CHAPTER 1

Criminal Conduct/Antisocial Behavior

James Madison placed the primary emphasis on freedom in framing the free exercise of religion guarantee of the First Amendment. In expanding this emphasis, the Supreme Court has ruled that religious freedom includes more than the right to believe and worship according to the dictates of one's own conscience. Religious freedom also means the right to proselytize—to engage in activities designed to win converts to the faith,[1] to distribute and sell religious literature free from license requirements and tax burdens,[2] to refuse to participate in secular practices against one's own religious beliefs,[3] to use public streets and parks for religious meetings,[4] and to make door-to-door solicitations free from local restrictions.[5] And the meaning of religious freedom has evolved in direct proportion to the Court's expansion of the outer limits and coverage of the First Amendment.

The starting point for a review of the constitutional meaning attached to the free exercise of religion guarantee by the Supreme Court is the case of *Reynolds v. United States*.[6] The most positive limitation on the exercise of individual religious freedom is its subjection to valid criminal law. While religious belief is protected, any practice made criminal by law is usually not protected regardless of the religious motivations involved. Practice in the form of criminal conduct must be balanced against the public welfare of the community as set forth by law.

Members of the Mormon Church since 1853 considered polygamous marriage a sacred duty. While Utah was still a territory, Congress enacted a statute making polygamy a criminal offense.[7] George Reynolds was duly convicted under this law. In his appeal on writ of error, Reynolds based his claim squarely on the free exercise of religion guarantee, as well as on the basic tenets of the Mormon Church. His counsel argued before the Court that (1) at the time of his second marriage he was a member of the Mormon Church and a follower of its doctrines; (2) the doctrine of his church prescribed the act of polygamy as a sacred duty; (3) polygamous marriage was a practice directly enjoined by God upon man in a "revelation" to the prophet Joseph Smith; and (4) the Mormon Church specifically taught that failure to practice the act of polygamy would lead to "eternal damnation." However, the Supreme

Court ruled that Congress did not violate Reynolds' right to the free exercise of religion, or violate (for that matter) any constitutional prohibition against the national government. The ruling stressed that this particular freedom prohibited the government from restricting religious belief, but not a religious practice (action) that violated valid criminal law.

Since the word "religion" was not defined in the Constitution, Chief Justice Waite (speaking for the Court) asked the crucial question: What is the religious freedom of the individual that is guaranteed against all infringements? His review of tradition and past experience of the United States led him to the documents of the Virginia experiment, to Madison's *Memorial and Remonstrance*, to Jefferson's concept of the balance between civil government and religious freedom as stated in his letter to the Danbury Baptists.[8] Such a constitutional guarantee, the Chief Justice believed, did not prohibit legislation regarding the distinction of what properly belongs to the church and to the state. Congress may have been deprived of all legislative power over mere opinions, but it still possessed the power to deal with actions considered criminal. Indeed, Congress could act to forestall behavior that it ordinarily had the power to prevent; and since it acted here in furtherance of a valid secular objective, the religious beliefs of Reynolds could not "decriminalize" his actions. What enters the picture, as a guide for future Supreme Court adjudication, is what Richard E. Morgan calls the "secular regulation rule":[9] "If the law is within the scope of governmental authority and of general application, it may . . . be applied without regard to the religious convictions of those whose acts constitute wilful violations of that law."[10]

The Chief Justice, obviously believing that polygamy violated some civil contract aspect of monogamous marriage, had no difficulty in finding a valid social interest that Congress had the power to legislate.[11] And in the process, the Court seemed to take the incredible step of equating "religion" (and all the concept entails) with Christianity. Of course, such an interpretation had not been the intention of Mason, Madison, and Jefferson. Furthermore, Waite suggested that the religious beliefs and practices of the individual, no matter how sincere the motivations, cannot be accepted as a justification for the commission of a crime.

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doc-

> trines 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.[12]

Reynolds' offense consisted of a positive act that he knowingly committed. For the Court, therefore, "it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made."[13] The Court might accept ignorance of a fact as lack of criminal intent, but never ignorance of the law. The decision reiterated the congressional intent to outlaw polygamy and make its practice criminal.

