ATTACHMENT 3

REFERENCE CASES AND AUTHORITIES

Texas Virtual Judicial Competition
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SEARCH WARRANT CASES AND STATUTES

Code of Criminal Procedure: Art. 18.01. Search Warrant

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

(c) A search warrant may not be issued pursuant to Subdivision (10) of Article 18.02 of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Aguilar v. State, 378 U.S. 108 (1964).

Defendant was convicted, in the Criminal District Court, Harris County, Texas, of illegal possession of heroin, and the Texas Court of Criminal Appeals, 172 Tex.Cr.R. 629, 362 S.W.2d 111, affirmed. On certiorari granted, the United States Supreme Court, Mr. Justice Goldberg, held that affidavit for search warrant may be based on hearsay information and need not reflect direct personal observations of affiant but magistrate must be informed of some of underlying circumstances on which informant based his conclusions and some of underlying circumstances from which officer concluded that informant, whose identity need not be disclosed, was 'credible' or that his information was reliable.

Reversed and remanded.

This case presents questions concerning the constitutional requirements for obtaining a state search warrant.

Two Houston police officers applied to a local Justice of the Peace for a warrant to search for narcotics in petitioner's home. In support of their application, the officers submitted an affidavit which, in relevant part, recited that:

'Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.'[FN1]

FN1. The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503, 79 C.J.S. Searches and Seizures s 74, p. 872 (collecting cases). In Giordenello, the Government pointed out that the officer who obtained the warrant 'had kept petitioner under surveillance for about one month prior to the arrest.' The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. Moreover, there is no evidence in the record that a surveillance was actually set up on petitioner's house. Officer Strickland merely testified that 'we wanted to set up surveillance on the house.' If the fact and results of such a surveillance had been appropriately presented to the

magistrate, this would, of course, present an entirely different case.

The search warrant was issued.

In executing the warrant, the local police, along with federal officers, announced at petitioner's door that they ***110** were police with a warrant. Upon hearing a commotion within the house, the officers forced their way into the house and seized petitioner in the act of attempting to dispose of a packet of narcotics.

At his trial in the state court, petitioner, through his attorney, objected to the introduction of evidence obtained as a result of the execution of the warrant. The objections were overruled and the evidence admitted. Petitioner was convicted of illegal possession of heroin and sentenced to serve 20 years in the state penitentiary.[FN2] On appeal to the Texas Court of Criminal Appeals, the conviction was affirmed, 172 Tex.Cr.R. 629, 362 S.W.2d 111, affirmance upheld on rehearing, 172 Tex.Cr.R. 631, 362 S.W.2d 112. We granted a writ of certiorari to consider the important constitutional questions involved. 375 U.S. 812, 84 S.Ct. 86, 11 L.Ed.2d 48.

FN2. Petitioner was also indicted on charges of conspiring to violate the federal narcotics cotics laws. Act of February 9, 1909, c. 100, 35 Stat. 614, s 2, as amended, 21 U.S.C. s 174; Internal Revenue Code of 1954, s 7237(b), as amended, 26 U.S.C. s 7237(b). He was found not guilty by the jury. His codefendants were found guilty and their convictions affirmed on appeal. Garcia v. United States, 5 Cir., 315 F.2d 679.

In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, we held that the Fourth 'Amendment's proscriptions are enforced against the States through the Fourteenth Amendment,' and that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.' Id., 374 U.S. at 33, 83 S.Ct. at 1630. Although Ker involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.'

An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action ***111** of officers * * * who may happen to make arrests.' United States v. Lefkowitz, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877: The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule 'that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436. Under such a rule 'resort to (warrants) would ultimately be discouraged.' Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 736, 4 L.Ed.2d 697. Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' ibid., and will sustain the judicial determination so long as 'there was substantial basis for (the magistrate) to conclude that narcotics were probably present * * *.' Id., 362 U.S. at 271, 80 S.Ct. at 736. As so well stated by Mr. Justice Jackson:

'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 13-14, 68 S.Ct. at 369

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police.

***112** In Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159, a warrant was issued upon the sworn allegation that the affiant 'has cause to suspect and does believe' that certain merchandise was in a specified location. Id., 290 U.S. at 44, 54 S.Ct. at 12. The Court, noting that the affidavit 'went upon a mere affirmation of

suspicion and belief without any statement of adequate supporting facts,' id., 290 U.S. at 46, 54 S.Ct. at 13 (emphasis added), announced the following rule:

'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.' Id., 290 U.S. at 47, 54 S.Ct. at 13. (Emphasis added.)

The Court, in Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 applied this rule to an affidavit similar to that relied upon here.[FN3] Affiant in that case swore that petitioner 'did receive, conceal, etc., narcotic drugs * * * with knowledge of unlawful importation * * *.' Id., 357 U.S. at 481, 78 S.Ct. at 1247. The Court announced the guiding principles to be:

FN3. In Giordenello, although this Court construed the requirement of 'probable cause' contained inRule 4 of the Federal Rules of Criminal Procedure, it did so 'in light of the constitutional' requirement of probable cause which that Rule implements. Id., 357 U.S. at 485, 78 S.Ct. at 1250. The case also involved an arrest warrant rather than a search warrant, but the Court said: 'The language of the Fourth Amendment, that '* * * no Warrants shall issue, but upon probable cause * * *' of course applies to arrest as well as search warrants.' Id., 357 U.S., at 485-486, 78 S.Ct., at 1250. See Ex parte Burford, 3 Cranch 448, 2 L.Ed. 495; McGrain v. Daugherty, 273 U.S. 135, 154-157, 47 S.Ct. 319, 71 L.Ed. 580. The principles announced in Giordenello derived, therefore, from the Fourth Amendment, and not from our supervisory power. Compare Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103. Accordingly, under Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, they may properly guide our determination of 'probable cause' under the Fourteenth Amendment.

'that the inferences from the facts which lead to the complaint '(must) be drawn by a neutral and detached***113*** magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436. The purpose of the complaint, then, is to enable the appropriate magistrate * * * to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion * * *.' 357 U.S., at 486, 78 S.Ct., at 1250.

The Court, applying these principles to the complaint in that case, stated that:

'it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination * * * that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.' Ibid.

The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's***114*** possession.[FN4] The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'

FN4. To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession.

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, was 'credible' or his information 'reliable.'[FN5] Otherwise, ***115** 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' Giordenello v. United States, supra, 357 U.S. at 486, 78 S.Ct. at 1250; Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, or, as in this case, by an unidentified informant.

