarily agree among themselves, and even if they did, it would still be an "outsider's" verdict. How can anyone determine from outside whether a given group is meeting its members' religious needs? Only the members themselves can testify to that, and they do so most plainly by continuing to belong, or not continuing. But how does one discern whether their continued adherence is attributable to *religious* incentives or to other motivations?

The magistrate can operate with a number of rebuttable presumptions:

1. If the applicant is descended or derived from one or more recognized religious bodies, it may be presumed to be continuous in character therefrom; or

2. If the applicant can show a pattern of observable traits meeting all or most of the criteria numbers 2 through 13 above, it may be presumed to be a religion/church;

3. Lacking the foregoing, if the applicant can show that it has been in continuous existence for fifty years—or for ten years beyond the death or departure of its founder, if that is sooner—with the following attributes:

a. A continuing body of adherents sufficient in number and commitment to support it by their voluntary contributions;

b. A system of teachings or beliefs that deals with the ultimate or fundamental meaning of human existence in a comprehensive way;

c. A regimen of adherence that corresponds in function or effect to *some* of the twelve traits cited above,

—then there is no basis on which the civil magistrate can say it is *not* a religion.[34]

As should be clear from the preceding exposition, a *religion* is the system of belief and practice that provides an explanation of the ultimate meaning of life for its adherents. A *church* is the structure or continuing community of adherents (whether local, regional, national or international) that bears or embodies the religion. A *religious organization* is a voluntary association that is based on or related to a religion and seeks to advance one or more of its purposes or interests but does not encompass the full range or scope of a religion or church.

This section has attempted to explain why there is a solid "secular" justification for the various protections and exemptions afforded religion under the First Amendment. That there is such a justification does not make it a *quid pro quo*—a "service" that churches must render or lose those exemptions and protections—because government cannot determine from "outside" whether a given church is

34. For further discussion of these points, see the author's *Why Churches Should Not Pay Taxes* (New York: Harper & Row, 1977), pp. 654ff.

actually fulfilling the function of religion or not. Only its members can determine that. As long as they continue to support it, government has no ground for denying it the protection of the Free Exercise Clause. But it is a self-limiting exercise that will not continue beyond its usefulness. When its members decline to support it, it will fade away without any need for governmental action. In fact—under the Establishment Clause—the government has no right to try to keep it going. The *consumers* of the product of the religious enterprise are the final judges, and the civil magistrate best honors the religion clauses of the First Amendment by discerning and ratifying their decision.