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Struttura della rivista:

Parte I

Sezioni	Direttori Scientifici
Antropologia culturale	M. Minicuci
Diritto canonico	A. Bettetini, G. Lo Castro
Diritti confessionali	M. d'Arienzo, V. Fronzoni, A. Vincenzo
Diritto ecclesiastico	M. Jasonni, L. Musselli (†)
Sociologia delle religioni e teologia	G.J. Kaczyński, M. Pascali
Storia delle istituzioni religiose	R. Balbi, O. Condorelli

Parte II

Settori	Responsabili
Giurisprudenza e legislazione amministrativa	G. Bianco, R. Rolli
Giurisprudenza e legislazione canonica	P. Stefanì
Giurisprudenza e legislazione civile	L. Barbieri, Raffaele Santoro, Roberta Santoro
Giurisprudenza e legislazione costituzionale e comunitaria	G. Chiara, R. Pascali, C.M. Pettinato
Giurisprudenza e legislazione internazionale	S. Testa Bappenheim
Giurisprudenza e legislazione penale	V. Maiello
Giurisprudenza e legislazione tributaria	A. Guarino, F. Vecchi

Parte III

Settori	Responsabili
Letture, recensioni, schede, segnalazioni bibliografiche	M. Tedeschi

Comitato dei referees

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'"I know it when I see it'": the essential elements of religion(s) in U.S. law

Pasquale Annicchino

1. Introduction

The identification of the essential elements that constitute the notion of religion in US law has been a constant topic of academic debate and judicial decisions.[1] This contribution discusses the most significant decisions of the US Supreme Court in shaping the individuation of the essential elements of religion. Given the current state of academic discussion in the United States, this analysis is relevant to the protection of religion as a distinctive category, and therefore the legal norms that protect freedom of religion.[2] Part II outlines the basic elements of the approach taken by those who claim the impossibility of defining religion for purposes of protecting religious freedom. Part III includes the most important decisions of the US Supreme Court in this area. Part IV argues that the rise of nonbelievers, agnostics, or those who believe in 'nothing in particular'[3] adds new challenges to the issue of defining religion. Part V concludes this work by arguing that despite the difficulty and complexity in adopting a consistent and coherent approach to identifying the essential elements of religion for legal purposes, the issue

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[1] The literature in the field is rich. See among the others: J.H. Choper, 'Defining "Religion" in the First Amendment', *University of Illinois Law Review*, 3, 1982, p. 579–613; G.C. Freeman, 'The Misguided Search for the Constitutional Definition of "Religion"', *Georgetown Law Journal*, 6, 71, 1983, p.1519-1565; K. Greenawalt, 'Religion as a Concept in Constitutional Law', *California Law Review*, 72, 5, 1984, p. 753-816; M.G. Sanderson, 'Objective Criteria for Defining Religion for the First Amendment', *Toledo Law Review*, 11, 1979-1980, pp. 988-1018; S.L. Worthing, 'Religion and "Religious Institutions" under the First Amendment', *Pepperdine Law Review*, 7, 2, 1980, pp. 313-353.

[2] For arguments against protecting religious freedom through dedicated normative tools, see, among others, B. Leiter, *Why Tolerate Religion?*, (Princeton: Princeton University Press 2012) and M. Schwartzman, 'What If Religion Is Not Special?', *University of Chicago Law Review*, 79, 2012, p. 1352–1427.

[3] See the full report published by the Pew Forum, *America's changing religious landscape*, available at: http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

cannot be quickly resolved by eliminating a category of religion for legal purposes. The problem is here to stay.

2. The (im)possibility of religious freedom

Several international treaties or state constitutions protect and promote the freedom of religion; however, using any of them to help define the precise meaning of the word 'religion' is difficult. This issue has always puzzled legal scholars, judges, and lawyers. However, there is a major difference between academics and practitioners. As Jeremy Gunn pointed out:

> While academics have the luxury of debating whether the term "religion" is hopelessly ambiguous, judges and lawyers often do not. […] Judicial decisions about what constitutes religion make a very real difference in the lives of persons who may or may not obtain refugee status, or in the economic viability of a group that may or may not be recognized as a tax-exempt religious association.[4]