FN5. Such an affidavit was sustained by this Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697. The affidavit in that case reads as follows:'Affidavit in Support of a U.S. Commissioners Search Warrant for Premises, 1436 Meridian Place, N.W., Washington, D.C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.'In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated (sic) in the above mentioned places. The last time being August 20, 1957.'Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.'This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.'Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated (sic) in the above apartment by Cecil Jones and Earline Richardson.'Det. Thomas Didone, Jr.,Narcotics Squad, MPDC.'Subscribed and sworn to before me this 21 day of August, 1957.'James F. Splain, U.S. Commissioner, D.C.' Id., 362 U.S. at 267-268, n. 2, 80 S.Ct. at 734.Compare, e.g., Hernandez v. People, 385 P.2d 996, where the Supreme Court of Colorado, accepting a confession of error by the State Attorney General, held that a search warrant similar to the one here in issue violated the Fourth Amendment. The court said:'Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause * * *.' Id., 385 P.2d, at 999.

We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that ***116** the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial.

The judgment of the Texas Court of Criminal Appeals is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Barraza v. State, 900 S.W.2d 840 (Tex.App.—Corpus Christi 1995).

OPINION

Rogelio Barraza appeals from a conviction for misdemeanor possession of marihuana. Appellant claims the trial court erred in failing to suppress the contraband seized because the underlying affidavit for the issuance of the search warrant did not set out probable cause. We agree and reverse the trial court.

At approximately 10:30 p.m. on April 21, 1992, Thomas J. Turner, a criminal investigator for the Victoria County Sheriff's Department received information which led him to believe that marihuana may be found at appellant's residence. Thus, at 1:30 a.m., Turner appeared before Magistrate Laura A. Weiser and requested a warrant to search appellant's residence for marihuana. Turner's affidavit in support of the search warrant states in pertinent part as follows:

1. THERE IS IN VICTORIA COUNTY, TEXAS, A SUSPECTED PLACE DESCRIBED AND LOCATED AS FOLLOWS: A mobile home located at Route 5, No. 3, Serene Drive, Victoria County, Texas, and any and all outbuildings, vehicles, openings, edifices, and curtilage at said suspected place.

* * * * * *

4. On May 22, 1990, your Affiant and other members of the Victoria County Sheriff's Department executed a controlled substance search and arrest warrant, #BQG–90–82, at the suspected place. As a result of the directed search, a felony quantity of marijuana was discovered, and Rogelio Barraza, Sr., was arrested for said violation. The said Rogelio Barraza, Sr., was identified as a highlevel marijuana distributor in Victoria County.

At approximately 10:30pm [sic] on Tuesday, April 21, 1992, your Affiant was contacted by Calhoun County, Texas, Deputy Rusty Coward, who advised your affiant that he had been contacted by a reliable and credible confidential informant and advised that one Darrell Gann, a white male whose birthdate is 12–09–67, had left Port Lavaca, Calhoun Co., Texas, enroute to the suspected place for the purpose of purchasing a quantity of marijuana. Deputy Coward advised your Affiant that the said confidential informant indicated that Gann would be operating a blue 1985 Plymouth bearing Texas license plate registration 802–UHP. Deputy Coward alerted Texas Department of Public Safety Narcotics Task Force Sgt. Glenn Mize, and Coward's partner, Deputy Jim Dunlap, who proceeded to a surveillance point near FM 616 and US Hwy 87. At 10:55pm [sic], Officers Mize and Dunlap observed the suspected vehicle southbound from Placedo, Texas, utilizing the access road from FM 616; FM 616 is intersected by Serene Drive west of Placedo, Texas. At 11:11pm [sic], deputies from Calhoun County Sheriff's Department stopped the Gann's vehicle south of Placedo, Texas, and their subsequent investigation resulted in the discovery of approximately 5 pounds of suspected marijuana and the arrest of Darrell Gann.

During the course of this investigation, the said confidential informant advised Deputy Coward that Darrell Gann would *842 be returning to the same location that your Affiant and other Victoria County sheriff's deputies raided approximately 2 years ago. Your Affiant has determined through criminal history research that the same Rogelio Barraza, Sr., said suspected party, has, since his original sentence to the Texas Department of Criminal Justice Institutional Division, been released and, to your Affiant's knowledge, is residing at the suspected site.

Based upon this affidavit, Magistrate Weiser issued the search warrant. The officers executed the warrant and arrested appellant and his wife. Appellant was indicted for felony possession. After a jury trial, he was found guilty of misdemeanor possession. Appellant appeals from this conviction.

In his sole point of error, appellant alleges that the trial court erred in admitting the contraband because the affidavit in support of the search warrant did not set out probable cause for the issuance of the search warrant. To test the finding of probable cause by the magistrate, we must apply the "totality of the circumstances" test adopted by the Court of Criminal Appeals. Bower v. State, 769 S.W.2d 887, 903 (Tex.Crim.App.), cert. denied, 492 U.S. 927, 109 S.Ct. 3266, 106 L.Ed.2d 611 (1989). In judging the adequacy of a search warrant affidavit, we must look within the "four corners" of the affidavit because that is what the magistrate had before her when she issued the warrant. Cerda v. State, 846 S.W.2d 533, 534 (Tex.App.—Corpus Christi 1993, no pet.). The task of the magistrate issuing a search warrant is to decide whether, given all the circumstances set forth in the affidavit before her, there is a fair probability that contraband or

evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). An affiant must present the magistrate with sufficient information to allow her to determine probable cause; a mere conclusory statement will not do. Id. at 239, 103 S.Ct. at 2332.

The veracity and basis of knowledge of persons supplying hearsay information are relevant considerations in the totality of the circumstances analysis. Id. at 233, 103 S.Ct. at 2329. An unnamed informant's reliability may be established by the affiant's general assertions stated in the affidavit concerning the informant's prior reliability. Cerda, 846 S.W.2d at 534. Furthermore, an affiant may rely on hearsay as long as a substantial basis for crediting the hearsay is presented. Gates, 462 U.S. at 241–42, 103 S.Ct. at 2334; Green v. State, 736 S.W.2d 218, 219 (Tex.App.—Corpus Christi 1987, no pet.). Thus, an informant's tip should be corroborated through the independent investigation of the police or through other sources of information. Gates, 462 U.S. at 241–42, 103 S.Ct. at 2334; Green, 736 S.W.2d at 219.

With respect to the reliability of the informant, affiant simply stated that he was told by Deputy Coward that Coward "had been contacted by a reliable and credible confidential informant." This is a mere conclusory statement as to the reliability of the informant. There is nothing in the affidavit to show that the informant had previously given information to Coward which had turned out to be reliable. The informant did identify a Darrell Gann who was, according to the informant, going to go to a location in Victoria County to purchase a quantity of marihuana. Again, there is nothing in the affidavit which shows how the informant had acquired the knowledge about the location where the marihuana was to be purchased or that there was any marihuana at said location. There is no corroboration. The affiant apparently sought to get around this problem by relying on the fact that Mr. Gann was arrested and found to be in possession of a quantity of marihuana. There is nothing, however, in the affidavit to show when, where, or from whom he acquired the marihuana. The affidavit also fails to show whether or not Mr. Gann's vehicle was seen at the suspected place or even on the street of the suspected location. The best the affidavit does is put the vehicle on an access road to a farm to market road which, at some point west of a town named Placedo, Texas, intersects the street on which the suspected place is located. The Gann vehicle, however, was traveling south from Placedo. It is unclear from the affidavit if the location and identity of the suspected place came from the *843 informant or from affiant's knowledge because of a narcotics raid that had taken place two years before.FN1 If the informant knew of the suspected location because of that raid, or even knew of the raid, it is not reflected in the affidavit how she had acquired such knowledge.