Reynolds was the first of the Mormon cases. Other federal decisions were to follow. Each reiterated and strengthened the secular regulation rule, as well as the notion that the practice of one's religious beliefs cannot be used as a justification for the commission of a crime. Equally important, these decisions—following along the lines set out in *Reynolds*—continued to judicially define the term religion.

Polygamy, then as now, a criminal offense, constituted a disqualification for voting under territorial and other statutes. Samuel Davis was a Mormon who wanted to vote. He appeared before the appropriate registrar in the then Territory of Idaho and took the required oath.[14] He was subsequently indicted for, and convicted of, conspiring to obstruct the due administration of the territorial laws by falsifying his voter's oath. In essense, the lower federal court had upheld the disenfranchisement of members of the Mormon religion. Speaking for a unanimous Court in *Davis v. Beason,*[15] Justice Field rejected both the free exercise and establishment claims of Davis in language that reasserted the secular regulation rule:

> It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal law of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.[16]

To outlaw polygamy was clearly proper, according to Field. By a delegation of power from the Congress, the territorial legislature of Idaho had the authority "to prescribe any qualifications for voters calculated to secure obedience to its laws."[17] If disenfranchisement of certain criminal segments of the community was deemed necessary to secure that compliance, then Idaho's action was not only reasonable but also a valid secular objective.

The logical conclusion was to define the concept of religion in narrow terms, including belief and some forms of worship, but excluding criminal action in the guise of religious practices.

> The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was in tended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.[18]

Justice Field then continued:

> With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.[19]

And still continuing with the same theme, Field quoted (with obvious approval) Chief Justice Waite's similar view in his *Reynolds* opinion that laws may indeed interfere with religious action made criminal by law. Field defined religion in terms of individual commitment. Yet he could not accept any suggestion that a criminal act became "less odious because sanctioned by what any particular sect may designate as religion."[20] As George W. Spicer suggested, it was the intended purpose of the free exercise clause to allow everyone "to hold such beliefs respecting his relation to the Diety and his obligations thereunder as meet the approval of his judgment and conscience and to express his beliefs in such form as he may think proper, so long as there [was] no injury to the rights of others."[21]

The final Mormon case involved the successful attempt by Congress in 1887 to annul the charter of the Mormon Church in the Utah Territory, and to declare forfeited to the national government all church real estate except a small portion used exclusively for public worship. In 1862 Congress legislated against the practice of polygamy. But failing to stop the Mormon practice by legislation, Congress (in 1887) instructed the Attorney General to begin proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of the 1862 statute. Both the Mormon Church and John Taylor (a trustee) sued. Justice Bradley, speaking for a majority of the Court in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States,*[22] believed that whenever the law of the land (in this case the law against polygamy) had been systematically violated by a charitable organization, it was within the power of Congress to disincorporate such an organization. Moreover, because of the national gov-

ernment's plenary power over the territories, "when a corporation is dissolved, its personal property, . . . ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority";[23] and the Congress may direct such property "to other charitable objects."[24]

Article I, Section 8, Clause 7 of the Constitution gives Congress the authority "to establish post offices and post roads." In exercising this provision, the Congress has enacted many postal rules under which the mails are processed and delivered. With the general welfatre of the community in mind, Congress enacted the postal law of 1889, which was concerned with the use of the mails for religious fraud. And in the case of *New v. United States*,[25] the national government prosecuted a professional faith healer for using the mails to defraud the public. The government charged that (1) the two defendants (John Fair New and Marie T. Leo) had pretended to believe that they attained a supernatural state of selfimmortality by righteous conduct, enabling them to conquer misery, poverty, disease, and death; (2) they could transmit this power to others for money; and (3) for the execution of their fraudulent scheme they used the mails of the United States.

