# THE CASE OF THE HUMAN SACRIFICE

## In the Supreme Court of the New States
## Spring Term 2383
## State v. Williams

Chief Justice Goodhart announced the judgment of the Court in an opinion in which Justices Lemon and Frank joined:

The present case brings before us a question often asked by this Court and its predecessor, but never answered. Heretofore that question has been rhetorical only; for our brethren on the bench and for the commentators to ask was enough. Today we must go further. We have before us the ritual sacrifice of one competent consenting person by another in the context of genuine religious belief and practice. We are at the limits of the protection afforded by the first principle of the Restored Constitution and we must determine whether or not we are beyond those limits.

The first principle states: "Neither Congress nor the individual legislatures of the states shall make a law prohibiting free exercise of religion or respecting an establishment of religion." On May 1, 2381, James Williams, the head priest and "Prophet on earth" of the New Whole Earth Church (New Mexico Division), killed Sarah Reinhart and Roger Reinhart by severing the blood vessels of their throats with a ritual steel blade. Williams was prosecuted for the crime and was found guilty of murder in the first degree by a legally constituted jury of twelve peers. The High Court of Rio Grande affirmed the decision on appeal and we granted Williams' request for discretionary review. Should we affirm the decision of the high court, Williams will be executed within ninety days of our decision.

### I.

The New Whole Earth Church was founded some 150 to 200 years ago, taking its name from a small sect destroyed during the years of the Wars of Belief. The Church grew rapidly and has been subject both to schism and persecution. Rumors of human sacrifice and other primi-

tive beliefs and practices have accompanied the Church since shortly after its founding. Of the fifteen identifiable acknowledged leaders of the original New Whole Earth Church (now known as the New Whole Earth Church, Eastern Division) and the two surviving sects (New Mexico Division and Pacific Division), five have been murdered as a result of popular mob action and three have been convicted of murder and executed, all on the basis of alleged ritual human sacrifices.[1]

The beliefs of the Church comprise an eclectic and subtle blend of the Judeo-Christian tradition and various ancient American Indian cultures. The resulting combination has a strong pantheistic emphasis. Although the religion's teachings govern all aspects of life and stress the concept of community, the Church is not economically communal. A strong moral and ethical element pervades the formal writings and discussions of Church groups, and, aside from the rumors of sacrifice and resulting persecutions, most Church members are considered to be upright, law abiding citizens.[2] Although most congregations of the Church have a meeting hall for social and community purposes, almost all religious services are held outdoors, usually in wilderness settings. Services are held once a week on the Sabbath and on numerous sacred and holy days throughout the year.

As a result of the trial below, the practice of human sacrifice by the New Mexico Division of the Church is no longer a matter solely of rumor and speculation. Extensive testimony detailing the practice was given by the defendant and several sect members. The usual practice of the sacrifice as outlined below was followed, with the exception of minor differences, in the case of the Reinharts.

The sacrifice occurs high in the mountains in the late fall once every seven to ten years. To the believer the ritual symbolizes, affirms, and embodies the oneness of man and the earth and the presence of the spirit of God in both. Two members of the Church, one male and one female, are selected by the prophet to be the central parties in the "most holy act of solidarity with the Earth and God." Those selected are unmarried, usually in their mid-twenties in age, and may or may not be from the same community or congregation. The prophet consults with each party in private prior to formal selection and demands that partic-

1. H. HOSTETLER, A HISTORY OF THE NEW WHOLE EARTH CHURCH 266-67 (2358); H. LIEBER, SACRIFICE AND SALVATION: THE STORMY PATH OF THE NEW WHOLE EARTH CHURCH 313 (2365); D. Erickson, The Lives of the Leaders (June 1, 2372) (doctoral dissertation, University of New Garth, No. 8174322).

2. Some have theorized that, while the spark for the repeated attacks on church members has always been rumors of human sacrifice, the fuel has in fact been the envy of the general populace for the close, supporting, and comforting community provided by the Church and the serenity, calm, and aura of superiority of its individual members. *See* authorities in note 1 *supra*.

ipation be "purely and totally voluntary."[3] Approximately one month after their selection, the central parties are married in a "joyous ceremony" attended by a group of approximately fifty of the "most blessed members of the Church chosen from the faithful of the many congregations." For one week after the marriage, the central parties live as man and wife in an isolated cabin somewhere in the mountains of the several western states where the cult thrives. The locale for the interlude of marriage and the subsequent sacrifice is different on each occasion. All of the basic needs of the couple are attended to by a small party of the faithful led by the prophet, who bring in supplies and perform chores once each day.

On the morning of the eighth day after the marriage the prophet comes to the couple. Each victim at that time ingests a mild tranquilizer and a stronger muscle relaxer. The couple and the prophet then take a long walk through the woods. Approximately twenty of the "elect" are waiting for "these holy three" at the location of the sacrifice. This is always a place close to a high stream or brook which can be considered a "source" for one of the major rivers of the continent. Following a long series of group prayers and meditation, the couple sits holding hands with their backs to a young tree. The prophet and high priest wraps each in sacred blankets, takes the ritual blade, and severs the blood vessels of the throat. Then, as a Church prayer recites, the blood of the victims "drains into the earth at the roots of the tree at the source of the river." The Church members present meditate as the blood flows, and for an hour thereafter. Each takes a solitary walk for another hour. After rejoining for further prayers, the group buries the victims at the base of the tree.

The Church has not been entirely successful in keeping this sacrificial rite a secret. Rumors and stories of the practice, frequently in grossly distorted or exaggerated forms, have circulated wherever the sect has settled, leading frequently to persecution and violence. Church members have responded by becoming more secretive concerning their practices. Believing that this circle of secrecy and violence, feeding upon itself, was destructive, and believing that the first principle protected the rights of the Church, Williams decided to bring the practice

3. Williams testified that "refusal or ambivalence" to participate was the uncommon response, but that it had occurred "many times." Williams further asserted that refusal or reluctance to participate after acceptance of the "Primary Role" had also occurred "on several occasions," but that it had never occurred during the last three days of the ritual. The prophet, according to Williams, invariably treats ambivalence or reluctance at any stage as a final and irremediable sign that the sacrifice should not occur that year. Two cult members testified that they had been approached for the Role, but had been refused upon a less than enthusiastic affirmative answer on their parts. One former cult member testified that he had enthusiastically accepted, but had reneged five days prior to the ceremony. To his knowledge, no ceremony was held that year.

into the open—to test the principle with his own life to be determined by the balance of justice. After conferring with several sect lawyers, Williams enlisted two psychiatrists from outside the Church as observers. Each was allowed to interview each of the victims alone at length, to observe them following selection on through the rite itself, and to take a sample of the ingested drugs for analysis. Although their testimony was admitted solely as to the basic facts of the case, extensive expert testimony was proffered that the Reinharts were competent adults whose participation in the rite was meaningfully voluntary with full knowledge of the circumstances and consequences.[4]

There were no significant disputed facts at the trial. Due to its possible relevance in regard to the state of mind of the defendant and the consequent category of homicide which the jury might determine, the state stipulated that Williams' actions in killing the Reinharts were motivated primarily by his sincere belief in the doctrines of the New Whole Earth Church. The state further stipulated that this belief and these doctrines were in fact religious in nature and that the New Whole Earth Church was a bona fide church whose beliefs constituted a genuine religion.[5] Substantial testimony was proffered by the defendant concerning the nature of the Church, the ritual of the sacrifices, and the psychological status of the victims. The trial court excluded all such evidence, however, ruling in each instance that it was not relevant because the first principle had no application to the crime charged. The trial judge also refused to instruct the jury concerning a defense based upon religious practice. Exception to each of these rulings was made

4. The proffered psychiatric testimony is perhaps the most interesting of the case. Each expert undertook the employment with reluctance, was greatly shocked to learn of the actual existence of the rite, and admitted to a prejudice against the sect at the beginning of the interviews. Each, however, was surprised by the extent to which manipulation or pressure, overt or covert, was absent from the process by which the victims came to participate in the rite.

5. At oral argument counsel for the state admitted that these stipulations placed Williams' beliefs within the pale of religion covered by the first principle. The issue of what is and what is not religion for the purpose of the application of the first principle is thus not before us. This issue may prove in the future to be one of great difficulty. Some suggest that an overly narrow interpretation of the term "religion" in the original Constitution's free exercise clause subsequent to the *Yoder* and *Fahd* cases, notes 41 & 43 *infra*, was one of the factors which contributed to the Wars of Belief. *See* H. HOULIHAN, FOUNDATIONS THAT CRUMBLED: THE BEGINNINGS OF THE WARS OF BELIEF 204-05 (2337). Others suggest that a broad interpretation of that which is to be considered religion is only compatible with a relatively narrow and innocuous exemption from civil control for religiously based activity. The factors which will determine this question, and whether or not the nature or strength of the evidence required to determine it will vary with the severity of the harm threatened, are issues to be determined at another time. We might add, however, that in this case the state's stipulation is in accord with the evidence: Williams' beliefs and the church he leads appear to be religious in the traditional and historic sense of that term whether one focuses upon the nature of beliefs, the nature of the practices under those beliefs, the sociological history and organization of that entity known as the New Whole Earth Church, or the psychological functions of those beliefs and practices in the lives of the church's adherents. And while subjective state of mind is always an elusive fact, no evidence suggesting anything other than sincere belief has been submitted in this matter.

by the defendant in a timely fashion. In the state of Rio Grande the death penalty is mandatory in cases of murder in the first degree.

## II.

In the one hundred and fifty years since the founding of the New States this Court has had but two occasions to address the free exercise provision of the first principle. In *State v. Sand* we concluded that the state could not limit or restrain individual usage of ingested substances if: (1) the usage was based upon religious belief or was a religious practice; and (2) the state could not demonstrate a high probability of serious harm to specific persons resulting from the ingestion of the substances in question in the context of the particular religiously based usage before the Court. The opinion was brief, and the limited analysis it contained referred to and rested upon the free exercise cases of the old United States which are discussed below by my brother Cohen. The opinion in *Jenkowitz v. Commissioner of Health*, based upon the same precedents, was even briefer in holding that a person could be required to submit to an inoculation protecting against contagion of a disease which presented an actual and not remote threat to the community despite that individual's sincere religiously based intention and determination to avoid that inoculation. *State v. Sand* does not provide an answer if the situation is such that the state can, as here, demonstrate a specific, concrete, serious harm to a specific person resulting from the action in question. *Jenkowitz v. Commissioner of Health* does not indicate the result if the threatened harm relates to specific consenting adults, rather than to the community as a whole. And the precedents of the old United States, while we may turn to them for example, advice, and guidance, in no way bind us in our decision. The time is past due when we should face our own first principle directly and determine its meaning and implication for our society in this age.