FN1. Affiant admitted at the hearing on the motion to suppress that the informant did not supply him with the exact address. Instead, affiant came up with the exact location, that is appellant's residence, himself based on his previous experience with appellant and the fact that appellant lived in the area described by Deputy Coward. Moreover, Judge Weiser testified that she believed that the affiant, and not the informant, provided the address of the suspected place.

The State seeks to remedy the defects in the affidavit by referring to testimony given at the motion to suppress. The testimony adduced at said hearing, however, was not before the magistrate at the time she considered the affidavit and issued the warrant. While we must apply the totality of the circumstances standard in testing the sufficiency of the affidavit, this application only goes to the circumstances included in the affidavit. See Cerda, 846 S.W.2d at 535 n. 3. That is why we must restrict ourselves to the "four corners" of the affidavit. While no authority requires an affiant's basis for finding an informant's reliability to be of a certain nature, affiant is required, nevertheless, to actually have some basis for concluding that the informant is credible concerning the information supplied. See Olivarri v. State, 838 S.W.2d 902, 905 (Tex.App.—Corpus Christi 1992, no pet.). We find that lacking here. Affiant's assertions do not establish the credibility of the informant nor do they establish probable cause upon which a search warrant could be issued. We sustain appellant's sole point of error.

Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

Bower v. State, 769 S.W.2d 887 (Tex.Crim.App. 1989), cert. denied, 492 U.S. 927 (1989).

OPINION

Appellant was convicted of four capital murders after a joint trial. Punishment in each case was assessed at death. Appellant has raised the same twelve points of error in each case and, for that reason, all four cases will be considered together.

Testimony at trial showed that one of the victims, Bobby Glen Tate, owned the B & B Ranch which was located near Sherman. Mr. Tate owned an ultra light aircraft which he stored in a hangar located on his property. Another ultra light aircraft owned by David Brady was also stored in the hangar. Evidence was presented to show that Tate had decided to put his ultra light up for sale and his friend, Philip Good, another one of the victims, who sold ultra lights was attempting to find a buyer for the aircraft. A day or two before the commission of the offense, Tate told his wife, Bobbi, that Philip Good had met someone the previous Wednesday who was interested in buying the ultra light.

On October 8, 1983, Mr. Tate went out to his ranch to work on a house he was building. According to Bobbi Tate, he was to return to their home in town around 4:30 p.m. About 7:30 p.m., when he failed to return, Bobbi and her stepson, Bobby Jr., went to the ranch. Outside of the hangar, they saw vehicles belonging to Tate, Philip Good and Ronald Mays. However, the hangar was locked and no lights were showing through the windows. Bobbi retrieved a key from her husband's pickup and unlocked the hangar door. Upon opening the door, they saw the body of Ronald Mays lying in a pool of blood. Bobbi and Bobby, Jr. went to the nearest phone and called police.

Marlene Good, the widow of Philip Good, reiterated a similar story. She testified that on September 30, 1983, someone called their home and spoke with Philip for ten or fifteen minutes regarding an advertisement Philip had placed in "Glider Rider" magazine regarding the sale of an ultra light. Philip told the caller that he had sold the ultra light advertised in the magazine, but he had another that he could sell. On the following Monday or Tuesday, the man called again. On Wednesday, October 5, Philip met the man at the Holiday Inn in Sherman and took him out to the B & B Ranch in order to show him Bob Tate's ultra light. When Philip returned at about 4:00 p.m., he told Marlene that he thought he had sold Bob Tate's ultra light and the man was going to pick up the plane on Saturday, October 8. On October 8, Marlene testified that she spent the day with Ronald Mays' wife. Philip spent the day helping Jerry Brown build an ultra light in Philip's hangar. At 3:30 p.m., Philip called her and told her he was going to meet the man at the hangar on the B & B Ranch at 4:00 p.m. At approximately 4:30 p.m., Ronald Mayes left to go the hangar at the ranch. When he had not returned by 6:30 p.m., Marlene went to the hangar to see *890 what was happening. When she arrived, she too saw all the vehicles parked outside. The door to the hangar was locked and when she looked into the hangar windows, she could see that Bob Tate's ultra light was missing. Seeing that no one was around, she went home.

When investigators arrived on the scene, they discovered a grisly sight. Immediately inside the door of the hangar, they found the body of Ronald Mays. Underneath a pile of carpeting, investigators found the bodies of Philip Good, Bobby Tate, and Jerry Mack Brown. Good, Tate, and Brown had each been shot twice in the head. Mays had been shot once in the head, once in the neck, once in the right arm and once in the right side of the chest, and once in the back of the chest. All of the victims still had their wallets and their jewelry. Tate's ultra light which had been in the hangar earlier in the day was missing. A table situated against one wall of the hangar had a large spot of blood on it. Tests showed that this blood matched a sample of blood taken from Tate's body during an autopsy. This, plus the placement of the bodies underneath the carpet, led investigators to speculate that Tate had been shot while sitting at the table and then had been dragged over and placed with the bodies of Brown and Good. Investigators also found eleven spent .22 caliber shell casings which had been manufactured by Julio Fiocci. The scattered arrangement of the casings on the floor of the hangar indicated that the killer had used an automatic weapon rather than a revolver, since an automatic ejects the cartridges after each shot.

Dr. Charles Petty performed autopsies on the victims. According to Dr. Petty, three of the

victims, Good, Brown and Tate all sustained two gunshot wounds to the head. In the cases of Good and Tate, both men had one contact wound. On the other hand, both of Brown's wounds were contact wounds. Mays sustained one contact wound to the head and four other wounds to the upper part of his body. Dr. Petty further testified that the presence of the contact wounds indicated that when the weapon was fired, the muzzle of the gun was placed directly against the victim's head. In addition, the gunpowder residue left on the victims indicated that in each instance the murder weapon was equipped with a silencer. Dr. Petty testified that he removed eleven bullets and fragments from the victims. All of the bullets appeared to be .22 caliber hollow point bullets.

Larry Fletcher, a firearms examiner with the Dallas County Institute of Forensic Sciences, testified that tests run on both the spent casings and the bullets indicated that the shots were fired from either an AR–7 .22 caliber rifle, a Ruger .22 caliber semi-automatic pistol, or a High Standard .22 caliber semi-automatic pistol. Markings on the bullets indicated that a silencer was used. In addition the ammunition was manufactured by Julio Fiocchi and was A-sonic (traveled at speeds below the speed of sound) and had hollow points. Fletcher testified that A-sonic ammunition had the characteristic of reducing the noise discharge normally heard upon the firing of a weapon. Fletcher also testified that Julio Fiocchi ammunition was unique in that in his nine years as a firearms examiner, he had never encountered it before. Due to the condition of the bullets, Fletcher could positively say that only two of the bullets were fired from the same weapon. One of these bullets was extracted from the body of Mr. Mays and one from the body of Mr. Tate.