The defendants questioned the validity of the indictment against them on the ground that it prohibited the practice of their religious beliefs. The Circuit Court of Appeals for the Ninth Circuit pointed out that the government did not attempt to force the defendants from holding the religious views

> the indictment alleges they pretended to entertain, or from honestly and sincerely endeavoring to persuade others, by any legitimate means, to embrace the same notions. But what the government did undertake to do, and what it had the statutory authority for doing, was to prevent by indictment the defendants . . . from pretending to entertain the views therein specifically alleged for the false and fraudulent purpose of procuring money or other things of value from third parties by use of its post office establishment, of which use the indictment alleges the defendants availed themselves for the said false, fraudulent, and illegal purpose.[26]

The court held that the government's action (i.e., prohibiting religious fraud through the use of the mails) was a valid secular objective; for the sole purpose of the law was to prevent the obtaining of money through the fraudulent use of the mails. Almost three decades later the precedent was to be reexamined by the Supreme Court, which based its new decision on criteria and reasons other than the furtherance of a valid secular objective.

In May 1940, the Supreme Court handed down its decision in *Cantwell v. Connecticut*,[27] and specifically ruled that the fundamental

concept of liberty in the due process clause of the Fourteenth Amendment included the free exercise of religion guarantee. More important, the Court's decision raised three questions that would ultimately require judicial answers. First, *how far* in future decisions would it be willing to depart from the accepted distinction of the polygamy cases between protected belief and unprotected action?[28] Second, does the law have an *unlimited right* to protect people against the perpetration of *religious* frauds? Third, can an administrative official determine if a cause was in fact a bona fide religious one, so as to determine its right to survive? The Court now seemed willing to apply the logic of Cardozo in *Palko v. Connecticut*[29] and Stone in footnote four of his opinion in *United States v. Carolene Products Co.*,[30] to a First Amendment freedom in need of greater scrutiny and protection. For nearly a decade after *Cantwell* the Court would continue to narrow the older distinction between belief and action, although never to the point of being synonymous. There would be great victories for the cause of free exercise in all areas of adjudication save for "criminal" conduct. Here the victories would be slight and infrequent. And as hard as the Court would sometimes try, it could not seem to ever totally abandon the secular regulation rule.

The Ballard family had organized the so-called "I Am" movement in San Francisco during the late 1930s. They claimed (as messangers from God) the power to communicate with the "spirit world" and solicited money on the basis of the claim. They were indicted for religious fraud and for using the mails to accomplish their fraudulent scheme. With the consent of counsel for both sides, the trial judge instructed the jury that the government could not concern itself with either the truth or falsity of the Ballards' religious beliefs. This left the jury to consider only the question of whether the Ballard family honestly and sincerely believed in the claim they made. Thus, if the jury found that they did not honestly and sincerely believe their own representations, they must be found guilty.[31] The district court convicted the Ballard family for using, and conspiring to use, the mails to defraud. The Court of Appeals for the Ninth Circuit reversed the conviction on grounds that the trial court had restricted the jury to the issue of the good faith of the defendants, although the government should have proved the claims false. When the appeals court granted a new trial, the Solicitor General asked the Supreme Court to reinstate the jury verdict. A majority of the Court agreed that the contention of the court of appeals ought to be reversed—because of basic agreement with the position of the trial judge. And it was their intention (which they accomplished), according to Glendon Schubert, to quash the new trial and order the appeals court to consider the constitutional issues raised by the Ballard family in the original appeal.[32]

Justice Douglas, for a 5-4 (Jackson's dissent should more appropriately be listed as a concurrence of sorts making the decision 6-3) majority of the Court in *United States v. Ballard,*[33] side-stepped the issue of the defendants' good faith and concentrated on the reasons for excluding from governmental concern any inquiry into the truth or falsity of a religious belief. He accomplished this task by not applying the secular regulation rule and, at the same time, creating a so-called test of sincerity. Douglas maintained that the government must not concern itself with the question of truth or falsity of religious beliefs. The only issue for judges was whether the questioned belief was sincerely held. The free exercise of religion guarantee does not attempt to set up a preferred belief, but rather applies to all beliefs. "Freedom of thought, which includes freedom of religious belief," said Douglas, "is basic in a society of free men."[34] The constitutional guarantee of free exercise includes the right

> to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . [Our Founding Fathers] fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.[35]

Although the religious beliefs of the Ballard family might seem incredible, they cannot be subjected to verification of truth. "When the triers of fact undertake that task, they enter a forbidden domain."[36] And in applying the test of sincerity, Douglas seemed to conclude that the "I Am" movement was in fact a "religion" because the Ballards believed that it was. Consequently, it required the protection of the free exercise clause, no matter how unusual its doctrines.