Both the religion clauses of the old first amendment[6] and our first principle[7] are responses of a weary and wary people to ages of religious controversy, persecution, and strife—often armed, often violent, often fatal to hundreds and sometimes thousands of persons. The old United States disintegrated as a result of the drastic and rapid decline of its economic well-being in comparison with other nations of the globe and the simultaneous development of a multitude of diverse and fundamentally conflicting religious and political groups, many of them mili-

6. The religion clauses of the amendment are set out at note 31 *infra*.
7. The first principle is set out in the text above at the second paragraph of this opinion.

tant and totalistic.[8] The Wars of Belief, which grew from the initial multiple civil revolts of conscience, and the destruction they wrought, are well known to each of us from grade school on. Also common knowledge is the fact that, following the Interregum, this government and this nation were established on the basis of a single written document, the first principle of which mandates religious freedom, toleration, and separation of the state from religion. That this principle is first—primary—is of no little significance in our deliberations today.

We have learned that matters of religion and conscience are, of all concerns of man, the most likely to be beyond reason, beyond persuasion, and beyond consent to majority rule. As such, if invaded, these provinces are the most likely to rebel, the most likely to rupture the ties that bind the political organization of society; for among the most significant of those ties are commitments to reason, to persuasion, and a consent to the rule of the majority. Therefore, the first principle begins our political order with the explicit recognition of this simple reality: In matters of religion we do not consent to be governed by the political mechanisms elaborated in the body of our Restored Constitution.[9] Of course this exception, or exemption, is not absolute, although the language expressing it is. Every principle of our law or politics when stretched far enough will conflict with another principle, and in such situations accommodations must be reached. Even the first principle can sometimes conflict with the rights of the community expressing itself through the mechanisms of government, as in *Jenkowitz*, or with the rights of other individuals, either rights under the first principle or one of the other principles, several of which are expressed in language equally absolute.

This brings us to the question we attempt to resolve today: what are the limits of our first principle when such a conflict arises? It is at this point in the argument that one usually hears the sound of alarm—the shrill cry that an absolute interpretation of the free exercise lan-

8. The relationship between the economic collapse and the radical segmentation of the population, and whether either was a consequence of the other, has been debated for generations.

9. The first amendment of the Constitution of the old United States was also based upon this reality, although interpretation of its provisions often did not reflect it. The first numbered paragraph of James Madison's historic "Memorial and Remonstrance" states that,

> Religion or the duty which we owe to our Creator and the manner of discharging it . . . is *precedent, both in order of time and in degree of obligation*, to the Claims of a Civil Society. *Before* any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor 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 Universal Sovereign. We maintain therefore that *in matters of Religon, no man's right is abridged by the institution of Civil Society and* that *Religion is wholly exempt* from its cognizance.

8 THE PAPERS OF JAMES MADISON 299 (W. Hutchison & W. Rachel eds. 1973) (emphasis added).

gauge disables government and leads to anarchy. Thus, in *Reynolds v. United States*,[10] our predecessor Court stated in the first major interpretation of free exercise rights:

> To permit this [violation of the law based upon religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances.[11]

And at this point also the heretofore rhetorical questions appear:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[12]

From such observations it is easy to go on to "balance" the state's legitimate interests against the right of the individual, as was done in the later old United States cases, and, in a rather conclusory fashion, by this Court in *Jenkowitz* and *Sand*. What is left out in this rhetorical process, however, is the great weight which must be placed on the individual's side of this balance before one even begins the process of weighing the specific interest in question. It is the first principle itself which mandates this unequal beginning for the balancing process.

Even if one is doubtful about the reality of the exemption created by the first principle on the basis of a social contract theory of our Restored Constitution (or even the persuasiveness of the image of or analogy to such a contract), there is no doubt that the history of the Wars of Belief led the framers to the conclusion that the stability and endurance of our political order required the widest possible latitude for actions based on religious belief. And if one is not persuaded by an appeal to the perception of the framers, our own knowledge of that same history (even with the sharpness of memory dulled by 200 intervening years of relative peace from religious strife) coupled with the plain language of the principle and the simple fact that it comes literally first, *graphically* prior to the rest of our law, must lead us to the same conclusion. To repeat, with us the principle of toleration for religiously based action comes first—it is the base of our political order.[13]

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10. 98 U.S. 145 (1878).
11. *Id.* at 167.
12. *Id.* at 166.
13. The first reaction to this suggestion may well be the same as that quoted above from *Reynolds*: This is a slippery and unreliable base, one likely to deteriorate toward chaos. Such a concern is legitimate, but it cannot lead us to an answer to our question unless we choose to

Thus, the answer to our query concerning the limits of constitutional protection for the free execise of religion may not be found in any simple balancing of the importance or weight of the interest of the state against the importance, weight, or significance of the practice to be limited. Nor can it be found in the "parade of horribles" which arguably will result from a "radical" interpretation of the clause. The answer that follows from the premises stated above is that the protection must be as complete as it can be and yet also be reconcilable with the existence of a social order. In other words, the exemption, as language and history both dictate, must be as total, as absolute as possible within the context of our Restored Constitution—that is, within the context of a society ordered by law. To phrase it yet another way, the answer to both rhetorical and actual questions must be "yes" up to the point where we approach a situation which threatens actual anarchy, to the point beyond which we honestly believe we cannot go without bursting the ties which bind our society together.

This conclusion, of course, does not magically dissolve the dilemma before us, but it does provide us with the proper context. In attempting to discriminate those actions which do in actuality threaten the social order from those that do not, we cannot accept alleged consequential harms which are abstract, general, tenuous, or speculative. To prohibit or punish action genuinely based upon religious belief, the state must demonstrate that the action involves a real likelihood of serious, concrete harm to individuals other than those individuals participating in or consenting to the action. If substantial probability of such harm is not demonstrable, the first principle protects the action in question.[14] Under such a rule, state interference with action mandated by religious belief will be limited to those situations in which the action would impinge in a tangible way on the rights or interests of other persons, the very situation in which refusing to protect other persons may

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amend our Constitution. That document stands for the conclusion reached by the framers that the risk of such deterioration is *less* than the alternative risk posed by imposition upon conscience and religious practice. Because the years of religious strife are so remote from us, we may disagree with such an assessment of the risks. Such disagreement, to the extent it exits, must be channelled in the proper direction—amendment to the Constitution—not into judicial perversion of the first principle.

14. This radical libertarian rule can be seen to be derivative from the classic formulation of John Stuart Mill:

> [The] end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

*On Liberty*, in J.S. MILL, UTILITARIANSIM, LIBERTY AND REPRESENTATIVE GOVERMENT 95-96 (Am. ed. 1951). The endless debate over the validity of this proposition in general, which so often reduces to a dispute concerning how broadly or narrowly the term "harm" is to be used, is of little relevance to our inquiry. We are concerned only with that narrow and limited category of behavior protected by the first principle, and we use the term "harm" in a narrow and limited manner.

well lead to outrage, self-help, or revolt, in short to the dissolution of the social fabric.

With this guide in mind, the case before us is significantly simplified. True, the harm in this case was singularly clear and tangible: death to two healthy young adults. Not only was there a high probability that the threatened harm would occur; it did occur and promises to recur. That harm, however, was visited upon two persons who were participating in the questioned activity and who consented to it.[15] Regardless of the clarity, tangibility, and stark actuality of the harm, that consent vitiates the severely threatening nature of the harm in regard to the social order. The Reinharts' consent circles the harm back, contains it within a willing group, and thus shields society from the kind of harm reaction to which poses a serious threat to social cohesion. Having determined that the action in question was motivated by sincere religious belief,[16] and having also determined that the harm resulting from that action does not pose the type of ultimate threat to our society required before the state may pierce the strong exemption created by the first principle, we must conclude that defendant's actions were privileged under the free exercise clause of the first principle. This action therefore must be remanded with directions to reverse the conviction of James Williams. Because our decision transforms the relevance of the issue of consent by the victims, reversal of the conviction shall be stayed for a period of six weeks to allow the prosecutor to develop any evidence he might discover to support a motion for a new trial on the question of the consent of the Reinharts.

## III.

To answer certain criticisms voiced by our brothers in dissent, and to assist the lower courts in deciding the difficult cases which may arise in the future, we believe a modest elaboration of the criteria applied above is appropriate prior to concluding this opinion. We have held that an action genuinely motivated by religious belief may not be found to be criminal unless it poses (1) a high probability of causing (2) serious (3) concrete harm to (4) individuals other than those consenting to or willingly participating in the action.

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15. Substantial, nearly cumulative, evidence was proffered to demonstrate that the Reinharts were competent, willing adults, each of whom was fully informed concerning the ritual sacrifice to which each freely consented. Under our interpretation of the first principle, this evidence should have been admitted and, had it been admitted, reasonable men could not have differed on the issue of the voluntary consent of the Reinharts. Moreover, at oral argument counsel for the State of Rio Grande admitted that the prosecutor had been unable to develop any evidence to the contrary. On the issue of consent, therefore, only one result is possible.

16. The State of Rio Grande has admitted throughout this action that defendant Williams' acts were motivated by sincere religious beliefs. See text accompanying note 5 *supra*.

Although this test has not previously been articulated in our opinions, it is consistent with *State v. Sand* and *Jenkowitz v. Commissioner of Health*, the two previous cases concerning the free exercise clause decided by this Court. Analyzed by the standards announced today, the state in the *Sand* case failed to meet the fourth requirement, just as the state has failed to do so here. Whatever harm the state could prove to the defendant ingesting the drug,[17] it could demonstrate no concrete, tangible harm to third parties (or even to society "in general").