Much of Fletcher's testimony was duplicated by the testimony of Paul Schrecker, a firearms examiner with the FBI. Schrecker testified that all eleven casings were fired from a single weapon, and the markings on the casings were all consistent with a Ruger firearm. His examination of the bullets indicated that at least seven of the bullets were fired by the same weapon. He agreed with Fletcher that a silencer was used. As far as the type of ammunition used, Schrecker testified that he had *891 never encountered Fiocchi .22 caliber long rifle ammunition before this case.

Dennis Payne, appellant's supervisor at Thompson–Hayward Chemical Company in Dallas, testified that appellant had worked for the company in Colorado until he was laid off in February of 1983. Then in May of 1983, Payne had hired him for a sales position in Dallas. Although appellant's job performance in Colorado had been excellent, his performance in Dallas was poor.

While working in Dallas, appellant had been assigned a telephone credit card. A review of the record of the Thompson–Hayward Chemical phone bills indicated that on Friday, September 30, a call was made and charged to appellant's company credit card. This call was made to Philip Good's residence and the conversation lasted ten minutes. A direct dial call was made to Philip Good's residence again on Monday, October 3. This was a two minute call. Another call was placed on appellant's credit card to Philip Good's residence on Friday, October 7. This call lasted three minutes.

Another one of appellant's coworkers, Randal Cordial, testified that prior to the company sales meeting on January 3, 1984, appellant told him that he was building an ultra light airplane and lacked only the engine.

FBI Special Agent Nile Duke testified that after they traced the above-mentioned phone calls to the Thompson–Hayward Chemical Company, he began interviewing all the employees of the company in hopes of finding out who had placed the calls. After learning that appellant had told Special Agent Jim Knight that he had telephoned Philip Good, he scheduled an interview with appellant on January 11, 1984 at the company office. During the two hour interview, appellant told Duke that he had seen an advertisement in Glider Rider Magazine regarding an ultra light aircraft that Good had for sale. Appellant admitted calling the Good residence twice. According to appellant, during the first call which he said was the shortest, he had spoken only with Mrs. Good who told him that Mr. Good was not at home. He later called back and spoke with Mr. Good who informed him that the ultra light had been sold. Appellant told Duke that he had made only two calls and none of the calls had been placed on company credit cards. Appellant also told Duke that he had never made an appointment to see Good and had only passed through Sherman on his way to Tulsa or Gainesville. When asked his whereabouts on the day of the murders, appellant told Duke that

he could not account for his whereabouts on October 8, although he did remember that he was sick with a virus on Monday, October 10 and had stayed home from work. Finally Duke testified that appellant admitted he owned a .300 Winchester Magnum rifle, a Remington 1100 shotgun, a Savage Model B side-by-side double barrel shotgun, a Ruger 277V .220 caliber rifle, a 6.5 caliber Japanese rifle, a Winchester bolt action .22 caliber rifle, a Marlin lever action .4570 caliber government rifle, a .243 caliber Remington 700 rifle, and a .20—Model 929 Smith and Wesson .44 caliber Magnum revolver. Appellant also told Duke that he had previously owned a .357 caliber revolver. When asked specifically about a .22 caliber handgun, appellant replied that he did not own one.

On January 13, 1984, appellant went to the FBI office in Dallas to take a lie detector test. After talking with the agents there, appellant decided not to take the test. According to FBI agent William Teigen, at that point all the authorities knew about appellant was that he was employed at Thompson–Hayward, that three telephone calls had been made on the company phone bill to Philip Good's residence and that he was interested in ultra lights. Appellant stayed and talked with the FBI agents some four hours. During this conversation, appellant admitted that he had made the calls but that he decided not to buy the ultra light from Good and never had any further contact with him. Appellant also told the agents of his interest in ultra lights. Appellant related to the agents how he had spent hours researching *892 ultra lights and how he hoped someday to build an ultra light. Appellant went on to tell the agents that he had already obtained a piece of fabric for the covering, a fiberglass boat seat and some aircraft aluminum. Teigen testified at trial that after talking with appellant he believed that appellant was more than obsessed with the aircraft. When asked specific questions by the agents, appellant said that he had never bought an ultra light, that he had not been in Sherman on the day of the murders, that he had not met Philip Good on the day of the murders and had never met him in person, that he did not know where the missing ultra light was, and that he had never seen the missing ultra light.

After further investigation, a search warrant was obtained for appellant's residence. The search was conducted during the evening of January 20, 1984. Among the items seized were various manuals and magazines which were introduced into evidence at trial: a manual on the Cuyuna ultra light aircraft engine, a magazine entitled Glider Rider's Magazine which showed appellant as a subscriber, the World Guide to Gun Parts, the Instruction Manual for Ruger Standard Model .22 Automatic Pistols, Vol. II of Firearm Silencer Manual, two Xeroxed pages from Shotgun News depicting silencers and silencer weapons, The AR–7 Exotic Weapons System Book, a manual on explosives entitled High–Low Boom! Modern Explosives, another manual entitled Semi–Full Auto, AR–15 Modification Manual, another weapons manual entitled Rhodesian Leaders Guide, and several catalogs containing ads for military equipment including guns, clothing and numerous publications including books on how to kill. Authorities also found a form letter address to “Dear Customer” from Catawba Enterprises, indicating that appellant had purchased an item from the company. Authorities also found inside a briefcase which was located inside appellant's garage an Allen wrench which could be used to mount a Catawba silencer to a pistol and a packet of materials which included among other things appellant's Federal Firearms Licenses which permitted him to sell firearms, ammunition and other destructive devices. Appellant's own Firearms–Acquisition and Disposition Record which was also seized during the search indicated that he bought a Ruger RST–6–automatic .22 pistol, serial number 17–28022 on February 12, 1982 and sold it to himself on March 1, 1982. Investigation showed that on February 12, 1982, appellant also ordered three boxes of Julio Fiocchi .22 ammunition. Perhaps most incriminating were the parts of the ultra light found during the search. In the garage were two ultra light tires and rims with the name “Tate” scratched in each rim. Another ultra light tire and rim were found in appellant's house. Six pieces of aluminum ultra light tubing were found in the garage. Wadded up on top of a box in the garage were warning stickers that had been removed from the aluminum tubing of an ultra light. In addition, an ultra light harness was found in the house and a fiberglass boat seat was found in the garage. Authorities also removed a pair of rubber boots and a blue nylon bag from appellant's garage after noticing what appeared to be blood stains on these items. Also removed was a sledge hammer and some ashlike debris taken from the trunk of appellant's car.