Chief Justice Stone, along with Justices Roberts and Frankfurter, dissented from the opinion of the Court. Stone said in effect that the constitutional guarantee of religious freedom does not afford immunity from, or justification for, the commission of a crime. This was especially true where the interests in protecting society outweigh the interest in religion. "I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences."[37] Under such circumstances, Stone believed that the government should have been allowed to submit to the jury any

proof available that the Ballards were religious fakers. In addition, Stone was concerned with the issue of the defendant's state of mind because such mental processes are as capable of

> fraudulent misrepresentation as is one's physical condition or the state of his bodily health. . . . Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.[38]

For him, as for the Solicitor General, the verdict of guilty should be reinstated. After all, the issue of belief had been submitted to the jury in good faith.

Justice Jackson also wrote a separate dissenting opinion, although he agreed in principle with the majority. For him, the justices composing the majority did not carry their opinion to a logical conclusion. The national government and the states cannot in any circumstances question the sincerity and honesty of the individual's religious beliefs. In a society where its constitutional guarantees protect the individual's free exercise of religion, religious sincerity cannot be tried apart from religious verity: "If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."[39] Not content to stop there, Jackson then concluded his opinion by asking when

> does less than full belief in a professed credo become action able fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.[40]

In essence, he would not allow either the government or the courts to examine anyone's religious beliefs. Neither instrumentality was capable of doing so; and such prosecutions could lead only to religious persecutions. Milton R. Konvitz summarized Jackson's feeling about the Court's not carrying its decision far enough when he suggested that it was not possible to measure a person's

> honesty or sincerity when it comes to religious beliefs. . . . The human mind plays with subtleties, shadings of meanings, nuances, refinements of thoughts, ideas and shadows of ideas, myths, metaphors, parables, paradoxes, hyperboles, anthropomorphisms, circumlocutions, and a thousand and one other devices, which . . . the mind itself has made. . Who can weigh and measure the quantity and quality of honesty in professions of religious faith.[41]

And he also indicated that if inquisitions for heresy are alien to our Constituion, inquisitions for hypocrisy should also be alien.[42]

At first glance *Ballard* seems to abandon the secular regulation rule. It does not. Jackson's dissent (or more appropriately his concurrence regarding first principles) was not the opinion of the Court. And Douglas simply side-stepped the issue of good faith entirely. His sincerity test, although not what one would have hoped for in a result-oriented way, nevertheless allowed free exercise to emerge victorious. If the majority opinion "legitimized" the perpetration of religious fraud, it was a small enough price to pay for a free society. Elwyn A. Smith commented on the majority holding and its enlargment of free exercise in the following way:

> *Ballard* makes clear that so long as the courts are reluctant to define religion or even to specify, from a legal point of view, the sphere in which religion is conceived to lie, the area protected by the First Amendment tends to expand, encroachment on the state's sphere of operation tends to grow, and the rights of individuals and minorities over against those of the majority tends to increase.[43]

Inevitably, free exercise was more than the right to hold ideas. It also meant the right to express them.[44]

In contrast, *Prince v. Massachusetts*[45] illustrated succesful application of a state criminal statute against a form of "criminal" conduct. The decision continued the precedents of the polygamy cases—that a valid secular objective may taint certain forms of religious behavior with criminality. I might note one significant caveat: the Court did in fact distinguish between actions of an adult (which might fall under the protection of the free exercise clause) and actions of a child (which were not comparably protected).