The *Jenkowitz* case, on the other hand, provides an example of the rare situation in which a threat to society is sufficiently severe to override the otherwise rigid protection provided by the first principle. The evidence in that case led to the conclusion that there was a high probability within the succeeding several years of an outbreak of severe contagious sciriosis, a disease which had ravaged the continent twice in the previous eleven years. Vast numbers of the population in this country remained uninoculated—*Jenkowitz* arose over one hundred years ago, at a time when the state of public health and the public's knowledge of the need for inoculation against sciriosis was incomparable to that which we enjoy today. In such a situation, refusal to be inoculated constituted in fact a substantial threat of severe illness and possible death to innumerable individuals other than those refusing. If the disease began, containing it through quarantine and inoculation was extremely difficult. One weak link, the uninoculated individal, could render futile weeks of effort, as had been shown repeatedly in the progression of the sciriosis epidemic of 2260. Refusal to be inoculated thus created a genuine likelihood of serious physical harm to third parties—precisely the type of threat we suggest above would be sufficient to intrude upon the protection of the first principle. It should also be noted that this is also precisely the type of threat which *in fact* threatens the social bonds of society. Thus, both the principle developed today and the test derived from it were met in *Jenkowitz*. This Court correctly refused to allow the plaintiff to avoid compulsory inoculation on the basis of an admittedly sincere religious belief. Whether an inoculation case would present a sufficiently severe threat in this day and age is, of course, a question which we do not reach today. The particular factual context determines the reality and nature of the risk.

The line we are attempting to draw today may be highlighted by

17. The obscure opinion in the *Sand* case "balanced" the impingement on free exercise against the state's interest, and found the harm proved by the state insufficient. *See* text following note 5 *supra*. The *Sand* opinion is ambiguous concerning whether harm to the actor, rather than a third party, could remove the protection of the free exercise clause. The facts upon which the Court based its conclusions were that no physical damage could be demonstrated; psychological damage was to some extent speculative; and dependence was no greater than in commonly accepted recreational and therapeutic substances.

imagining a change in the facts before us. Assume the Reinharts had two young children orphaned by the actions of the defendant. My colleagues in dissent have suggested two effects sufficiently harmful to remove the protection of the first principle in such a situation:[18] first, the debilitating psychological effect on the youngsters and, second, the burden on society in raising them.

The second suggested harm is the least persuasive. That the burden of raising the children would be placed on society is speculative; relatives, friends, or cult members might assume the burden.[19] Should the harm eventuate, however, the burden on society would be financial in nature—the expenses of raising two children. The primacy of the first principle means, at the least, that we do not subvert it on grounds solely financial, certainly not when the cost is as modest as that of raising a few children. Thus, the societal harm in such a situation would be insufficiently severe and insufficiently certain to meet parts one and two of the test announced today.

The harm to the children themselves is a far more serious problem. Growing up without a father and mother under the bizarre circumstances attending their deaths in this kind of case might well cause substantial psychological difficulty or damage. Surely we would not suggest that the artificial distinction between psychological and physical mutilation is the basis of our test, argue my dissenting colleagues. Yet this *is* the basis of a valid and necessary distinction in our analysis of these difficult questions. Moving from physical injury to psychological injury is to shift from the verifiable to the inherently speculative. Many admirable citizens have been raised under circumstances as difficult, indeed far worse, than those imagined here. And, not only is the fact of injury less certain in the psychological realm, but the severity is extremely difficult to either measure or predict.[20] Finally, the emphasis upon a concrete or tangible harm—which would be absent in this hypothetical case—is perfectly congruent with our emphasis on identifying only those harms likely to substantially threaten the social order as offering grounds for interference with the free exercise of religion. The concrete and tangible injury, simplistic and artificial as the distinction may be, is in reality far more likely to cause outrage and revolt than the more sublte forms of damage we are imagining.

The possibility of outrage or revolt in reaction to concrete injury

18. *See* note 52 *infra*.

19. Such an assumption of responsibility is particularly probable within groups such as the New Whole Earth Church which stress the concept of community as a living reality.

20. This difficulty is compounded when one remembers that the alternative being argued is for the children to be raised by parents who have been forced by the state to abandon the dictates of their religion because of the state's concern for the welfare of those children. The psychological atmosphere of such a family situation might itself be severely damaging to the innocent children.

returns us to the specifics of the case actually before us, and another threat argued to lead to a result contrary to the one we have reached. It is suggested that allowing such serious and graphic crimes to go unpunished will itself incite violence and disregard of the law. The general populace will not tolerate such criminals and crimes in its midst. Mob violence, if nothing else, the state suggests is a threatened harm of sufficient probability and severity to override first principle protection. In answer we must point out first that once again we deal with a speculative harm. We do not know whether such a result would eventuate. Second, lawlessness by a minority cannot be allowed to be the only test under the principle announced today, although perhaps our comments could be read to degenerate into such a result.

Certainly, a small portion of our population might react in the lawless manner suggested. But history suggests that the individual and the minority sect likewise will not tolerate imposition by society on actions mandated by fundamental religious belief. The Wars of Belief demonstrate this, if nothing else. Thus, we have two conflicting threats: (1) Extreme toleration poses a real threat to our social fabric. (2) Imposition on religious belief poses a real threat to our social fabric. The first principle itself reflects the choice made by our society as to which is the greater threat. Only in cases where the revolt or general lawlessness is far more probable and far more likely to involve a substantial portion of the population than in this case could the first principle be overcome. That choice may be wrong, but it has been made, not by us, but by the Founders.[21] In our opinion, the first principle mandates that in almost every case the minority is to be protected from the majority in the area of religious activity. The threat to the social order will stem from the actions of the imagined mob, not from the individuals (such as the defendant in this case) threatened by that mob. The persons composing the mob will be the criminals, and this aspect of our problem, although serious and frightening, must be considered primarily a question of law enforcement and education.

The last argument against our decision is, to us, the most difficult. Toleration of such a heinous and fundamental crime as we have before us in this case, we are told, will subvert our entire moral order. And, this argument continues in the terms we have chosen to employ in our analysis, that moral order, the people's belief in the reality of right and wrong, is one of the most basic of the ties that bind us together as a society.[22]

21. If our decision results in agitation for an amendment of the first principle, as some suggest it will, the decision and debate will have been placed in the proper forum. This Court does not have the last word in these matters.

22. It might be answered that this threat and the threat of mob violence discussed immedi-

The links between morality, law, punishment, and behavior are little understood, but, in our opinion, are real and important. Each affects and modifies the others in a subtle and complex system; alter one, and the others will be changed. This line of perception persuasively suggests that the removal of punishment in certain cases of fundamental crimes, such as the murders in this case, will lead inexorably to significant changes in the beliefs of persons concerning the nature and reality of morality and law, which in turn will alter behavior in significant negative ways.

The short and simple answer would be to say that this threat remains too speculative, given our present knowledge of psychology and sociology, to rise to the level needed to meet the first arm of our test. Also, the harm is insufficiently concrete to meet the third arm of the test. The retort to this answer is that the ultimate seriousness of the threat and its fundamental relation to the ground of our test—the survival of the social order—more than balances out its speculative, intangible nature. The rejoinder is twofold. First, the elements of the test we have announced today are not cumulative or interdependent; failure to meet the threshold of one requirement cannot be offset by extreme clarity or strength in another.[23] Second, should the harm in fact develop, a situation would in time be realized when the threat was sufficient to mandate a different result under the test employed in this case.[24] That it might be too late to change the tide, to stem the dissolution of our social order once the threat had materialized, is a risk we believe to be mandated by the first principle.

Employing our test to answer a fundamental criticism of a result mandated by that test demonstrates how we intend the test to operate, but it also begs the question which has been raised. The final answer to what we shall denominate the "erosion of the moral order argument" lies in our understanding of the nature of our Restored Constitution and the first principle. That Constitution provides a process and structures for making decisions which will bind all persons in the society.[25]

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ately above are inconsistent: Outrage at a fundamental wrong unpunished and subversion of a belief in right and wrong are opposite responses. However, each might be the effect on a portion of the population; they might exist as alternative serious threats to our social order; or, more likely, the first might, with sufficient time, transform to the second in a significant number of persons.

23. Were it otherwise, the certainty, seriousness, and concreteness of the harm in this case (death), which clearly meet the first, second, and third arms of the test, might be said to overbalance the speculative and intangible nature of the harmful effects on nonconsenting third parties—the failure to meet the fourth arm of the test.

24. The difficulty might well remain, however, of demonstrating the causal connection between the harm and its alleged cause: exemption from punishment for crimes committed under the shelter of the free exercise clause.

25. This is just another way of stating the obvious: the document forms a polity or government.

It does not determine any ultimate reality, whether it be in the realm of metaphysics, epistemology, or ethics; nor does it provide a process or method for doing so. Ultimate truth is for the individual (or for groups voluntarily created by individuals) to discover, not for the state. A person's (or group's) understanding of ultimate truth may form the basis of his or its belief, argument, or decision in the course of the *process* of governmental decision-making, but ultimate truth is neither the object nor the result of that process.[26] This fundamental axiom applies to the reality or truth of right and wrong just as it does to all other reality or truth. The first principle itself can be read as a recognition of this distinction which places a particular category[27] of individual determinations concerning ultimate truth and reality—and action based on such beliefs—beyond the control of the very processes of decision-making created by the body of the Restored Constitution. Thus, it appears to us that an appeal to governmental authority to act in support of the people's belief in the reality of right and wrong when that exercise of authority would impinge on the area of basic freedom protected by the first principle—an area itself fundamentally concerned with ultimate reality and therefore beyond the competence of civil society[28]—is at odds with the function intended for the structures and process of government created by the Restored Constitution and the exemption from it created by the first principle.

This elaboration may be merely yet another way of restating the priority and fundamentality of that exemption which, as discussed above,[29] mandates the type of strict test we have framed in this opinion. As an answer to the "erosion of the moral order" argument, however, we conclude that it is a further demonstration that in a conflict between the first principle and values related to the survival of our moral order, the very structure of our polity rests upon premises which suggest the primacy of first principle protection. This is so even when the conflict is embodied in a case such as the one before us, which presents a real possibility that the argued subversion of the moral order will lead to subversion of the social order—the very evil which both the Restored Constitution as a whole and that portion of it we know as the first principle were designed, in part, to prevent.

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26. The structure of our government and the freedoms of belief, speech, press, and association protected by the second through fifth principles reflect the Founders' belief that "ultimate" truth could be approached through the free play and competition of all ideas and beliefs as opposed to any official, enforced determination by the polity of any particular "truth" or "reality."

27. The definition of religion under the first principle is a task we need not face today. *See* note 5 *supra*.

28. *See* note 9 *supra*.

29. For the reasoning and the perceptions underlying and leading to the creation of the test applied today, *see* section II *supra*.

In sum, the conviction of the defendant is impermissible under the limitations on government mandated by the free exercise clause of the first principle of the Restored Constitution. The matter is remanded for proceedings consistent with this opinion and the directives at the conclusion of Part II.