Scientific evidence presented at trial showed that a fingerprint belonging to one of the victims, Jerry Mack Brown, was found on one of the pieces of ultra light tubing found in appellant's garage. In addition, an analysis of the sledge hammer removed from appellant's garage showed that material present on one side of its head was polypropylene, the same material which was used to make the American Aerolight decals. Metallic smears present on the other side of its head tested out to be of the same type of aluminum alloy as was used to make the Cuyuna engine, the reduction unit for a Cuyuna engine, the crank case and the carburetor used in ultra light aircraft. An analysis of the material taken from the trunk of appellant's car also revealed a fragment of this same aluminum *893 alloy. A forensic metallurgist with the FBI determined that this metal fragment was once a portion of a reduction unit for an ultra light engine and it appeared that the reduction unit was fragmented by a smashing action, consistent with a blow from a sledge hammer. Also found in the debris from the trunk of appellant's car were fragments of an American Aerolights decal. Tests on the boots removed from the garage showed the presence of human blood on the right boot but an attempt to type the blood was inconclusive. Tests on the blue nylon bag found in appellant's garage also indicated the presence of human blood.

Other testimony was presented to show that Catawba Enterprises dealt primarily in silencer parts and that the Catawba silencer could be easily installed on a Ruger RST–6 semi-automatic .22 pistol with an Allen wrench. Ed Waters, the attorney for Catawba Enterprises testified that ninety-nine per cent of the company's business was selling silencers and thus if appellant had one of the company's form letters acknowledging a transaction, appellant had probably purchased a silencer from the company.

Sandy Brygider, the owner of Bingham Limited, the sole distributor of Julio Fiocchi ammunition in the United States testified that the .22 sub-sonic Fiocchi ammunition was not sold over the counter but rather was a specialty item used primarily for suppressed weapons. Brygider testified that in the previous three years, his company had sold Fiocchi ammunition to only ten or fifteen dealers in Texas. He further testified that his company records showed that they had shipped three boxes of Fiocchi .22 long rifle sub-sonic hollow point ammunition to appellant on February 12, 1982 and five more boxes on December 10, 1982.

Lori Grennan, the customer service coordinator for American Aerolights, testified that her company manufactured the ultra light owned by Bob Tate. She testified that it was possible for the aircraft to be broken down and put into a thirteen foot carrying case and carried by one person. Grennan also testified that every ultra light manufactured by her company bears three company decals, two on one of the pieces of tubing and one on the engine. However, after examining the tubing removed from appellant's garage, she noted that these stickers decals were not present. She also testified that every ultra light has certain warning stickers. When shown the wadded up stickers found on the box in appellant's garage, Grennan testified that those were the warning stickers that would go on the ultra light manufactured by her company. Finally, Grennan testified that the harness and tire rims found in appellant's garage came from an ultra light manufactured by American Aerolights.

Marjorie Carr, the owner of a fruit stand in Sherman, testified that she had seen appellant in the company of Philip Good in Sherman in late September of 1983. According to Carr, Good and appellant had come into her stand and appellant was interested in buying some oranges. Carr related that she spoke with appellant for some ten or fifteen minutes and she remembered appellant telling her that he had moved from Colorado several months earlier and was then living in Dallas.

Further testimony showed that appellant had gone to the Arlington Sportsman's Club on September 30, 1983 and had spent fifteen minutes firing .22 ammunition.

During the defense case-in-chief, appellant presented several witnesses who testified that appellant's reputation for being a peaceful and law-abiding citizen was good. Evidence was also presented to show that although appellant had bought a Ruger RST–6 semiautomatic .22 pistol in 1982, he had lost it in the mountains of Colorado while backpacking alone in August of 1982. Finally, appellant's wife testified that on the morning of the offense, appellant left their home around 6:30 a.m. to go bow hunting. He returned home around 6:30 p.m.

. . . .

We now turn to appellant's complaint regarding the sufficiency of the affidavit. He urges that the affidavit does not contain probable cause to show that the ultra light aircraft would be found in the garage and thus the search was in violation of the United States Constitution, Article 1, Sec. 9 of the Texas Constitution and Article 18.01, V.A.C.C.P. The portion of the affidavit in support of the search warrant which purports to set out probable cause is set out below:

"Affiant Weldon Lucas, is a Peace Office of the State of Texas, and is currently employed with the Texas Department of Public Safety as a Texas Ranger, Company B. Affiant is investigating the murders of the individuals named above in Paragraph 4. On October 8, 1983, Bobbie Tate and Bobby Glen Tate, Jr. discovered the body of Ronald Howard Mayes in an aircraft hangar on the property of Bobby Glen Tate, Sr., which property was located in Grayson County, Texas. They notified the Grayson County Sheriff's Office who responded and discovered the bodies of Ronald Howard Mayes, Phillip Boyce Good, Bobby Glen Tate, and Jerry Mac Brown, shot and dead inside the hangar.

"The bodies of the four aforementioned individuals were transported to the Southwestern Institute of Forensic Sciences in Dallas, Texas, for an autopsy, which autopsy was conducted on the 9th day of October, A.D. 1983. From each of the bodies of the aforementioned individuals, during the autopsy, the Southwest Institute of Forensic Sciences advised by written report, that .22 caliber bullets were removed from the bodies.

*900 "The autopsy report advised that each of the bodies of each of the above individuals contained at least one wound from a .22 caliber weapon which was a hard contact wound. On the 20th day of January, 1984, Dr. Irv Stone, pathologist with the Southwest Institute of Forensic Sciences in Dallas, Texas, advised Affiant that there was a likelihood that in connection with the wounds found on the bodies of the four aforementioned individuals by the autopsy that blood could have splattered or squirted from the wound either at the time the shot was fired or when the weapon was removed from the body and that blood from this splattering or squirting could have gotten upon the shoes or clothes of the individual who fired the shots. Dr. Stone further advised that there was a great likelihood that blood from one or more of the bodies could have gotten upon the shoes or clothing of the individual who moved the bodies after they were shot.

"On October 8, 1983, Bobbie Tate, wife of Bobby Glen Tate, Sr., reported to the Grayson County Sheriff's Office that the above described ultralight aircraft was missing from the hangar where the bodies of the four individuals named above were found and that the aircraft had been in that hangar earlier on the day of October 8, 1983, fully assembled. Mrs. Tate advised that the ultralight aircraft missing had been covered by a bright orange and yellow fabric. Marlene Good, wife of Phillip Boyce Good, advised that her husband was attempting to sell the above described ultralight aircraft for Bobby Glen Tate and that its value according to the price being asked was $3,000.00.