The child labor statute of Massachusetts declared that no minor (boy under twelve or girl under eighteen) could sell any article of merchandise on the streets at night. The statute also made it unlawful to furnish a minor with items to be sold in violation of the law. A nine-year-old girl and her aunt (who was also her guardian) were convicted for selling publications of their religious sect on the streets at night. Both claimed to be ordained ministers of the Jehovah's Witnesses, and rested their case on the free exercise of religion clause. The aunt also entered a claim of parental right secured by the due process clause of the Fourteenth Amendment.

Speaking for a 5-4 majority, Justice Rutledge said that the family unit was not immune to regulation in the public interest even in the face of a free exercise claim. "[N]either rights of religion nor rights of parenthood are beyond limitation."[46] Indeed, when acting to protect the general welfare of the community on behalf of its children, the state as *parens patriae* may restrict the control of the parent and child in many

ways. The state's authority over children's activities, according to Rutledge, was broader than like actions of adults.[47] And invoking a modified version of the secular regulation rule, Rutledge compared the relative importance of the competing interests involved and found that the statute was reasonable under all circumstances.

> We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.[48]

And once again, Rutledge was concerned with the adult-child distinction. Accordingly, "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[49] Without that distinction—and the fact that parents are not free to make martyrs of their children—this decision might invariably have gone the other way.

The very same distinction that troubled Rutledge troubles me as well. In fact, I believe it to be a distinction without a difference. To suggest, as he did, that similar action by an adult would be protected by the free exercise clause, or that parents were free to make martyrs of themselves but not their children, was to disregard the meaning of religion for Jehovah's Witnesses. All—children and adults alike—believe themselves to be Witnesses of God, ordained ministers in His cause, with the primary task of proclaiming the impending Kingdom. To declare that the state may reinterpret the meaning of religion for the Witness sect—to distinguish between "witnesses" and "witnesses"—was to intrude upon basic belief, not actionable criminal conduct. Such an attitude on behalf of the state was to place a secular meaning upon the concept of religion. Such an attitude was to create a fictitious secular objective when no clear and present danger existed. It was one thing to draw a workable line between the realm of God and the realm of Caesar, but quite another thing for Caesar to be the only one to say what God was in fact entitled to.

Justice Jackson, along with Justice Frankfurter and Roberts, dissented, saying that the decision reached was inconsistent with the *Murdock* opinion.[50] He felt the case pointed out the basis of disagreement among Court members as expressed in earlier Jehovah Witness cases. And the basis of such disagreement involved the methods to be used in establishing limitations on the outer limits of the free exercise clause.

> My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or

> of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. . . . [But when churches engage in purely secular activities, these things are] Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.[51]

Also dissenting was Justice Murphy, who felt that no distinction should be made between the religious exercises of parent or child. Moreover, the actions of both parent and child must be allowed free exercise protection up to the point of a grave, immediate, and substantial danger.[52] In addition, reasoned Murphy, no sufficient proof was presented to justify the belief that lasting harm would come to Witness children distributing religious literature in public places. "[T]he bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion."[53] Murphy then went on to argue that parents and/or guardians should not be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils that the state can protect children from must be grave, immediate, and substantial; a higher standard than "vague possibilities" was required by the free exercise clause.

Murphy's dissent also raised the issue of what logical conclusion might be reached in the application of the free exercise clause—and presumably the other First Amendment guarantees as well—and how far it might be extended in areas where a *vital secular claim* was not presented.

> In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. . . . On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth . . . are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.[54]

The significance of the issue raised by this forceful dissent, the actual reversal of the presumption of constitutionality concept, will be presented in the concluding chapters of this volume.