Justice Cohen dissented in an opinion in which Justices Wasson and Foote joined:

The opinion of the Chief Justice represents a fascinating political theory. As speculative, abstract academic discourse it is both admirable and persuasive. As law, however, the opinion has two fundamental flaws. First, it is unrelated to the body of our law; it rests upon no precedent and bears no analogy or relation to any of our general legal principles. Second, and more significant, the result is perverse, contrary to all that we intuit as right and moral in the situation before us. Thus, the opinion of the Chief Justice is like a soaring narrow tower without foundation or buttress—a pleasure to behold in the mind, but a disaster if constructed in the real world.

These two failings are not unrelated. Our legal system is premised upon precedent and gradualism for the very reason that often what appears esthetically pleasing, consistent, and reasonable in political or legal theory is too harsh, too contrary to human nature, or simply too impractical to function as a legal rule or principle which will govern and affect the actual behavior of real persons. The opinion of our Chief Justice elaborates a political theory based upon an absolute interpretation of one provision of our law to the detriment of all others.[30] In doing so, it strikes a broad theoretical swath through the detritus of the law, a tactic which is tempting due to its clarity and simplicity, not to mention its creativity and audacity. It is also, however, a tactic which is dangerous and arrogant, for precedent embodies both the experience of the ages and the wisdom of generations of judges, many of whom were at least the equals of the present members of this Court. In this opinion we shall first describe the precedents which delineate the proper legal principles applicable to free exercise questions arising under the first principle. We shall then apply the rules we have derived to the facts of

30. The Chief Justice pays passing respect to the principle that every provision of law "when stretched far enough will conflict with another principle, and in such situations accommodation must be reached." Text following note 9 *supra*. The result reached by the Chief Justice and the rule delivered in this case reveal that such "accommodation" is illusory when the first principle is one of the provisions in question. Although situations might be imagined in which the principle would not prevail under the test framed by the Chief Justice (he suggests *Jenkowitz*, for example), they are so few and unusual that the term "absolute" is a fair and accurate description of the Chief Justice's interpretation of the first principle.

this case. Before doing so, however, two fundamental misconceptions of the Chief Justice's opinion must be briefly explored.

First, a close examination of the ruling opinion in this case reveals a curious fact: The argument of the Chief Justice is based upon the location of the legal provision in question in the document in which it is found. Because the language of the first principle is the first substantive provision of the Restored Constitution, it is concluded that it was meant to have priority over provisions located further back in the body of the document and over other provisions of our law mandated under procedures set out by that document. This rule of priority is surely a novel principle of statutory construction, plausible in the abstract but ridiculous in application. In any writing something must come first, and absent specific language suggesting that any particular portion of a legally binding document is meant to have priority over any other, or is meant to be interpreted in an absolute fashion while other provisions phrased in equally absolute language are not, there appears to be no reason to give substantive meaning to the mere order in which provisions appear. Surely such a principle of construction unnecessarily complicates both the drafting and the explication of a legal document, encumbering a search for plain expression and meaning with the necessity for deciphering inarticulate coding. When language itself is perfectly capable of indicating a preference should conflict of provisions arise, and when such language is not infrequently found in our statutes, there is no reason to believe or conclude that the framers of the Restored Constitution resorted to a code to indicate a preference they did not express in langauge. Would the Chief Justice accept the notion that because his cherished right of privacy appears in the twelfth principle it must be sacrificed in any conflict with earlier provisions, such as those protecting the rights to fair public trial or fair recompense for the public taking of private property? The priority or primacy of the first principle which is the foundation of my brother's opinion is, quite simply, totally illusory, the result of attributing meaning to an ordering which was not intended to convey meaning and has not previously been interpreted to convey meaning. And without this foundation there appears to be no reason to give the first principle a more radical or absolute interpretation that is given to other portions of the Restored Constitution.

The second fundamental misconception of the Chief Justice is his belief that this Court is writing on a blank tablet, unbound by previous decisions. This position is reached by two incorrect dismissals of authority. The Chief Justice mistakenly suggests that (1) *State v. Sand* and *Jenkowitz v. Commissioner of Health* do not apply to the situation

presented by the instant case because of factual differences; and (2) the cases of our predecessor Court in the old United States do not bind this Court. The first dismissal is incorrect because the balancing test approach of *Sand* and *Jenkowitz* can be applied to the case before us. The applicable principle can be determined from these cases, even if on their faces they do not supply a clear answer. The second dismissal is incorrect because *Sand* and *Jenkowitz* unambiguously apply the principles of the old United States free exercise cases and rely upon them as authority for decision. This citation and unqualified reliance function to incorporate the old cases into our law. Thus, to the extent we are bound by the previous decisions of *this* Court, we are bound as well in this area of the law by the decisions of our predecessor Court.

We turn, then, to the development of the law under the first amendment of the old Constitution, not only to consult the wisdom of the ages as developed in a mature progression of precedent, but also because our own precedents bind us to these decisions as the law governing our deliberations today. Freed from the "priority" argument but encumbered by precedent, it becomes apparent that the Chief Justice's creativity and radicalism are inapproprite to the proper exercise of this Court's duties in this case.

## I.

As is well known, a provision substantially identical to our first principle was a portion of the first amendment[31] to the Constitution of the old United States. The interpretation of the amendment in regard to its "free exercise" aspect underwent a remarkable evolution, bracketed at beginning and end by two cases concerning polygamy—the *Reynolds*[32] case, the first to interpret the free exercise clause, and the *Fahd*[33] case, one of the last to rest on the clause. Little is known of the original intentions of the framers of that Constitution in regard to the free exercise clause. The writings of some of these men are consistent, however, with a determination to protect only belief, conscience, and verbal communication or expression, and it was with this understanding that the free exercise clause was first interpreted.[34]

31. Our first principle is quoted in full at the beginning of the second paragraph of the Chief Justice's opinion. The relevant portion of the first amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

32. Reynolds v. United States, 98 U.S. 145 (1878).

33. Fahd v. Arizona, 513 U.S. 1587 (1988).

34. The most characteristic expression of this attitude, and one quoted by this Court's predecessor in the *Reynolds* case discussed below, is to be found in Thomas Jefferson's language in "A Bill for Establishing Religious Freedom" adopted by the old state of Virginia in 1785. After declaring the necessity for total freedom in regard to religious *opinions*, the bill stated, "it is time enough for the rightful purposes of civil government for its officers to interfere when principles [opinions of a religious nature] break out into overt acts against peace and good order." Reynolds

Thus a narrow, limited scope of protection was adopted by the old Court in its first interpretation of the amendment. In the early United States, dominated as it was by the Christian tradition, male-female monogamy was not only the dominant form of social relationship between the sexes, it was also the only legal form of marriage and the only form of marriage occurring in any large social group. A divergent Christian sect arose which mandated polygamy as a religious obligation for those with the means to support more than a single wife. In *Reynolds v. United States*,[35] this Court's predecessor determined that the practice, though mandated by a genuine religion and practiced as a religious tenet, could be proscribed by the criminal law and punished by the state. The old Constitution was interpreted to leave the government "free to reach actions which were in violation of social duties or subversive of good order."[36] Since any action labelled and proscribed as criminal by definition would be contrary to both a "social duty" and "good order," any action which the state decided was criminal would not be protected by the free exercise clause of the amendment. The court reached this extreme conclusion because it saw no reasonable alternative. If "religious belief [was] superior to law of the land," it would in effect "permit every citizen to become a law unto himself"[37]: anarchy would prevail.

Two obvious problems with this reasoning appear at once. The first is that all beliefs need not qualify as religious; in fact, relatively few of the actions of men are motivated by religion. And of those that are, relatively few will fall outside the pale of the law. Thus the image of anarchy evoked by the court is an unlikely result of a more encompassing reading of the clause. The second problem rises inevitably from the language of the amendment. The word "exercise" unambiguously connotes action. To remove action from the ambit of the clause is to truncate it almost to the point of rendering it redundant: freedom of speech (also contained in the old first amendment, now found more fully articulated in our second principle) can be interpreted by implication to comprehensively protect freedom of opinion and belief. As interpreted by our predecessor Court, it did so.

Whether for these two reasons or others, approximately fifty years after the *Reynolds* decision the Court began to retreat from the action-belief dichotomy,[38] and in less than one hundred years the pendulum

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v. United States, 98 U.S. at 163. *But cf.* note 9 *supra* (some of the Founders appear not to have shared Jefferson's understanding).

35. 98 U.S. 145 (1878).

36. *Id.* at 164. It was in *Reynolds* that the rhetorical question was first asked which has returned to confront us in the real world. *See* text at note 12 *supra*.

37. 98 U.S. at 167.

38. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Court stated that the first amendment

had swung sufficiently for the courts to presume that action based upon religious belief was protected by the amendment absent unusual circumstances. In *Sherbert v. Verner*[39] the Supreme Court of the old United States reached an interpretation of the clause under which even an "incidental burden" on religiously based action could be justified only with a "compelling state interest" in the regulation: "Only the gravest abuses, endangering paramount interests give occasion for permissible limitation."[40]

That this expansive language of *Sherbert* was not quite the law, but that the principle embodied in the case was correct, was clarified in the subsequent opinion of *Wisconsin v. Yoder*[41] in which our predecessor Court "weighed" not only the interest of the state to find whether or not it was compelling, but also added onto the balance the extent or seriousness of the "burden" on the free exercise of religion. In *Yoder*, the Court balanced the state's interest in compulsory public education (found to be at the "apex" of the various interests of the state) against the religious mandate of a small, self-sufficient sect to remain separate from the world, including a necessity to eschew the final two years of state compelled education. The interest of the sect in free exercise of religion overbalanced the strong state interest in compulsory education for two reasons: (1) The burden on the free exercise of religion by the sect would be extremely large because the very survival of the sect was seriously threatened by compulsory compliance with the law. (2) The state interests served by the regulation were not seriously threatened because the long, well-established history of the particular sect in question demonstrated that their education of their children was sufficient for the lives they led, and the lives they led, due to their self-sufficiency, did not seriously impinge upon the society around them.[42]

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embraced both "freedom to believe and freedom to act . . ." and noted that while the former was "absolute," the latter "in the nature of things" could not be. *Id.* at 303, 304. The Court held one of the defendants' abusive proselytizing activities immune from prosecution for the common law crime of inciting a breach of the peace. *Id.* at 311. Because the activity in question consisted of speech and related communication (the playing of a recording), the test of "clear and present danger" was applied. *Id.* at 308. For this reason, among others, the protection of non-speech related action under the free exercise clause remained unclear.