"On the evening of October 8, 1983, a crime scene search was conducted at the aircraft hangar where the bodies of the four individuals above named were found, by numerous deputies of the Grayson County Sheriff's Office. During this search eleven (11) .22 caliber shell casings were found at the crime scene which were seized and preserved by the deputies of the Grayson County Sheriff's Department. These shell casings were subsequently furnished to the Southwestern Institute of Forensic Sciences in Dallas, Texas, for examination. Larry Fletcher, a firearms examiner employed by the Southwest Institute of Forensic Sciences in Dallas, Texas, has informed Affiant that the eleven (11) .22 caliber shell casings found at the crime scene were JULIO FIOCCHI shell casings. Larry Fletcher advised that in his opinion, after examining the shell casings previously mentioned and examining the spent projectiles removed from the bodies of the four individuals above named, that the bullets causing the death were fired from a Charter Arms AR–7 Ruger, Winchester or High Standard brand automatic or semi-automatic firearm. Fletcher advised further that the markings on the spent projectiles removed from the bodies of the victims were consistent with their having been fired from a weapon equipped with a firearms silencer.

"Special Agent Jim Blanton, FBI, has advised Affiant that the records of Bingham Arms Limited show that on February 12, 1982, Lester Leroy Bower, ordered 150 rounds of JULIO FIOCCHI brass cases .22 caliber lead hollow point, asonic ammunition and on December 10, 1982, Lester Leroy Bower ordered 250 rounds of said ammunition to be delivered at 590 Briarwood Lane,

Grand Junction, Colorado, which is the address which appears on Lester Leroy Bowers. Jr. federal firearms license, said license having number 58403901B312226922183. Don Bell, U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms, has advised that the above listed federal firearms license was issued to Bower at the address 590 Briarwood Lane, Grand Junction, Colorado.

"Marlene Good, wife of the victim Phillip Boyce Good, then an ultralight aircraft dealer, has informed Affiant that on approximately September 30, 1983, she overheard part of a conversation between her husband and an unknown caller wherein her husband told the caller that the caller would have no trouble with his weight if *901 the caller should purchase Tate's said ultra-light aircraft, and that the caller's weight of 250 pounds would be no problem.

"During the crime scene search of the hangar where the bodies of the above mentioned individuals were found, there was found cut metal rings used in the assembly and disassembly of the ultralight aircraft.

"Affiant is in possession of a manufacturer's brochure of ultra light aircraft which advertises that an ultralight aircraft of the type stolen and described in Paragraph No. 2 above, can be easlily (sic) disassembled and hand carried.

"Deputies of the Grayson County Sheriff's Office advise that on October 8, 1983, when the crime scene search was conducted, the area surrounding the hangar was wet and muddy.
"Affiant has personally examined the records of Southwestern Bell Telephone Company showing that on September 30, 1983, a call was made from the Duncanville Texas Public Library to Phillip Boyce Good's home in Sherman, Texas, the conversation lasting approximately 10 minutes and that on October 3, 1983, a call was made from Thompson Hayward Chemical Company, 2627 Weir in the City of Dallas to Phillip Boyce Good's home in Sherman, Texas, the conversation lasting approximately 2 minutes. During an interview with Bower on January 13, 1984, Bower admitted making said phone calls to Phillip Good's home for the purpose of the ultralight aircraft described above, in response to an advertisement in GLIDER RIDER magazine. Bower further told Affiant that he was a glider and ultralight enthusiast and that he was an employee of Thompson Hayward Chemical Company.

"Richard Mann, an employee of Thompson Hayward Chemical Company, advised Special Agent Jim Knights that on January 3, 1984, Bower told Mann that he had in his possession either an ultralight aircraft, or the parts to an ultralight aircraft, which he intended to fly. On January 11, 1984, Bower listed for Special Agent Knights approximately one dozen firearms by make and caliber, which he, Bower, owned.

"John Whitney, a special agent of the FBI, contacted Paladin Press, a weapons information publishing company in Boulder, Colorado, and informed Affiant that the records of said company reveal that in February of 1983, a Lester Bower, 590 Briarwood, Grand Junction, Colorado, ordered a publication entitled 'The AR–7 Exotic Weapons System', showing how to convert the Charter Arms AR–7 rifle into a silenced, fully automatic weapon. Whitney has informed Affiant that on January 16, 1984, he interviewed Howard E. Hendricks, a 20 year member of the Arlington, Texas Sportsmen's Club, who told Whitney that Bower is a member of said club, and that he has seen Bower firing a .22 caliber semi-automatic pistol, possibly a Ruger, at the Club's range. The latter is a rim fire weapon, according to Hendricks.

"Dr. Irv Stone of the Southwestern Institute of Forensic Sciences in Dallas, Texas, has informed Affiant that he examined photographs of the wounds on the bodies of the above victims and that said wounds were contact wounds with very little power (sic) strippling, being consistent with the use of a silenced weapon.

"On Friday, January 13, 1984, Affiant went to the premises described in Paragraph 1 above and observed, from outside the garage of said premises, aluminum tubing of the type used in the framework of an ultralight aircraft.

"Affiant has determined from the records of the U.S. Treasury Department Alcohol, Tobacco and Firearms Bureau, that Bower's address currently listed on his Federal Firearm Dealer's License is 3008 Quail Lane, Arlington, Texas."
In the recent case of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2336, 76 L.Ed.2d 527 (1983), the Supreme Court abandoned the two-pronged test of

Aguilar and Spinelli and applied a "totality-of-the-circumstances" analysis for the determination of probable cause under the Fourth *902 Amendment. See also Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984); Whaley v. State, 686 S.W.2d 950 (Tex.Cr.App.1985); Hennessy v. State, 660 S.W.2d 87 (Tex.Cr.App.1983). Noting that the probable cause standard is practical and not technical, the Court affirmed the idea that the basis of probable cause is probability. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Cf. Tolentino v. State, 638 S.W.2d 499 (Tex.Cr.App.1982). The Court stressed that the magistrate is not bound by such finely tuned standards as proof beyond a reasonable doubt or by a preponderance of the evidence; rather his sole concern should be probability. Illinois v. Gates, supra; Winkles v. State, 634 S.W.2d 289 (Tex.Cr.App.1982) (Opinion on Rehearing).

In United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), the Supreme Court had stressed that the magistrates determination of probable cause should be given great deference by reviewing courts:

"Although in a particular case, it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," United States v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965).

This was reaffirmed in Gates and the Court went on to add that reviewing courts should not make a de novo probable cause determination but rather, after viewing the evidence as a whole, should determine only if there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.

"Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Jones v. United States, 362 U.S. 257, 271, 4 L.Ed.2d 697, 80 S.Ct. 725 [736], 78 ALR2d 233 (1960). See United States v. Harris, 403 U.S. [573] at 577–583, 29 L.Ed.2d 723, 91 S.Ct. 2075 [2078–2082 (1971)]." 462 U.S. at 236–237, 103 S.Ct. at 2331, 76 L.Ed.2d at 547 (footnote omitted).

See also Massachusetts v. Upton, supra; Hennessey v. State, supra. With these axioms in mind, we now address appellant's contentions concerning the probable cause.