From a theoretical and social sciences perspective, defining religion is difficult.[5] Many scholars claim that defining religion is impossible, and any legal attempt to define it for legal purposes risks becoming a mere exercise in political discretion. Among others, Elizabeth Shakman-Hurd recently pointed out that the definition (or non-definition) of religion for legal or political motives creates difficulties: 'Many forms of affiliation and experience fit uncomfortably, if at all, into an understanding of religion as a singular, bounded "cause" of political behavior. Many operate outside of the understanding of religion presupposed by its secular legal and administrative "management"'.[6] The definition of religion into precise categories would therefore have side effects, particularly on minorities: 'Dissidents, doubters,

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[4] T.J. Gunn, 'The Complexity of Religion and the Definition of 'Religion' in International Law', *Harvard Human Rights Journal*, 16, 2003, pp. 189-215.

[5] Silvio Ferrari highlights this as the major source of tension between legal scholars and anthropologists, because criticisms towards legal approaches to the definition of religion: "… have the ability to make L&R (law and religion) scholars nervous, as they are afraid that their subject of study becomes so multiform and changeable that the end results are elusive", S. Ferrari, *Introduction. The challenge of law and religion*, in S. Ferrari (ed.), *Routledge Handbook of Law and Religion*, Routledge, 2015, p. 4.

[6] E. Shakman-Hurd, *Beyond Religious Freedom. The New Global Politics of Religion*, (Princeton: Princeton University Press, 2015), p. 13.

and those who identify with nonorthodox versions of protected traditions struggle for representation'.[7] Elizabeth Shakman-Hurd's understanding is deeply influenced by the studies of legal anthropologists such as Winnifred Sullivan,[8] who have attempted to demonstrate how courts reconstruct and format religion according to criteria that are interpreted according to fixed categories for what religion is, usually established hierarchically by religious authorities.[9] In national and international politics, law is probably the most powerful tool for formatting a religion, and thus for the application of provisions on religious freedom. After establishing that a defined group fits into the category of religion, all the legal provisions that establish and confer certain benefits can be applied:

> Powerful forces, including the law, incentivize individuals and groups to make claims for rights, dignity, and justice in the languages of religious rights and freedoms. […] Political and material rewards await individuals and groups who can convincingly frame identities and specify collective needs as religious actors, religious minorities, and religious communities in search of their freedom. If being a persecuted religionist…makes it more likely that development assistance, trade deals, or accession to the European Union will be forthcoming, we should not be surprised to see legislative, executive, and judicial action at all levels privileging the category of religion.[10]

Academic reflections do not necessarily lead to immediate consequences or require pragmatic policy prescriptions, but the situation changes when the courts are given the difficult task of defining religion and its essential elements, as the decisions of the judiciary immediately impact people's lives. As Talal Asad pointed out: 'Legal definitions of religion are not mere academic exercises: they have profound implications for the organization

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[7] Ibid. To this extent, Elizabeth Shakman Hurd suggested the category of 'lived religion' to differentiate it from the legal or political reconstruction of the general category of 'religion': 'The category of lived religion is meant to draw attention to the practices that fall outside the confines of religion as construed for purposes of law and governance. And yet to distinguish between official and lived religion in this way is to risk reifying and romanticizing lived religious practice', ibid.

[8] Among others, see W.F. Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) and W.F. Sullivan, 'We Are All Religious Now. Again", *Social Research: An International Quarterly*, 76, 4, 2009, p. 1181-1198.

[9] On the 'formatting' of religion, see O. Roy, *Holy Ignorance. When Religion and Culture Part Ways*, (New York: Columbia University Press, 2010).

[10] E. Shakman-Hurd, *Beyond Religious Freedom. The New Global Politics of Religion*, see supra at footnote 7, p. 20.

of social life and the possibilities of personal experience'.[11] Therefore, law must be understood as a limited and pragmatic tool used to resolve societal disputes, a tool that does not aim for theoretical perfection or deep inquiry into the anthropological assumptions underlying the notion of religion used by the judiciary in the application of normative provisions. Indeed, law is a reductionist tool, and its use entails costs[12] that legal scholars should not deny:

> Since what goes under the label of religion is culturally contingent, multifarious, and multifunctional — ideological, personal, political, institutional, communal, a phenomenon of cultural identity and at the same time a source of trans-temporal truth — one ought to expect the same variety, conflict, and incommensurability among and within the conceptions of religious liberty cherished by particular communities and enlisted to protect religion under the Constitution.[13]