39. 374 U.S. 398 (1963).

40. *Id.* at 403, 406, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945). Appellant claimed a monetary benefit under social legislation protecting against the hazard of unemployment. The state refused to pay the benefit because the program was only intended to cover those "available for work," and the appellant's unemployment was caused by her refusal to work on her sabbath. This refusal was clearly a religiously mandated *action* unmixed with any speech or communicative element. The Court held that the state was precluded by the free exercise clause from denying the benefit. The language quoted was bar broader than the law as applied, however, for the lower courts found enough elasticity in the concept of a "compelling" interest to justify many limitations on religiously based action.

41. 406 U.S. 205 (1972).

42. In addition, the Court stressed that such extraordinary protection would not be available to one who based actions contrary to law on beliefs which were merely personal or philosophical. *Id.* at 216. In the process of emphasizing this limitation, the Court implied that a limited and

Resting directly upon *Sherbert* and *Yoder*, the case of *Fahd v. Arizona*[43] reached a result contrary to *Reynolds* in a celebrated late twentieth century polygamy case.[44] Emphasizing as in *Yoder* that the action in question was undoubtedly religious in origin and nature due to (1) the long history of the religion in question, (2) the authority for the practice emanating from a text held sacred by the religion, and (3) the presence of an organizational entity embodying the religion and mandating the practice, the Court overturned the bigamy conviction of a Moslem whose splinter sect not only allowed polygamy but required it as a spiritual duty of those able to support more than one wife. The Court admitted that the state's interest in the stability and integrity of family life could be considered compelling, but found that the religious beliefs in question as practiced by the Moslem sect of which the appellant was a member did not sufficiently threaten the interest for four reasons: (1) only four marital relationships could be engaged in simultaneously by a male; (2) the marriages resembled the dominant culture's monogamous relationships in that multiple marriages were not lightly entered; each family was fully supported by the husband; all children were deemed legitimate; and all wives were treated with respect; (3) no historical evidence of abuse of the practice or negative economic, social, or psychological effects was brought forward by the state; and (4) numerically the sect was extremely small in relationship to the population of the state, and the practice was therefore unlikely to significantly threaten the dominant model of marriage and family life.

The opinion did retreat from *Yoder* in that it did not inquire into the extent to which curtailment of the practice would injure the religious interest of the sect. Once the practice was found to be genuinely religious, the *Fahd* court suggested that further inquiry into its centrality or importance was the type of state involvement with religion that both the free exercise and establishment clauses of the first amendment

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traditional definition of religion was to be used in defining the area of protection of the free exercise clause. *Id.* See note 5 *supra* for a brief discussion concerning the question of definition of religion. I agree with the Chief Justice that the definition of religion is not an issue in the case before us.

43. 513 U.S. 1587 (1988).

44. The decision in *Fahd* has a prominent place in our histories of the old United States more for its political implication than its legal significance. The appellant in the case was a young member of the Saudi Arabian royal family studying computer engineering at a state university. The bigamy prosecution and conviction of a distant cousin of the king was perceived as placing a significant strain on relations with a nation upon whose petroleum resources the old United States had been dependent for over twenty years. Contemporary commentators, frequently unschooled in constitutional law, attributed the decision of the Court to these facts rather than to the legal issues in question. Historians dwell on the *Fahd* case for its relevance to the two most significant developments of the period, seeing the contemporaneous political interpretation of the case as an exemplification of the economic weakness to which the nation was rapidly descending, and viewing the legal result reached in the case as a significant encouragement to the religious sectarianism and totalism that were gradually taking root and which subsequently blossomed in the Wars of Belief.

were meant to prohibit.[45]

Discerning principles or rules to apply in our present decision from this circular progression of precedent is not an easy task; certainly such guides do not leap out. We submit, however, that a sensitive and reasoned attention to the cases as a whole does enable us to distill from them a number of valid propositions applicable to free exercise questions in general and to the case before us in particular.

> (1) Amongst the many aspects of personality and the multitude of possible motivations for action, religion and actions motivated by religious belief are focused upon by the Constitution for preferential treatment. This aspect of personality and actions stemming from it are allowed greater freedom for individual choice than are other facets of human personality.
>
> (2) The preference is not absolute. Under appropriate circumstances the state may impose upon and limit individual freedom in this aspect of personality.
>
> (3) Such limitation and imposition by the state upon individual freedom in the realm of religiously motivated actions may occur only when the state has a very good reason for the limitation or imposition. The goal for which the limitation or imposition functions as instrument must be of extraordinary importance or significance within the hierarchy of values of the state.[46]
>
> (4) When a legal provision of such extraordinary importance or significance conflicts with the free exercise of an individual's religion, a court must determine which of the two interests of extraordinary importance to the state is the more compelling.
>
> (5) The balance struck between the competing values (free exercise of religion versus the value underlying the legal provision in question) is dependent upon the importance or significance of each under all the circumstances weighing upon the state at the time when the question is presented. The balance is not static but will vary as the values and circumstances of the society change with time.

The first of these propositions is the most obvious, suggests itself immediately from the very existence of a first amendment or first principle, and presents no difference of opinion between our position and that of the Chief Justice. The second proposition is one which we believe to be fundamental to our entire system of jurisprudence; one

45. The opinion also articulated a secondary rationale based upon a fundamental constitutional freedom to marry which had been developing in contemporary Supreme Court opinions such as Zablocki v. Redhail, 434 U.S. 374 (1978).

46. The reason for this should be quite obvious. The first principle is simply an expression that freedom for this particular facet of human personality is of extraordinary importance and significance in the hierarchy of the state's values as consensually determined in the Constitution. Thus, overbalancing this preferred position requires a value of equal or greater importance and significance to the state.

which appears in the discussion, more or less explicitly articulated, in each of the free exercise cases under both the original first amendment and the first principle; and is the point at which our analysis and that of the Chief Justice part company.[47] The third and fourth propositions present the fulcrum for any decision: We must determine the state's interest in limiting free exercise of religion and the importance and significance of that interest in comparison with the value of free exercise. Each of the old United States cases discussed or referred to above focused at least in part on this question.[48]

The fifth proposition is the least obvious but possibly the most important lesson to be drawn from the cases. *Reynolds* and *Fahd* can be seen under the fifth proposition not as in irreconcilable conflict and not as representing fundamentally different interpretations of the free exercise limitations upon government,[49] but rather as a manifestation of a changing hierarchy of societal values. The nature of marriage and the family had altered substantially in the 100-year interim between the cases and the importance and centrality of marriage and the family may have concomitantly changed significantly. Polygamy as practiced by Fahd was simply not as stark a contrast with prevalent marital and family practices as it would have been 100 years earlier (marriage and family were no longer monomorphic; alternative patterns of familial organization had become widely accepted). And the contrast which was perceived between polygamy and monogamy in the contemporary culture may not have been interpreted as an extreme danger because the family, already undermined, was no longer generally understood to be either immutable or of utmost importance.[50]

The fifth proposition also suggests one other important factor we must consider. The value behind free exercise of religion, toleration for and freedom of diverse religious beliefs and practices, may be of varying importance at different stages in our society's history. Because of its place in the first principle, the value will always remain high and preferred (proposition one), but it may vary in relation to other significant and important values ("compelling interests") from age to age. Thus, we would suggest that during a time of long-standing religious toleration and peace such as our own, the free exercise value (being

47. *See* note 30 *supra*.

48. In addition, *Yoder* focused upon the extent of injury to the free exercise of religion, finding it extensive, possibly fatal. 406 U.S. at 218-19. This inquiry was, however, somewhat anomalous in regard to previous cases and was deemed inappropriate in the *Fahd* case. Even were we to pursue such an inquiry and determine that human sacrifice was the very essence of the New Whole Earth Church, the result, in our opinion as presented below, would not be different.

49. The criterion and language employed in *Reynolds* are certainly incompatible with the *Sherbert-Fahd* line of reasoning, but the result may well have been the same even if the *Reynolds* court had employed the "compelling interest" balancing test.

50. *See* note 45 *supra*.

largely realized) might be less significant in relation to other values (threats to which might be more pressing), than in another age when the reverse was true, for example the decades immediately preceding and succeeding the Wars of Belief.

The *Sand* and *Jenkowitz* cases, this Court's meager additions to the free exercise literature, are of little significance beyond their clear adoption of the old United States cases. Neither contains significant doctrinal discussion, and the results of both are perfectly consistent with and exemplify the principles delineated above. Even the Chief Justice admits that *Jenkowitz* presented quite graphically a situation in which values more pressing and significant than free exercise of religion were on the balance. And in *Sand* the state quite simply failed to demonstrate any truly compelling interest in the regulation in question by failing to present any evidence of a significant probability of substantial harm to the individual religious practitioner who ingested the proscribed substance or to anyone else. Thus, the state did not have a sufficiently strong reason for limiting the free exercise of religion. We might add that the decision in *Sand* may also have resulted at least in part from the fact that the case arose not long after the conclusion of the last of the Wars of Belief—a time when the free exercise value was of pressing importance and in a far more precarious position than is the situation in our age.

We believe that the five general principles derived from the available precedents are sufficient to determine the result in the case before us, and therefore we perceive no need to further reconcile the disparities in the cases or to refine the principles beyond the level of generality provided. As elaborated in section II below, the state's interest in enforcement of the prohibition on murder manifestly represents a substantially more important and fundamental value than does the state's interest in the free exercise of religion.

## II.

The law often appears ubiquitous; few aspects of behavior have not, at one time or another, been objects of legal constraint. The law is thought of most frequently in terms of prohibition: one may not maintain more than one marital relationship at a given time; one may not ingest or possess certain psychoactive drugs; one may not incite a riot; one may not collect unemployment compensation benefits from the state if one is not available to work. The law also often demands action rather than prohibiting it: parents are required to send their children to schools approved by the state; all persons must be immunized by inoculation to prevent certain dangerous diseases; in times of war one may

be conscripted into the armed forces. Each of these legal provisions has, at one time or another, come into conflict with the exercise of an individual's religion, and the conflicts between the societal interests underlying the particular legal provision and society's commitment to religious toleration and freedom have been resolved by this Court or its predecessor in the old United States. As discussed above, decisions in the particular cases have gone both ways, and often the question has been considered a close and difficult one. The circumstances of the present case lead us to a simple contrast with these past cases. If the past cases embodied close questions, what is the answer when we deal with the legal proscription against taking a human life? If the balance was perceived as dubious when the courts considered merely whether or not a child must be educated in a particular way, or an adult submit to an inoculation, or refrain from taking a second spouse, does the scale not tip conclusively when a human life is added to the balance? To us that answer is obvious and, prior to this Court's decision to accept review of the murder conviction before us today, we submit that all those familiar with the law under the first principle would have agreed. The question of human sacrifice has been "rhetorical only" for good reason, and the extent to which that has been altered by this Court's action today should weigh heavily upon the conscience of my colleagues in the majority. That we must expand upon the obvious is a sad task, but one which we cannot avoid.