When the practice of a religious belief becomes criminal conduct, the Supreme Court will not accept the free exercise of religion guarantee

as a justification. The precedent was established in the polygamy cases and has been reiterated many times.[55] What contrary holdings there have been—with the exception of *Ballard*—occurred in the lower federal and state courts;[56] and they have been the exception rather than the rule. In this one area of adjudication, the Court has been unwilling (one is tempted to say unable) to rid itself of the secular regulation rule. And so long as the distinction between belief and action remains (at least under the *Reynolds* and *Davis* definitions), the Court has two viable options open to it in criminal conduct cases: (1) it can continue to invoke the secular regulation rule in the obvious cases of polygamy and snake-handling; and (2) disregard the rule (and create a more favorable free exercise test) in the harmless cases exemplified by *Ballard* and *Prince*. I include here the problem of child-labor laws because I believe Rutledge and the majority were wrong in drawing both their distinctions and their lines. I would also add the harmless drug cases involving peyote, marijuana, and LSD, such as *People v. Woody*,[57] *United States v. Kuch*,[58] and *Oregon Department of Human Resources v. Smith*.[59] Since an acceptable (and useable) definition seems to be beyond the ability of man, the Court might consider the wisdom of such an approach—especially when our definitions of criminal conduct are subject to the same constant changes as society itself.

SUMMARY

What seems obviously apparent is that the judicial distinctions between belief and action still exist in the area of criminal conduct; and the use of such favorable free exercise tests (used in other areas of adjudication) as greater judicial scrutiny, clear and imminent danger, and preferred freedoms, have found little applicability here. The secular regulation rule, although not always acceptable in other free exercise areas, still finds here a large degree of support. But the problem is more complicated than this.

On the prime occasion when the test of sincerity replaced the secular regulation rule for a majority of the Court, it raised almost as many problems as it solved. As a test it was much more favorable to the free exercise claim—for it protected belief *and* many forms of action. Yet the test (as applied) did not set out any method of measuring sincerity. What might such criteria and standards be? Perhaps the length of time that the belief was held,[60] or the fervency with which the views were advanced.[61] How were either of these possibilities, or others that could be created, be measured? In other areas of free exercise adjudication the Court would attempt to grapple with the problem.

Another approach, begun in the polygamy cases, was to "test for religion." This required at least a coherent definition of the term. Unfortunately, the task proved not only more frustrating, but also more difficult. The creation and maintenance of such a definition required the Court to "examine the intrinsic quality of the beliefs asserted," as well as the "forms of worship or practice associated with the asserted beliefs."[62] Richard E. Morgan suggested this problem in the following way:

> To inquire into the quality of beliefs required that standards be set for determining what are assertions about the diety, about basic nature of man and about the human condition—standards which distinguish such assertions from trivial notions not worthy of the term religion. The mind boggles at the thought of judges hacking away, case by case, at this level of abstraction. Inchoate judicial subjectivism could be the only result.[63]

Morgan then continued:

> But to examine practices is even worse. Must there be regular meetings? Must there be exercises of a liturgical sort? It is hard to see how judges could avoid taking the familiar forms of religious worship as covert norms; the orthodox would be advantaged over the believer practicing in strange ways—just the sort of person whose behavior the free exercise [clause] is . . . being expanded to protect.[64]

Morgan also suggested that combining the two approaches did not guarantee coherence. Either everyone would qualify or judges (because of their personal predilections) would discriminate against the unorthodox and unfamiliar.[65] The dilemma has no answer. If the Court is to extend the free exercise clause to cover action, "it must define religion, and to define religion is to arbitrarily impose an orthodoxy."[66]

This, then, was—and is—the continuing dilemma. And the dilemma exists whether the free exercise clause is invoked by the "odd" few or a majority of religious fanatics. Remember, a right does not disappear because it is invoked or because of the increasing number of individuals choosing to invoke it.

There is one additional point to mention. I have saved the most difficult problem for last. The topic of this chapter is "criminal conduct/antisocial behavior." I used a double title because I am not convinced that all of the conduct discussed here is "criminal." Like H. L. A. Hart, I must wonder whether some of this so-called actionable behavior is not really a problem of morality—and its enforcement upon the "odd" few by a conformity-minded majority. Polygamy is the classic example here. According to Hart, if polygamy is being punished in order to protect the religious sensibilities of the majority, the polygamist is

being punished as a nuisance for committing a public act.[67] But, on the other hand, if polygamy is labeled a crime—because the activity is practiced in private—by individuals who strongly condemn the act for sexual reasons, the polygamist is being punished for immorality.[68] I recognize that a very fine line of distinction may exist here, but it is a distinction nonetheless. And I believe that the *Reynolds* and *Davis* cases were incorrectly decided—and the resulting secular regulation rule erroneously constructed—because I am convinced that *it should not be the purpose of the law to punish immoral behavior* that does not endanger nonparticipants. The polygamy cases do just that; for the only religious sensibilities infringed were those of the Mormons themselves.