On this topic I would concur with Marc DeGirolami, who argues that the epistemological problem lies in the different interests in and approaches to the issue. As DeGirolami argues:

> I suspect that this scepticism about getting beyond religious freedom may relate to broader differences of interest, focus, and purpose between the disciplines of law and the academic study of religion (ASR). To indulge in an overgeneralization (though one that, I hope, captures something true): ASR scholars are interested in dissolving religion; legal scholars are interested in managing it.[14]

Over the years, judiciaries in many countries, and in our study, the US Supreme Court, have tried pragmatically to 'manage' religion and define its essential elements in its judicial decisions. The exercise has been difficult and often incoherent, but it responds to the pragmatic needs of the adjudication of disputes and definition of legal boundaries, which are tasks of the

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[11] T. Asad, 'Response to Gil Anidjar', *Interventions: International Journal of Postcolonial Studies*, 11, 3, 2009, p. 226.

[12] For a detailed analysis on this point on US constitutional law, see M. DeGirolami, *The Tragedy of Religious Freedom* (Cambridge: Harvard University Press 2013).

[13] M. DeGirolami, 'What Comes After Religious Freedom?', *PluRel*, 25/09/2013, available at: http://blogg.uio.no/prosjekter/plurel/content/what-comes-after-religious-freedom.

[14] Ibid.

judiciary based on the elaboration of legal doctrines,[15] and in our study, the constant development of the essential elements of religion.

3. *Defining religion in US law*

In US law, no common definition of religion exists.[16] This is not a peculiarity of the United States; international law instruments contain many provisions to protect and promote the right to freedom of religion, but are missing a definition of religion.[17] Each possible definition considers some general assumptions and then proceeds to a general definition; however, even within the non-legal social sciences, a general consensus appears to be absent. Over the years, scholars, lawmakers, and judges have adopted different criteria to find a working definition of the term.[18] Some have relied on

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[15] For Marc DeGirolami, the role of 'doctrine' is an essential element that differentiates disciplines, such as law or theology, from other social sciences: '… law schools and schools of theology or divinity are the only ones I can think of in which the idea of doctrine is intrinsically important. This is in part because these disciplines are specially attuned to the authoritativeness of the past. Other disciplines have no such commitments – indeed, their commitments may run in a very different direction. It is not clear to me what perspective ASR [academic study of religion] has on the role of doctrine, but it would not be surprising that the less closely the discipline associates itself with schools of theology or divinity schools, the more it would embrace a critical posture towards doctrine. The other difference in this respect is that doctrine provides a coordinating function in law and theology that simply does not apply in other areas of study. This function of doctrine is, of course, connected to law's managerial role and its internal perspective on the customs and traditions of the specific society in which it operates. This role and this orientation are not shared by most other disciplines', M. DeGirolami, ibid.

[16] This is the conclusion of many scholars, including Mark Movsesian, the author of the main work that I have used for this article, to reconstruct the approach of the US Supreme Court, see M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', *ReligioWest working paper RSCAS* 2014/19.

[17] T.J. Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', see supra at footnote 5. For debates at the national level, especially in the United Kingdom, see. See L. Zucca, 'A New Legal Definition of Religion', *I-CONnect Blog*, 20/12/2013, available at: http://www.iconnectblog.com/2013/12/a-new-legal-definition-of-religion/ and concerning the definition of the Church of Scientology as a religion for the U.K. legal order.

[18] In addition to the contributions by courts, other important attempts were made, for instance, by the Internal Revenue Service to determine whether an organization can be considered a 'church' for taxation. Fourteen criteria have been identified: '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 courses of study; 9) a literature of its own; 10) established places of worship; 11) regular congregations; 12) regular religious services; 13) Sunday schools for religious instructions of the young; 14) schools for the preparation of its members'. See https://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Churches--Defined.