The state's interests in the enforcement of its prohibition on murder are quite simple: (1) to prevent the intentional destruction of human life and, if prevention fails, (2) to vindicate the value of the human life which has been taken, and (3) to preserve order and security through the prevention of private retribution. In theory (and in practice as many psychological and sociological experiments have shown) the individual trades a large portion of his uninhibited will in return for security. The individual gives up the opportunity to attempt to gratify all his desires in return for protection by society from others who would satisfy their desires at his expense. In the absence of society and law and order, the fear of loss of life is always real and present. The knowledge that one's life is not subject to constant threat from powerful others is therefore a most fundamental and important security. The proscription of murder, then, is at the very root of civilization; it is one of the primary building blocks upon which all else rests.

There are exceptions to the rule against the taking of human life, but without exception they vindicate the ultimate value of the individual life. Certain crimes are punishable by death. In most civilized nations such punishment is rare, usually reserved for the crimes of

murder and treason. The penalty for murder demonstrates the seriousness with which society views the loss of the individual. Treason threatens the safety and fundamental security of the entire community. Another primary exception, war, involves the same fundamental threat, and is itself considered an abomination, albeit one which is on occasion necessary to preserve the very security upon which civilization is founded. The final generally recognized exception, self-defense and defense of others, is limited and finely tailored by the law to vindicate the primary value of the individual's life: an exception to the rules of civilization is allowed when the security which forms the basis for the original bargain has momentarily vanished and life is unlawfully threatened by another.

Our civilization places an even greater emphasis on the value of the individual human life than do many others. To us the individual is the primary unit of society—our political and legal structures are organized to maximize the freedom and welfare of the *individual person* and to register the will of *individual persons*. With a populace of 310 million persons, by practical necessity these goals are reached by addressing political and legal action toward aggregates of individuals and by registering the desires of many individuals as they form aggregates. In concept and to a large extent practice, however, the individual remains the primary unit of our political legal system: rights and duties rest upon individuals, not groups; voluntary aggregations of individual interests, as in labor unions, political parties, and business corporations, are treated by the law as fictional individual persons; and the constituent members remain individuals with legal rights, and are treated as such, even in conflicts with those aggregate groups they have voluntarily joined. Some other societies are organized around the premise that the mass population, or the class, or the large corporate group is the reality—the individual is irrelevant. But we conceive of such large groups simply as aggregates of the individuals that compose them, nothing more.

All goals, values, and interests of our society, therefore, exist because we believe they serve the welfare of the individual. For example, unemployment compensation adds to the economic security of the individual. Laws limiting entry into the marital relationship protect the welfare of those individuals (primarily children) likely to be victimized by the destruction of familial identity and security. Freedom of speech protects the expressive and creative facets of each individual while also serving a more general and pervasive role in facilitating individual participation in the political, social, and personal decisions of the community. Each of these is a *partial* value adding to the general value of

individual welfare and freedom collectively referred to as the general welfare.

Freedom of religion and toleration, likewise, are *partial* values, serving the spiritual, cultural, emotional, and intellectual facets of the individual personality, while also, as so ably conveyed in the Chief Justice's opinion, facilitating the continued existence of our form of consensual political organization. Regardless of how significant and important these values may be, as evidenced by their preferred position in the first principle, they remain partial. When weighed against the whole which all of these partial values serve—individual human welfare, the single human life—the part cannot weigh more heavily than the whole. Our interest in the individual's interest in free exercise of his religion cannot be greater than our interest in the totality of an individual life.

Over the ages men have found many reasons to kill their fellows, many noble, more ignoble. Civilized society prohibits this drastic action, however, regardless of how good the reason, with the very limited exceptions described above. The value of the individual human life is one of the few constants civilization has at its disposal. The free exercise of James Williams' religion is of very great importance to this nation and to this Court, however bizarre or perverted we may personally believe it to be. It weighs heavily in any legal balance. But the one thing which it clearly does not outweigh is this nation's and this court's interest in the individual lives of Sarah Reinhart, Roger Reinhart, and the future victims of the New Whole Earth Church.

The opinion of the Chief Justice and this opinion posit two competing absolute values: the value of freedom to act as individual religious conscience directs contrasted against the value of the totality of an individual human life. We suggest that while both represent fundamental values of this society, the priority of the latter is not subject to doubt. The first principle was never intended to cast this fact into doubt, nor was it ever designed to carry the weight assigned to it today by the judgment of this Court.

## III.

It is possible to read the opinion of the Chief Justice as accepting the primacy of the value of the individual human life in general, but as holding that the "consent" of the Reinharts vitiates this value under the facts of the case: "The Reinharts' consent circles the harm back, contains it within a willing group, and thus shields society. . . ."[51] In the

51. Text following note 15 *supra*.

language of the traditional free exercise test, what had been a "compelling interest" in the lives of the Reinharts is rendered substantially less so by their consent to be victims of the sacrificial rite. For several reasons we disagree.

First, there is a fundamental difference between the Chief Justice's conception of the value of individual life and our own. As the quotation above and the reasoning behind it in Part II of the Chief Justice's opinion reveal, his conception of the individual life is instrumental and utilitarian. The importance of the individual life lies in its effects upon other groups of persons. If effects are "circled back," there is relatively little significance (and apparently little value) in even the totality of the individual life. If the effect of death can be isolated from the general community, there is no great importance to be assigned to that life under the legal calculus of the Chief Justice.[52] As was developed in Part II of this opinion, we believe, to the contrary, that the individual is the primary value in our society from which all other values are derivative and in comparison with which all other values are partial. In our opinion the reality and weight of this multifaceted value is in the individual—every individual—and is not an aggregate or dependent upon that individual's connections to or effect upon others.

It is for this reason that consent is not a defense to murder under our law, and it is for this reason that the consent of the Reinharts should be irrelevant to the issue before us. We are not dealing here with a civil action in tort for wrongful death; we deal with a transgression at the root of civilization. The crime is against society, not against the Reinharts or their friends, family, or community. Not only do the Reinharts have an interest in their lives, but society has an interest, and the law has not delegated to the Reinharts the power or right to waive that interest.

Second, even from the view of the Chief Justice focusing on the interests of the Reinharts themselves, consent is an inadequate protection against the harm in question. Death is quite simply unique in the extent to which it is absolute, permanent, irremediable. Other deci-

52. Even under his criterion, however, the Chief Justice may well be wrong. Society has an economic interest in each of its members; the loss of each is a significant economic loss to the whole. Moreover, in this case Williams' act has denied society not only the fruits of the labors of the Reinharts, but perhaps also the existence of their offspring. Society has lost two productive persons and likely more.

Before passing, it also should be noted that even accepting the Chief Justice's instrumented calculus of human worth, the test he proposes presents extremely difficult value judgments. Would not harm to others be perfectly clear if the Reinharts had been the parents of dependent children? The deaths of their parents would in all probability severely damage such children psychologically, and the state would be burdened with the obligation of caring for the orphans. Would such harm suffice? The Chief Justice states it would not, but rests his determination upon a distinction between phsyical and psychological harm which is more imaginary than significant.

sions in the course of human life are, to a greater or lesser extent, subject to change, alteration, or revision. A decision not to attend college can be revised by a decision ten years later to do so; decisions to be a Catholic, a doctor, a priest, a drunkard, all can be changed; even the decision to amputate a limb, although it cannot be undone, can be ameliorated to a significant extent with an artificial limb, training, and effort. But there is no going back from a decision to be dead. At ages 22 and 25 the Reinharts had sufficient faith in and enthusiasm for the New Whole Earth Church to unreservedly answer James Williams' request for their lives. At ages 35 or 40 would they have decided similarly? Would they still belong to the New Whole Earth Church? Would they still slavishly submit to the will of James Williams, without any expression of "reluctance" or "ambivalence"?[53] To the extent that the answers to these questions is indeterminate, the consent of the victims is inadequate as a defense for the crime of murder and inadequate to vitiate the "compelling" nature of the state's interest in the lives of these two persons.

This limitation on the legal effect of consent is reinforced by the extent to which that term is constructive, a concept from the imagination of man which may or may not correlate with any reality. The notion of consent, in concert with our entire political structure, rests upon the premise of individual freedom, which in turn implies individual determination of decision free from constraint. To the extent we limit the meaning of such concepts to an absence of direct identifiable external force at the control of some human entity, freedom and consent have clear meanings and reality in the experience of each of us.[54] Beyond this, however, we cannot go. To what degree our "free" decisions are constrained or determined by economic, social, psychological, cultural, or even physical phenomena beyond our control, we do not know. Thus we cannot be sufficiently persuaded of the reality of the

53. *See* note 3 *supra*.

54. Even under this conventional criterion of voluntariness, the consent of the Reinharts remains suspect. The testimony of the psychiatrists, *see* text & note 4 *supra*, is less than persuasive in light of the control over the situation experienced from beginning to end by James Williams. We do not know to what degree covert manipulation was successfully practiced by Williams upon these expert witnesses. This appears to us to be particularly likely in light of: (1) the long association with Williams and the New Whole Earth Church which occurred during the rite of sacrifice, a process which takes approximately five weeks from beginning to end; (2) the total control by Williams of the context in which the experts met the victims (the private meetings of each victim with each psychiatrist only ameliorate this problem in our minds); (3) the fact that cult leaders such as Williams are well known to have remarkable powers of persuasion, even over well trained skeptics, if the opportunity for personal contact is extensive, as it was in this case; and (4) the fact that Williams selected the experts. Having drastically truncated the law in such way as to make consent the key factual issue of this case, the ruling opinion at least allows for a possibility of retrial upon remand if evidence relevant to the consent issue is developed by the prosecutor. We would suggest that the prosecutor consider not only the direct evidence on this question, of which there is almost certainly very little, but also expert evidence provided by persons who have not been tainted by personal contact with the defendant.

concept of consent to allow it to overbalance the stark presence of the indubitable reality of death in our legal equation. It is not sufficiently real to turn murder into something else, something for which there is no punishment prescribed by law.