It must always be remembered that in virtually all jurisdiction where polygamy is punishable, the sexual cohabitation of the parties, although possibly a criminal offense, is seldom punished. If a married man cares to cohabitate with another woman—or even several other women—he may do so with impunity so far as the criminal law is concerned.[69] In fact, "[h]e may set up house and pretend that he is married . . . [b]ut if he goes through a [second] ceremony of marriage, the law steps in not merely to declare [the marriage] invalid but to punish the [polygamist]."[70] Should the law have the right to interfere at this point, after leaving the sexual cohabitation alone? Why is the extended period of sexual cohabitation not punished? Why does a simple marriage ceremony transform the act simultaneously into immorality and actionable criminal behavior?

It is not my purpose here to defend polygamy, or even condone it. Rather, I am concerned with the curious ritual that takes place in the minds and hearts of the community when certain forms of "antisocial behavior" become crimes simply because the community conveniently forgets about democratic principles and the guaranteed rights of the minority. John Stuart Mill's *On Liberty* rejected the idea that you could use punitive law to punish an act offensive to religious feelings;[71] and this would be especially true when the act itself was motivated by religious beliefs. Mill was not inconsistent on this point, even though he also suggested that coercion may be justifiably used to prevent harm to others. From Mill's perspective, you simply cannot—and should not—constitute as harm the possible distress occasioned by the thought that others are offending in private against public morality.[72] Even if the majority of the community is both neutotic and hypersensitive, and literally "made ill" by the thought, it cannot constitute harm under democratic principles.[73]

Hart suggested the nexus of the problem in the following language:

> [A] right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong,

> cannot be acknowledged by anyone who recognizes individual liberty as a value. . . . If distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory. Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does—unless, of course, there are other good grounds for forbidding it.[74]

If there is no harm to be prevented, and no potential victim to be protected, as is oftentimes the case when conventional "antisocial behavior" is involved (since there is usually consent, and the so-called victim is usually willing)—then the assertion that conformity is a value worth pursuing, and an appropriate end for the law to secure by the use of criminal sanctions, is completely unacceptable in a free society given the misery and sacrifice of freedom that it involves.[75] The price of human suffering forced upon people motivated by purely religious beliefs, the ability of society to inflict punishment as a symbol of moral condemnation, is simply too high a price to pay. Once again, Hart suggested what should be the last word:

> [W]here there is no victim but only a transgression of a moral rule, the view that punishment is . . called for as a proper return for the immorality lacks . . . support. Retribution here seems to rest on nothing but the implausible claim that in morality two blacks make a white: that the evil of suffering added to the evil of immorality as its punishment makes a moral good.[76]

Three decades ago, Alexander Meiklejohn suggested that "[t]o be afraid of ideas, any idea, is to be unfit for selfgovernment."[77] Punishing antisocial behavior as actionable criminal conduct is only one example in American law of the fact that most Americans are afraid to be free. The odd few, the dissenters and malcontents, the engagers in antisocial behavior, alert us to democracy's most fundamental truth: the imposition of conformity in the name of law and morality means no democracy and no freedom.

Nevertheless, by the 1940s the older distinction between belief and action would no longer suffice. Not only would the secular regulation rule be eroded, but it would not be carried over into other free exercise areas. Indeed, the Court (in these other areas) created a more favorable series of tests and tools and devices; and the new judicial techniques

allowed judges to write their values concerning the free exercise clause into the First Amendment. And in the process it allowed action to be protected along with belief—while on several occasions making the two indistinguishable.

It is to some of these problems that I now turn.