an essentialist definition, which attempts to define religion on the basis of some specific characteristics, such as the existence of a divinity. Others have adopted a functionalist criterion, evaluating the role religion plays in the life of a believer, while others prefer analogical criteria, running case-by-case comparisons with other known religions or religious groups. As mentioned above, there is no consensus among scholars, and this situation is reflected in the case law of the US Supreme Court. As Mark Movsesian noted, 'the decisions of the Court on this issue are "contradictory".[19] Beginning with the first case at the end of the nineteenth century, the Court stated that in order to recognise a set of beliefs as religious, a belief in a Supreme Being must be present. One example is an early (1878) US Supreme Court decision, *Reynolds v. United States.*[20] The United States introduced the *Morrill Anti-Bigamy Act* to ban polygamy in the country.[21] The main target of the bill was the Church of the Latter-Day Saints, which practiced polygamy at that time. The church challenged the law in court, claiming that it violated their First Amendment right to freedom of religion. The Court acknowledged in the case that

> 'The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed'.[22]

This 'elsewhere' has been turned to any time the Court has faced the problem, using various approaches. In the case of *Davis v. Beason,*[23] the Court employed a substantive and theistic definition of religion: 'The term "religion" has reference to one's views of his relations to his Creator, and

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[19] M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 5.

[20] Reynolds v. United States, 98 US 145 (1878).

[21] Signed into law on 8 July 1862 by President Abraham Lincoln.

[22] Reynolds v. United States, see supra at footnote 20.

[23] Davis v. Beason, 133 US 333 (1890). The US Supreme Court, in a 9-0 decision, ruled that the federal law against polygamy was not in violation of the Free Exercise Clause of the First Amendment. The decision is also very interesting for its historical narrative, which is offered as a justification for approval of the First Amendment: 'The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question'.

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'.[24] This decision of the US Supreme Court confirmed an approach that basically categorized as "religion" only Christian denominations that conformed to traditional theistic understandings. In *Church of the Holy Trinity v. United States,*[25] the Court remarked that 'we are religious people'[26] and that the United States was understood to be 'a Christian nation'.[27] In 1931, the decision in *United States v. Macintosh*[28] emphasized Christianity and in its opinion, Justice Hughes stressed that the central tenet of religion was the relationship between a person and God.[29] Notwithstanding this approach, as we have seen before, in the *Davis* case,[30] the Court did not affirm that Mormonism could be considered a religion. As Mark Movsesian notes: '… the Court scoffed at the idea that Mormonism could be a religion for constitutional purposes – notwithstanding the fact that Mormonism quite obviously holds a belief in God – because Mormonism advocated polygamy, a practice condemned "by the general consent of the Christian world"'.[31] At that time, Mormonism was not considered to be a Christian denomination, and therefore was not acknowledged as a religion for purposes of the First Amendment. Over the years, the religious demography of the United States gradually changed, and the pluralism of the religious landscape affected the judiciary's understanding of the notion of religion and its essential elements.

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[24] Ibid.

[25] Church of the Holy Trinity v. United States, 143 US 457 (1892).

[26] Ibid.

[27] The Court explicitly referenced Christianity by listing many sources from the national constitutions and federal laws referring to religion. The Court stated that: 'There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people. While, because of a general recognition of this truth, the question has seldom been presented to the courts …'.

[28] United States v. Macintosh, 285 US 605 (1931).

[29] The Court stressed this point, arguing that conscience should not trump state laws: 'When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those…', ibid.

[30] Davis v. Beason, see supra at footnote 23.

[31] M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 6

Laszlo Blutman points out[32] that a 1943 decision of the Court of Appeals for the Second Circuit signalled a new approach for the American judiciary. Called to interpret the expression 'religious training and belief' for purposes of the *Selective Service Act* of 1940, Judge Hand, writing for the Court, stressed how: 'Religious belief arises from a sense of 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'.[33] To this extent, a definition of conscientious objection can be offered as a '… response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought of as a religious impulse'[34].

Although the US Supreme Court decided the case of *United States v. Ballard* in 1944[35]*,* the decision contains no definition of religion. It can, however, be observed indirectly in the Court's interpretation of its essential elements. According to the majority opinion, written by Justice Douglas, freedom of religion includes: '… the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths … Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law'.[36]

In the 1960s the Supreme Court radically shifted its approach, no longer requiring a belief in God as one of the essential elements for applying the religion clauses. As Mark Movsesian points out: 'The Court has never expressly repudiated these nineteenth-century cases, but subsequent decisions reject the idea that religion requires a belief in God, much less the God of traditional Christianity'.[37] With the decision in the case of *Torcaso v. Watkins,*[38] the Court went even further by not requiring a theistic element for defining religion. The Court acknowledged in footnote 11 of the judg-

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[32] L. Blutman, 'In Search of a Legal Definition of Religion. Lessons from US federal jurisprudence', *Americana*, V, 1, 2009, available at: http://americanaejournal.hu/vol5no1/blutman.