Justice Fernandez joined in the judgment announced by the Chief Justice and concurred in a separate opinion:

I agree with the disposition of this case reached by the Court but remain troubled by certain fundamental implications of the plurality opinion written by the Chief Justice. Also, it is with great reluctance that I have agreed that our remand should include the explicit possibility of retrial on the consent issue. My assent to that directive from this Court was due to the greater reluctance of certain of my colleagues to reverse James Williams' conviction absent such an explicit possibility. My conception of the nature of the first principle differs substantially from that of both Chief Justice Goodhart and Justice Cohen. I shall mention briefly the areas where I believe the two preceding opinions are in error, and then suggest an alternative model for the proper function of the first principle in our social and legal systems.

## I.

My dissatisfaction with my brother Goodhart's opinion is not that it has gone too far, but that it has not gone far enough. Although the opinion is phrased in such a manner as to appear rather radical, and my brother Cohen has labelled it an "absolute" interpretation of the free exercise clause, I believe that a relatively small step has been taken.

This case of ritual sacrifice can be viewed as murder, but it can also be viewed as a suicide in which James Williams aided and abetted in his capacity as high priest. Suicide is not a crime in the State of Rio Grande. Causing or soliciting suicide is a crime, but requires force, duress, or deception, none of which appears to be present in this case. Consider these propositions: (1) If James Williams had merely persuaded the Reinharts that suicide was the most rational response to the dilemma of human life and urged them to act on this belief, our law would clearly impose no criminal liability on Williams if the Reinharts thereafter killed themselves. (2) If James Williams had merely given a knife to the Reinharts which they subsequently used to commit suicide, again no criminal liability would follow. (3) If, however, James Williams had wielded the knife at the request of the Reinharts but had not acted as described in statements (1) and (2) above, in most jurisdictions

he would have committed a crime.[55] Curiously, if person A commits acts (1) and (2) while person B commits act (3), criminal liability is more likely in the case of B than in the case of A. Looking at the death of the Reinharts as suicide, the opinion of the Chief Justice functions to include act (3) in the non-criminal category of acts (1) and (2), a rather modest transfer for the first principle to effect.

The emphasis laid by the Chief Justice on consent highlights this facet of the case, for it is the Reinharts' consent which suggests that the events in this case fit as easily under the rubric of suicide as of murder. I join my brother Cohen in his uneasiness at placing such weight and emphasis on the concept of consent for the reasons articulated in section III of his dissent. This unease does not lead me to welcome the possibility of retrial on this issue, however, as it does Justice Cohen, nor do I agree with him that abstract expert testimony is relevant to the issue. The evanescent nature of that construct we call "consent" leads me, to the contrary, to distrust it in a context where the decision of the Reinharts might as well be termed determined, preordained, or manipulated. As will be developed further in section III below, I believe that having grown up in the New Whole Earth Church as they did, the existence of the Reinharts' "free" consent is problematic indeed.

That portion of Justice Goodhart's opinion which I perceive to be a fundamental and important step is the theoretical elucidation of a coherent theory of first principle interpretation firmly grounded in both history and practical politics. I agree with our learned Chief Justice that the exemption from legal control granted by the first principle "must be as total as possible . . . within the context of a society ordered by law," but I doubt that serious harm to non-consenting persons will always fall outside of that limit.[56] Not only is the meaning of consent unclear, but it is unlikely that every religiously motivated action which results in serious harm to those who do not "freely" consent is the type of situation likely to "burst the ties which bind our society together." Thus I agree with the general principles laid down by the Chief Justice, but remain skeptical about the formula he has derived from them. Before elaborating further upon the way in which my understanding of

55. Available precedents are mixed: Cases holding the action criminal usually involve acts analogous to (1) or (2) above *combined* with (3), and those finding to the contrary usually involve euthanasia or analogous situations.

56. One of my conerns with the opinions delivered today is the extent to which the phrase "serious harm to non-consenting" persons is a plastic standard with a dangerous chameleonic potential. Each of the three operative terms is subject to widely different interpretation—the reading of such a scale is likely to vary more from judge to judge on the same facts than with the same judge on widely differing factual circumstances. *See* note 49 *supra*; text accompanying notes 17-21 *supra*.

the function of the first principle goes beyond that developed by the Chief Justice, a brief examination of Justice Cohen's position will be helpful.

## II.

Both Chief Justice Goodhart's opinion and the dissent present balancing tests. The nature of these balancing tests is strikingly different, for under the Chief Justice's approach the scale is drastically weighted in favor of protection of freedom of religion before the process of weighing even begins. This is the heart of a correct interpretation of the first principle: To overbalance religious freedom the state's contrary interest must be manifestly overpowering; there must be no alternative. Thus, a literally "compelling" interest is required. The balancing test of my brother Cohen is another matter entirely.

Under the dissent, the interest of the state in the regulation must be of "extraordinary importance or significance." The cases referred to in that opinion reveal the variety of such interests and the potential for expansive interpretation of the category. In fact, one might with reason suggest that in order to pass the gauntlet of the legislative process and executive scrutiny, the interest supporting any legal provision must be, or have been, of extraordinary significance or importance.[57] The first movement of the test is thus to weigh the interest in the abstract against a vague standard of importance or significance. If the interest tips this scale, it must then be balanced against the state's interest in religious toleration and freedom of religion, an interest the first principle insures to be of "extraordinary" importance and significance. Thus we have two roughly equivalent values set upon our scale of justice, the balance to be determined by "all the circumstances weighing upon the state at the time when the question is presented"—in other words, whatever seems important or persuasive to the particular group of judges at a particular time. To me, this approach can be characterized as double pronged inherent subjectivity. First comes the determination of how important, significant, or compelling the interest of the state is—in the absence of any more concrete or elaborated guidelines—and then comes the balancing of two such interests, again in the absence of any more concrete or elaborated criterion or guide. The length of the Chancellor's foot irresistably surfaces as the appropriate image.

57. I do not mean that this is the interpretation suggested by Justice Cohen. I do mean that a standard which with reason and respect for language can be interpreted in such a manner is subject to great slippage over time as it is applied by the lower courts and the legislature. The balancing principle provided by the Chief Justice unfortunately is also open to slippage, as the test he derives from it indicates, although I believe it is less subject to such distortion than is Justice Cohen's.

An example of the inadequacy of such an approach is the issue of the level of generality to be chosen in "weighing" the competing interests. Ostensibly my brother Cohen's level of analysis in the case before us focuses upon the individual: James Williams' free exercise right balanced against the lives of the Reinharts, two individuals. This occurs, however, after the Justice's analysis has freighted the individual lives of the Reinharts with the total weight of the welfare of society in general.[58] Would the balance point in the other direction if we reversed the levels of generality and compared the lives of two individuals—the Reinharts—with the overall value of religious toleration and freedom to our society? The answer is suggested by the fact that wars have been waged and thousands killed to protect various aspects of our way of life, including our allegiance to the concepts embodied in the first principle.[59] That these may be the appropriate levels to compare is suggested by the argument that it is only the very limited number of persons who in fact would become sacrifices of the New Whole Earth Church (or similar small fringe sects) who will be directly disadvantaged by a decision in favor of Williams, whereas the general principle of toleration of and freedom for religious activities as it affects all of our society will be directly damaged by a decision to uphold the conviction. This argument may raise eyebrows, and I do not rely on such a balancing, but I submit that it is suggestive of the poblems involved in the old United States compelling interest balancing test articulated by Justice Cohen. If unequal levels of generality on the balance seem troubling, are equal levels clearly correct, and if so, at what level of generality should the balancing be done?[60]

One other aspect of Justice Cohen's dissent must be addressed before moving on. My brother avoids the difficulties of the task of balancing roughly equal values of society by collapsing all values of our society into the individual human life. There is a glint of meaningful truth in suggesting that the individual is the unit our society is structured to serve, and that all our values are chosen because they serve some aspect of the welfare of at least some individuals. But to then suggest that therefore *all* of our many and variegated values and interests are simply partial aspects of individual welfare is a rhetorical flourish based upon a studied confusion between the general welfare and the individual. Justice Cohen has created the image of the individual

58. The propriety of Justice Cohen's emphasis upon the individual will be examined below.

59. Surely Justice Cohen's cavalier claim that wars are fought only to preserve the existence of the basic securities of civil society is, to say the least, disingenuous.

60. The level of generality chosen obviously has a direct effect on the outcome of the balancing test. *Compare* Prince v. Massachusetts, 321 U.S. 158 (1944), an old United States free exercise case not mentioned by Justice Cohen, *with* Wisconsin v. Yoder, 406 U.S. 205 (1972).

as the repository of all our values (a concept which is accurate only in reference to an abstraction of the individual—everyman, each of us), reified that imaginative construct (assumed it has an actual existence), and then identified that construct with two specific individuals, Roger and Sarah Reinhart.

In fact, the general welfare is composed of the values and interests of different groupings of individuals. Some values enhance the lives of some individuals while damaging the lives of others. Our political process consists of accommodating conflicting values and interests. If the process functions as designed, the resulting mix serves the general welfare of all. To particularize and anthropomorphize this abstract concept, as Justice Cohen has done, can only lead to confusion. Were the dissent correct, no "partial" value could compete with the "total" life of an individual. Yet when we construct a major bridge to facilitate transportation we know that a certain number of lives will be lost in that construction. The convenience to a portion of the public and the efficiency to the economy of more direct transportation are believed to be of greater value than the lives of several individuals. In analogous fashion, it may well be that freedom of religion is sufficiently beneficial to society as a whole to be more highly valued than the small number of individual lives to be lost through human sacrifice.[61] This is the difficult question which the dissent avoids completely by rhetorically overvaluing the life of each individual. It is a question of an order of difficulty which also highlights the subjectivity of a more forthright attempt to approach it under the two pronged old United States balancing test. It is a question which I believe we have correctly resolved today, but in a manner which, in my opinion, leaves the heart of the first principle unelucidated.