Probable cause to support the issuance of a search warrant exists where the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued. Cassias v. State, 719 S.W.2d 585 (Tex.Cr.App.1986); Schmidt v. State, 659 S.W.2d 420 (Tex.Cr.App.1983). While there is no firsthand evidence in the affidavit that the ultra light airplane was in either appellant's house or garage at the time of the search, this does not mean the affidavit lacked probable cause. It is only necessary that "the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought were located" at the place where it was proposed to search. United States v. Rahn, 511 F.2d 290 (10th Cir.1975). For instance, in Elliott v. State, 687 S.W.2d 359 (Tex.Cr.App.1985), we found it reasonable to assume that a suspect who was running a gambling operation out of his residence had gambling paraphernalia in his residence. Federal courts have held that evidence that a defendant has stolen material which one normally would expect him to hide at his residence will support a search of his residence. United States v. Lucarz, 430 F.2d 1051 (9th Cir.1970); United States v. Rahn, supra. Likewise, a search of an alleged murderer's living quarters for bloodstained clothing was approved under the same rationale in Iverson v. State of North Dakota, 480 F.2d 414 (8th Cir.1973).

In addition, there is no set time limit on how old information contained in an affidavit*903 may be. In Moore v. State, 456 S.W.2d 114 (Tex.Cr.App.1970), this Court noted that just how long a time may be permitted to elapse without destroying the basis for a reasonable belief as to the continuance of the situation set forth in the affidavit will vary according to the facts of the individual case. In Smith v. State, 23 S.W.2d 387 (Tex.Cr.App.1929), an affidavit was approved which recited that the affiants received their information thirty days prior to the issuance of the warrant.

The affidavit set out above indicates that the offense occurred on October 8, 1983. The magistrate signed the search warrant on January 20, 1984. The only information in the affidavit relating to whereabouts of the ultra light aircraft was the fact that Richard Mann, an employee of Thompson Hayward Chemical Company, advised Special Agent Jim Knights that on January 3, 1984, Bower told Mann that he had in his possession either an ultra light aircraft, or the parts to an ultra light aircraft, which he intended to fly and then on Friday, January 13, 1984, Ranger Lucas went to the appellant's house and observed, by looking through the garage windows, aluminum tubing of the type used in the framework of an ultra light aircraft. Based on the totality of these circumstances, appellant's residence was the only logical place to conduct the search for the ultra light airplane. Furthermore, we find that a period of seven days did not render such information stale. Therefore we find that the affidavit provided a substantial basis from which a reasonable and disinterested magistrate could have concluded that the ultra light airplane was on the premises sought to be searched. United States v. Maestas, 546 F.2d 1177 (5th Cir.1977).

As noted above, appellant also invoked his state constitutional protection under Article I, Section 9 of the Texas Constitution. We have found sufficient probable cause under the Fourth Amendment. But we must still determine whether the Texas Constitution provides more protection than the Fourth Amendment, or more particularly, does the test of Illinois v. Gates, supra, apply under the Texas Constitution.

Clearly, the states of the Union are justified in providing a greater degree of protection to their citizens than is provided by the United States Constitution. See Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). However, in regard to Article I, Section 9, supra, a plurality of this Court most recently declined an "invitation to attach to Art. I, § 9 of our Texas Constitution a more restrictive standard of protection than that provided by the Fourth Amendment." Brown v. State, 657 S.W.2d 797, 798 (Tex.Cr.App.1983). We again follow this holding and continue to interpret our Texas constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment. We now formally adopt the "totality of the circumstances" test adopted in Gates and abandon the "two prong" test of Aguilar and Spinelli.

There are several reasons for our holding today. First, there is no substantial textual differences between the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution. Thus, there is nothing to suggest in the language of Article I, Section 9, which suggests that it would offer greater protection. Second, the test of Gates involves a common sense, nontechnical analysis and there is more reasonable than the rigid formalistic test of Aguilar and Spinelli. As the Supreme Court stated in Gates :

"... probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules ...

"Moreover, the 'two-pronged test' directs analysis into two largely independent channels—the informant's 'veracity' or 'reliability' and 'his basis of knowledge.... Instead, they are better understood as relevant considerations in the totality of the circumstances analysis that has traditionally guided probable cause determinations...." Illinois v. Gates, 103 S.Ct. at 2328–2329.

*904 Because of all of the above, we hereby adopt the "totality of the circumstances" approach as the proper standard of review under Article I, Section 9 of the Texas Constitution. The affidavit in the instant case contained sufficient probable cause. Appellant's fourth point of error is overruled.

The search warrant authorized the officers to seize the following items:

"Stolen property, to-wit: an ultralight aircraft being an American Ultralights, Inc., Eagle Model 4904, Serial No. 102045, Engine No. 15949; and instrumentalities of the crime of murder, to-wit: a weapon which is a .22 caliber firearm and a quantity of .22 caliber ammunition and a firearm silencer; and evidence of the crime of the and (sic) murder which are books, magazines, pamphlets or other written or printed material concerning the manufacture, building, constructing or altering of ultralight aircraft, firearms or firearm silencers, or other written or printed material concerning or evidencing the purchase or sale of ultralight aircraft or firearms or firearms silencers; hand and power operated metal cutting, drilling, shaping and

forming tools; muddy clothing and boots, or clothing and boots bearing stains which could be blood."

During the search of appellant's house and garage, officers found a briefcase in appellant's Ford LTD. The contents of the briefcase were seized and admitted into evidence during the trial. Included in this evidence was State's Exhibit 68e, a firearms acquisition and disposition record and State's Exhibit 68f, a firearms transaction record. These records showed that appellant had purchased a .22 caliber Ruger RST–6 pistol, thought to have been the murder weapon in the instant case.

In a multifarious point of error, appellant argues that these firearms records were illegally seized under Articles 18.01 and 18.02(10), V.A.C.C.P. Initially appellant contends that the seizure of the firearms records was invalid in that the search warrant did not specifically describe such documents nor was there probable cause to show that the firearms records would be located in appellant's car. Thus, appellant asserts, the officers were engaged in a "global search" which Article 18.01(c) was designed to prohibit.

Article 18.02(10), supra, permits a search warrant to be issued for "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." Article 18.01(c), supra, states that a warrant may not be issued under Article 18.02(10), unless the sworn affidavit sets forth sufficient facts to establish probable cause that:

1. a specific offense has been committed;
2. the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; and
3. the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Tolentino v. State, supra.

Although the documents were not specifically described, we find that the warrant authorized the officers to look for any "written or printed material concerning or evidencing the purchase or sale ... of firearms." Information known to the officers established that the victims were shot with .22 caliber bullets, that appellant had twice purchased .22 caliber ammunition, and that appellant had been seen at a local firing range shooting a .22 caliber weapon. Although these documents were not specifically described in the search warrant, sufficient information was provided which would demonstrate that documents containing this information probably existed. Thus we find that there was sufficient direction given to the officers so that they were not engaged in a global search.