[33] United States v. Kauten, 133 F.2d 703 (2nd Cir 1943).

[34] Ibid.

[35] United States v. Ballard, 322 US 78 (1944).

[36] Ibid.

[37] M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 6.

[38] Torcaso v. Watkins, 367 US 488 (1961).

ment: 'Among religions in this country which do not teach what would be generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others'.[39] Under this approach, the interpretation of the notion of 'religion' is extended to cover both theistic and non-theistic understandings. Further clarification emerged from a series of cases concerning conscientious objection to military service. The legislation at that time exempted those opposed to war for religious reasons or beliefs. The definition was quite sympathetic to a theistic understanding, as it was defined in the following terms: '… an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code'.[40] Notwithstanding this wording from the Supreme Court, in the case of *United States v. Seeger,*[41] protection was also to be ensured for '… belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed'.[42] The test, therefore, shifted away from the content and essential elements of belief towards an assessment of its form, which, according to the Court, should be 'sincere and meaningful' and should occupy '… a place in the life of its possessor parallel to that filled by the orthodox belief in God'.[43] Moreover, the Court offered other elements for evaluating and excluding the application of the norm for beliefs founded '… on the basis of essentially political, sociological or economic considerations'[44] or derived from 'merely personal moral code'.[45] In essence, with the *Seeger* decision, the Court adopted a functionalist approach towards the definition of the essential elements of religion. The Court continued to develop its approach in another case concerning the Military Service Act of 1967. In *Welsh v. United States,*[46] the applicant refused to characterize his objection to military service as 'religious'. However, this did not prevent Justice Black from granting the exemption: '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 … such an

[39] Ibid.

[40] United States v. Seeger, 380 US 163, 165 (1965).

[41] Ibid.

[42] Ibid.

[43] Ibid

[44] Ibid.

[45] Ibid.

[46] Welsh v. United States, 398 US 333 (1970).

individual is as much entitled to…[an] exemption … as is someone who derives his conscientious opposition to war from traditional religious convictions'.[47] The approach of the Court, in this case, is generous in granting the exemption. However, the Court also identified those who would not qualify: '… those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency'.[48] As some commentators have argued, with this decision the Court helped relax the essential elements for identification of a religion, and therefore, increased protection.[49] Many of the cases dealing with conscientious objection suggested that '… intensely personal ethical or moral beliefs can qualify as religion'.[50] The Court seemed to depart from this approach in *Wisconsin v. Yoder,*[51] decided in 1972. In this case, the Court favoured a more conventional understanding of the essential elements of religion. Leaning toward an unconventional understanding could create an issue in interpreting and applying the First Amendment, because: '… 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'. The decision in *Wisconsin v. Yoder*[52] showed that the Court at this time seemed to favour an approach to defining the essential elements of religion that followed '… the precepts of an organized faith community'.[53] In 1981, the Court decided the case of *Thomas v. Review Board,*[54] concerning a Jehovah's Witness working in a steel factory who asked not to have to work on weapons, as this would violate his pacifistic beliefs. He asked to be moved to another production department, but was denied, and he resigned as a result. After his resignation, he was denied unemployment benefits. The manner in

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[47] Ibid.

[48] Ibid.

[49] This is the argument made by Blutman, see L. Blutman, 'In Search of a Legal Definition of Religion. Lessons from US federal jurisprudence', see supra at footnote 32. On the relevance of this case, see also A. Koppelman, *The Story of Welsh v. United States: Elliot Welsh's Two Religious Tests*, Northwestern Public Law Research Paper 12–34, 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189269.

[50] M. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 6

[51] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[52] Ibid.

[53] M. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 7.