## III.

The most troubling aspect of the opinions presented today is the failure to recognize that religion is primarily a group phenomenon. The Chief Justice bases his decision in part on his belief that the first principle "places a particular category of individual determination concerning truth and reality—and action based on such beliefs—beyond

61. It is true that in the bridge construction case the loss of life is cushioned in our calculation by the contingency of the deaths and the fact that they are unidentified; we do not know where life will be lost. But exactly the same can be said of the case before us. If we find that the first principle protects religiously motivated human sacrifice under the facts of this case, who the next victims will be, or whether there will be any, is unknown, or, more accurately, known only as a probability, just as with a construction project. The opinion of Justice Cohen is written as if the lives of Sarah and Roger Reinhart were in the balance. But they are not. Only the life of James Williams is directly in the balance in these opinions. A decision to affirm James Williams' conviction, leading to his execution, will not resuscitate Sarah or Roger Reinhart.

the control" of the state. Justice Cohen's dissent emphasizes that "rights and duties rest upon individuals, not groups." This model of government based upon the premise of the independent individual functions well to maximize human independence and dignity in most cases. The model of an atomistic society does not, however, correspond with actual human behavior, and reliance on it must not be exclusive and unthinking. In addition to being a primary protection of the individual, the first principle in my opinion stands for a special freedom for and recognition of *group* identity and behavior.

Human beings are social animals. A human being raised in isolation does not develop what we consider to be a human personality. Also, it is rare that only the two biological partents interact with the child. Rather, the dominant fact of *individual* human development is that it is primarily determined by the *social* matrix in which the parents are embedded. Socialization is "humanization."

The most significant social matrix for individual development and behavior is the culture. The term "culture," as I am using it, refers both to the total pattern of life (values, identity, behaviors, relationships, etc.) and to a group with a particular pattern.[62] Culture determines the reality the individual perceives and thus limits the alternatives within which individual autonomy may operate. Culture determines the general shape and pattern; the individual determines the specifics within the assigned mold. Thus most decisions by most persons are determined by the group in which they are raised.[63]

The Reinharts decision appears typical in that it was determined by their culture—they were born to parents devoted to the faith of the New Whole Earth Church, and maintained that identification through adolescence, the most likely developmental stage for conversion to a different cultural identity. To focus on whether their decision was free or manipulated by Williams is to focus on a chimera—within the pattern of the culture the two are probably not perceived as mutually exclusive. My reluctance to remand for a possible determination on the consent issue is thus linked with my belief that focusing upon individual freedom exclusive of the relevant group cripples the proper function of the first principle.

62. In this usage of the word, cultures are probably the true units of human social evolution and diversity. Cultures are born, grow, develop, metamorphose, conflict, merge, diverge, and die. Ordinarily cultures differ more amongst themselves than do individuals within a single culture.

63. Conversion from one fundamental group identity to another is relatively rare, except in cases where one culture is in the process of being dominated or assimilated by another, as in the worldwide phenomenon of Westernization that occurred during the nineteenth and twentieth centuries. In societies which are multicultural, conversion, although rare, is of great interest due to its inherent dramatic conflict, and thus is portrayed in both art and journalism with a far greater frequency than the phenomenon itself occurs in the populace.

The "relevant group" is that social unit with which the individual places his primary identity and affiliation. It is my belief that in early America, with its history of colonization by discrete religious sects, this primary identification was usually a religious one, and the first amendment applied to religion as the primary cultural identification of that age. That usage was adopted in the first principle partially as a result of unthinking mimicry and partially because during the Wars of Belief religion once again became the primary culture of allegiance.[64]

Whether or not this historical interpretation is correct, I am convinced that *functionally* the proper interpretation of the term religion in the first principle is as a protection for the autonomy of the *groups* with which persons place their primary allegiance and identification.[65] Because different cultures literally perceive the same phenomena differently, conflicts between cultures are the least easily resolved. As my brother the Chief Justice stated: Such conflicts are "beyond reason, beyond persuasion, and beyond consent to majority rule."[66] For example, one culture may not perceive newborn babies to be persons until a ceremonial act occurs during the first few days of life. Prior to that act, newborn infants may be destroyed at the parents' will. Cultures that perceive these babies to be persons at the time of birth (or even before) will be morally inflamed by such behavior, a reaction persons belonging to the first culture will have great difficulty comprehending.

This nation and its predecessors have continuously wrestled with the difficulty of encompassing plural cultures. The differences betwen the cultures were relatively small at the founding of the old United States[67] and progressively widened until the Wars of Belief destroyed the nation.[68] Currently, society is faced with cultural differences which

64. I agree with Chief Justice Goodhart that the definition of religion is not an issue in this case. *See* note 5 *supra*. I do believe, however, that an understanding of the proper interpretation of the term religion in the first principle is imperative in order to comprehend the values being balanced in this and similar cases.

65. In current society many individuals may have no such group. Their primary identification may be either with their own solitary identities or with the nation as a whole, or it may be spread amongst several cultural and social entities, including the nation, none of which takes clear and commanding precedence. Even those who do locate their primary identity and affiliation with a particular cultural group may have numerous secondary affiliations, including the nation and other groups, which may serve the function of primary identification for other persons. This is one of the facts which renders the first principle difficult to apply in a developed pluralistic society.

66. *See* text following note 8 *supra*. As stated above in section I of this concurrence, I agree with the theory of the first principle framed by the Chief Justice but not with his test. In this section I wish to delineate the one significant erroneous implication of the opinion of the Chief Justice which troubles me: that the liberty guaranteed by the first principle is applicable exclusively to the individual.

67. In fact, the plurality at the time may have been simply variants of one basic culture—Western European Christianity. This was possible because the two other cultures geographically present, the native American Indian and the black African, were defined out of the polity. Like the newborn infants in the example in the text, they were not perceived as persons.

68. Much of the political development of our species has consisted of enlargement of the

can be said to lie approximately at the middle of these two extremes. We thus respect cultural pluralism by necessity because the citizen's first allegiance is as frequently to his or her subculture as it is to the nation. More significantly, we also highly value our cultural pluralism not because it is a danger to the polity (which it certainly can be), but because it is a fundamental aspect of human diversity and human freedom. We value cultural pluralism because we respect human dignity, for to deprive a person of his culture is to deprive him of himself. This respect and valuation of cultural pluralism is rooted in the fundamental premise of cultural relativism. As stated above by the Chief Jusice, our Reformed Constitution does not legislate reality or truth; the perception of each individual and each culture of what is real and what is true are equal before our law. To me, the first principle is our society's fundamental recognition of that principle. That recognition cannot function properly if it is limited to the individual.[69]

When we embark upon an interpretation of the first principle cognizant of the underlying values of cultural pluralism and relativism, the problem is once again that of limits—where the line is to be drawn.[70] Before I attended law school, before I was ever faced with the conundrum of the first principle, a professor in a course in the history of western civilization suggested that the twentieth and twenty-first centuries posed the following problem: "In theory, can a single democratic polity encompass both a society of Christians and a society of canni-

primary unit of allegiance of the individual beyond the tribe to increasingly large political entities. Various notions of that enlargement have competed, geographical units as opposed to economic class units, for example. The development has not been linear, nor is there uniformity of belief that we can regard it as progress. The course of this development does suggest a number of elementary propositions, however: 1) If the unit becomes too large or provides insufficient psychological identification for the individual, smaller tribal groups will form to which the individual wil give primary allegiance. 2) Allegiance and identification by one individual can be split between groups, and this phenomenon increases the more culturally diverse the geographic area and the more mobile the society. 3) The nation-state appears to be the most stable large group which can function adequately for partial allegiance and identification purposes, but it is too large to function as the primary identification and allegiance factor in the lives of most individuals.

69. An example is provided within Justice Cohen's opinion, the old United States case of *Wisconsin v. Yoder*, text & note 41 *supra*. In weighing the burden upon free religious exercise against the state's interest in compulsory education, the Court relied heavily upon the factual conclusions that compliance by the Amish with the law would lead to abandonment of their religious beliefs and assimilation into society at large—in other words, disappearance of the distinct religious *group*. 406 U.S. at 218-19. None of these findings applied to the *individual* defendants, the parents; they would not be assimilated or abandon their religious beliefs if their children were forced to attend public school. Thus, a key step in the analysis and balancing included an assessment of the interest of the cultural entity itself (the religion as a social unit) applicable to no particular individual before the court. Although bristling with explicit qualifications and limitations that narrow the holding, dicta reveal quite clearly that the values of cultural pluralism and relativism (and the commitment to protection of the identity of the divergent culture) are the motivating forces underlying the *Yoder* Court's reading of the first amendment.

70. As mentioned at the beginning of section II of this concurrence, and reiterated at note 66, I agree with the basic theory of limits developed by Chief Justice Goodhart but, as discussed in this section of the concurrence, would expand the analysis beyond the individual to include the primary cultural group.

bals?" My initial inclination was that the answer was no, that the Christians, owing allegiance to an entity superior to the state, could not tolerate the practice of cannibalism. My mature judgment is to the contrary. To the extent that the members of the polity realize that the alternatives are war, bloodshed, and domination of one group by the other, it is in theory possible for each to place its commitment to the process of government and peace above its otherwise primary cultural commitments. If a polity is being forged from the ruins of a history of violent cultural strife (such as the Wars of Belief), a commitment to such radical tolerance may be included in the structure of the government. This, I believe, is the function of the first principle.

The principle for determining the limits of toleration, even in the case of the Christians and cannibals, has been supplied by the Chief Justice: the limits must be as few as possible "within the context of a society ordered by law." For the cannibals and the Christians to coexist only three rudimentary boundaries must be accepted: (1) The polity cannot punish as criminal either cannibalism or Christianity. (2) The cannibals must not eat Christians. (3) No person can be compelled to join either culture. Two other boundaries are suggested by the consensual democratic nature of the polity formed by our Reformed Constitution and by the fact that the first principle applies to individuals as well as to appropriate groups: (4) No person can be compelled to remain a member of either culture. (5) Each culture must be free to persuade members of the alternative culture to convert.

To the extent that our decision today protects James Williams and the New Whole Earth Church from prosecution for murder in instances where members of that Church are sacrificed pursuant to its beliefs and practices, we have taken a significant step toward recognition of the ideal of mutual toleration embodied in the first principle—the coexistence of the Christians and the cannibals. Whether or not the five limits suggested above are sufficient or properly formulated need not be determined today. Much of this opinion has been tentative and speculative—a pointing in the right direction, not a map—and many important unanswered questions remain implicit in this view of the first principle.[71] The slow growth of case-by-case elucidation will be required for these difficult tasks.

*Stephen L. Pepper**

71. For example, two of the limiting principles suggested above preclude compelling a person to join or remain a member of either culture. Thus the conundrum of consent cannot be avoided, and whether or not the term "compel" should be interpreted to mean only the use of physical force (or something very similar or analogous to it) is a question which must be answered.

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sic paradigm for this effort, Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). For a more sober explication of the free exercise clause and references, *see* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309.