[54] Thomas v. Review Board, 450 US 707 (1981).

which Thomas framed his belief in order to request protection under the Free Exercise Clause of the First Amendment is relevant to our study. The records of the lower courts that decided the case show that it was complex. The Supreme Court acknowledged the decision in *Wisconsin v. Yoder*[55], recalling that 'Only beliefs rooted in religion are protected by the Free Exercise Clause',[56] but also admitted that: '… religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection'[57]. While the applicant explicitly admitted that he was 'struggling' with his beliefs, the Court maintained that: 'Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ'.[58] In addition, the Court also acknowledged that it lacked the knowledge required to assess what is orthodox for any religious group: 'Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation'.[59] In 1989, the Supreme Court was called to decide another case concerning the denial of unemployment benefits to a person who did not want to work on Sundays for religious reasons, and consequently resigned. In *Frazee v. Illinois Department of Employment Security,*[60] the Court was given an extremely complex task, since the claimant argued that he considered himself an independent Christian, not affiliated with any particular denomination. Because he did not belong to any established religious group, the Illinois Supreme Court denied his request since, following the interpretation of the Court of Appeal: '… the injunction against Sunday labour must be found in a tenet of dogma of an established religious sect. [Frazee] does not profess to be a member of any such sect'.[61] The Supreme Court rejected this approach and reversed its decision, clarifying that it was not necessary to be a member of an established religion or denomination to claim the Free Exercise Clause protection: 'Undoubtedly, membership in an organized religious denomination, especially one with a

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[55] Wisconsin v. Yoder, see supra at footnote 51.

[56] Thomas v. Review Board, see supra at footnote 54.

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] Frazee v. Illinois Department of Employment Security, 489 US 829 (1989).

[61] Ibid.

specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. In this case, he was entitled to invoke First Amendment protection'.[62] Despite the fact that the Supreme Court's approach has constantly changed, the judges failed to articulate a clear test to identify the essential elements of religion for purposes of legal protection, and the lower courts responded by developed their own tests. As a result, there is no clear test for defining religion in the case law of the US Supreme Court. As Mark Movsesian puts it: 'For the Court, religion means a belief in God – except when it does not. Religion means a commitment to a traditional, organized faith community – except when it does not. Religion excludes personal, philosophical convictions – except when it does not. And a court cannot evaluate a belief's logical consistency or coherence with mainstream religious interpretations – except when it can'.[63]

4. *New challenges for the US legal system*

An immediate and direct issue linked to the difficulties in defining religion for legal purposes has arisen due to the growth of nonbelievers, or those who describe themselves as 'spiritual but not religious'. In essence, US religious demography is undergoing a drastic change, one that is likely to affect the interpretation and application of legal provisions on the protection of religious freedom. It would have (ideally) been easier to converge upon a common definition of religion when the religious demography of the country was not very diverse.[64] Although for many the debate on the definition of the essential elements of religion remains theoretical, in Movsesian's

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[62] Ibid.

[63] M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 7.

[64] As Mark Movsesian pointed out: 'The Supreme Court's jurisprudence is muddled, but it has worked reasonably well because American religion has tended to follow conventional patterns. Religion has mostly meant organized traditions everyone would recognize: the classic Christian communions and their offshoots like Seventh-Day Adventists and Christian Scientists; the different branches of Judaism and more recently, Buddhism, Hinduism and Islam', see M.L. Movsesian, 'Defining Religion in American Law: Psychic Sophie and the Rise of the Nones', see supra at footnote 16, p. 8.

view, we should not 'dismiss the debate about Nones as academic'.[65] The consequences for protection of the freedom of religion, and particularly for the definition of religion under US law, will be significant: 'Whether Nones qualify as a religion for legal purposes is a question with potentially significant real-world consequences'.[66] In essence, when a more individualised method of belief spreads, how can we identify appropriate boundaries to define who is qualified to enjoy the protection and accommodation guaranteed to religion? In the previously-mentioned case, *Reynold v. United States*[67], the Supreme Court argued that Mormon beliefs on plural marriage do not enjoy First Amendment protection. Acting otherwise, the Court argued, '… would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could only exist in name under such circumstances'.[68] When religious affiliation is increasingly affected by growing individualism,[69] the real problem, again, is in identifying the boundaries of the content, and therefore the essential elements, of religion in an increasingly pluralistic environment.[70]

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[65] Ibid., p. 10.

[66] Ibid.

[67] Reynolds v. United States, see supra at footnote 22.

[68] Ibid.

[69] J. Ogilvy, 'The Global Spread of Individualism', *Stratfor*, 14/10/2015, available at: https://www.stratfor.com/weekly/global-spread-individualism. Ogilvy connects this phenomenon to the crisis of the major institutional structures in the religious field: 'The spiritual but not religious are themselves the fastest growing 'sect' in America. Here again the emphasis is on autonomy. Rather than uncritically accepting holy writ as handed down from on high, the spiritual but not religious may have a passionate interest in matters outside the secular. They can meditate on their own. They may have an intense interest in mysticism. But they are no more willing to worship the old gods in their old churches than the Independents are willing to support the old politicians in the old parties. This is not all bad, however worrisome it may appear to prelates bemoaning empty pews'.

[70] For a detailed analysis of this topic, see N. Tebbe, *Nonbelievers*, Virginia Law Review, 97, 2011, p. 1111–1180. Tebbe concludes with a possibilistic approach on solving the dilemma posed by nonbelievers: 'Several scholars have recently argued that the entire project of protecting religious freedom is unsound – in part because of the difficulty of determining the scope of the concept of religion and in part because the persistent uniqueness of religion in American law is indefensible. Courts are striking compromises that they cannot conceptually defend. Yet carefully considering the case of nonbelievers indicates that there may be little cause for worry. While a polyvalent, piecemeal approach may require judgments that are irreducibly complex, the endeavour is not necessarily irrational or erratic', p. 1179–1180.

5. *Conclusion*

Many of the cases that attempted to define the essential elements of religion have ended up only raising more questions, further muddying '…the already muddied waters of First Amendment jurisprudence'.[71] The argument is also made more complex by methodological divisions among legal scholars and social scientists – particularly anthropologists – called upon to interpret shifting case law and conceptual variations in the definition of religion. As Silvio Ferrari puts it:

> Lawyers' approach is essentially practical and normative and this explains why they are more immediately interested in legal provisions and court decisions; the cultural meaning of these rules is not ignored, but remains in the background of their legal reasoning. The interest of anthropologists is more theoretical and descriptive. They focus on the cross-cultural analysis of the ordering of human societies.[72]

Elizabet Shakman-Hurd's argument with regard to international religious freedom also holds true for interpreting the religious clauses of the First Amendment, when the judiciary is called to identify what religion is for purposes of applying the Constitution.[73] The notion of religion is contingent, shaped by historical and cultural factors, and deeply influenced by a particular understanding of religion. The Supreme Court, therefore, acts pragmatically to describe the essential elements that define religion for legal purposes, but this exercise does not occur in vacuum. The result of changes in the country's religious demography will require the Court to constantly change its definition of religion. The identification of the essential elements that shape the definition of religion in US law will, therefore, continue to change as the Supreme Court follows the evolution of American society. Perhaps one day Americans will decide to exclude the category of religion

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[71] Thomas v. Review Board, dissenting opinion by Justice Rehnquist.

[72] S. Ferrari, *Introduction. The challenge of law and religion*, see supra at footnote 5, p. 4.

[73] According to Elizabeth Shakman Hurd: 'The expert definition and official protection of international religious freedom as a universal norm hinges upon, and sanctifies, a religious psychology that relies on the notion of an autonomous subject who chooses beliefs, and then enacts them freely. This understanding of religion normalizes (religious) subjects for whom 'believing' is taken as the universal defining characteristics of what it means to be free. Anchoring this approach to religion is specific, historically located figure of faith, and a particular, historically contingent notion' [I cannot verify this quote, it should be checked!], see E.S. Hurd, *Beyond Religious Freedom*, see supra at footnote 6, p. 57.

from the list of protected constitutional rights. But this day is not likely to come soon. In the meantime, the judiciary will continue to define religion using the approach adopted by Judge Potter Stewart to define the notion of 'hard-core pornography' for legal purposes in the famous case *Jacobellis v. Ohio*[74]: 'I know it when I see it'.[75]

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[74] Jacobellis vs. Ohio, 378 US 184 (1964).

[75] Ibid. Judge Potter Stewart wrote in his opinion: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hard-core pornography'], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that".

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