*905 As to appellant's contention concerning the location of the documents in the Ford, we find this to be an issue of first impression. Article 18.01(c) appears to impose a severe burden on the State in providing probable cause for the location of the items to be seized. The question before us is "how detailed must the probable cause be in terms of location of the items to be seized?" In the instant case, the warrant specifically commanded the executing officers to search appellant's home, "a Ford LTD four-door white in color bearing Texas registration 280DMB" and two other particularly described vehicles. Was it encumbent under the statute for the affidavit to furnish probable cause as to the exact location, be it house, garage, vehicle ## 1, vehicle # 2, vehicle # 3? We do not think this was the intent of the legislature when they drafted that provision and we have not found any case law which would support that position. Rather, we believe Article 18.01(c)(3) merely requires that there be probable cause to believe that the items would be located in the general location, i.e. somewhere within appellant's residence, which included the automobiles parked inside his garage and on the premises. To require anything more specific would be to require the impossible.

Appellant also contends in the same point of error that the firearms records were improperly seized in that they were his own personal writings and therefore not seizable under Article 18.02(10) V.A.C.C.P. Our review of the record shows that appellant's latter contention on appeal does not comport with the objections he made in the court below. Therefore, no error is preserved. In his motion to suppress, at the hearing on his motion to suppress and during the trial of the case, appellant did invoke Article 18.01, supra. However, his invocation only went to the argument that there was insufficient probable cause to justify the issuance of the warrant. The trial court was not asked to rule on the contention now presented. Thus we will not address it.

Finally, appellant asks us to hold that Article I, Sec. 9, Texas Constitution, imposes a more restrictive standard of protection than the Fourth Amendment. We have refused such requests in the past and we do so again. Brown v. State, supra. Appellant's fifth point of error is overruled.

Having found no reversible error, we affirm the judgments of the trial court.

Eatmon v. State, 738 S.W.2d 723 (Tex.App.—Houston [14th Dist.] 1987).

This is an appeal from a bench conviction for possession of methamphetamine. Prior to trial, appellant filed a written motion to suppress the evidence seized and asserted as grounds for its suppression violation of his rights pursuant to Tex. Const. art. I, § 9, U.S. Const. amend. IV, Tex.Code Crim.Proc.Ann. art. 1.06 (Vernon 1977), and Tex.Code Crim.Proc.Ann. art. 38.23 (Vernon 1979). After his motion to suppress was overruled, appellant entered a plea of no contest. The trial court found him guilty and assessed punishment at confinement for ten years in the Texas Department of Corrections. In three points of error, appellant argues the trial court erred in denying his motion to suppress the evidence seized during a search of his house because the search warrant was not supported by probable cause. We agree and, accordingly, reverse the judgment of the court below.

In points of error one and two, appellant argues that the affidavit made by the police officer in support of the search warrant failed to establish probable cause for the issuance of the warrant. Specifically, he contends that the affidavit failed to set forth any facts demonstrating the informant's reliability or the basis of his knowledge. Moreover, appellant argues that there was no independent corroboration of *724 the informant's information to compensate for the deficiencies in the affidavit. Consequently, he concludes that because the search warrant was unsupported by probable cause, any evidence seized as a result of the warrant's execution should have been suppressed. We agree.

In determining whether the affidavit contains sufficient facts to establish probable cause for the issuance of the warrant, we utilize the "totality of the circumstances" analysis announced in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Under this analysis the informant's reliability and basis of knowledge, as established by the facts in the affidavit, are relevant considerations in probable cause determinations: "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 462 U.S. at 233, 103 S.Ct. at 2329. Corroboration of the details of an informant's tip by independent police work is another relevant consideration in the "totality of the circumstances" analysis. 462 U.S. at 241–242, 103 S.Ct. at 2334.

Here, the affidavit contains no facts to establish the informant's reliability. It states, "I [the police officer] was informed ... by a Person I know to be reliable, trustworthy and credible...." This mere assertion, without more, is insufficient to establish the informant's credibility. *Eisenhauer v. State*, 678 S.W.2d 947, 953 (Tex.Crim.App.1984). Moreover, the affidavit contains no facts indicating that any part of the informant's tip was corroborated by independent police work. Therefore, we conclude that the affidavit contains insufficient facts to constitute a substantial basis for the magistrate's determination of probable cause.

In response to appellant's points of error, the State makes three arguments in support of an affirmance of appellant's conviction. We have reviewed two of the arguments and find them to be without merit. However, in its third argument, the State contends that even if the affidavit failed to establish probable cause for the issuance of the warrant, suppression of the evidence seized need not result. It argues that this court may apply the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The *Leon* good faith exception has been applied in Texas cases wherein the defendant has relied upon the federal and Texas constitutions in seeking suppression of evidence obtained upon the basis of an invalid search warrant. *See Moffett v. State*, 716 S.W.2d 558, 566–567 (Tex.App.–Dallas 1986, no

pet.). However, when the defendant relies on Tex.Code Crim.Proc.Ann. art. 38.23 (Vernon 1979) in seeking suppression of evidence obtained upon the basis of an invalid warrant, the *Leon* good faith exception has no applicability. *See Polk v. State*, 704 S.W.2d 929 (Tex.App.–Dallas 1986, pet. granted).

The State urges this court to reject the reasoning and holding of the Dallas Court of Appeals in *Polk*. It agrees that article 38.23 does render inadmissible any evidence obtained in violation of "the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States...." However, the State maintains that article 18.01(b) of the Texas Code of Criminal Procedure provides for a subjective evaluation of probable cause by a magistrate, to wit:

No search warrant shall issue for any purpose in this state *unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance*.... (emphasis added)

Because article 18.01(b) allows for a subjective determination of probable cause, the State argues that the legislature has incorporated a "good faith exception" into the Texas search warrant statute. Thus, it maintains that according to the law of Texas, if a magistrate is satisfied that an affidavit reflects sufficient probable cause the resulting warrant is not rendered invalid under article 18.01(b), regardless of whether a reviewing court subsequently finds the stated probable cause to be lacking.

*725 While we understand the State's argument, we find that it is incomplete. The latter half of article 18.01(b) provides:

A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed. (emphasis added)

See also Tex.Code Crim.Proc.Ann. art. 1.06 (Vernon 1977).

Here, we have determined the affidavit filed did not set forth sufficient facts establishing probable cause. Thus, the warrant was issued in violation of article 18.01(b) and article 1.06. Consequently, pursuant to article 38.23, the evidence seized under the invalid warrant must be suppressed. We agree with the reasoning of our sister court in *Polk*, wherein it held that a good faith exception does not exist under article 38.23.

In summary, we conclude that the evidence seized as result of the invalid search warrant, which was unsupported by probable cause, should have been suppressed. We sustain points of error one and two.

We reverse the trial court's judgment and remand this cause.

Eubanks v. State, 326 S.W.3d 231 (Tex.App.—Houston [1st Dist] 2010).

OPINION

A jury convicted appellant, Donald Ray Eubanks, of two counts of indecency with a child, two counts of sexual performance by a child, two counts of possession of child pornography, and two counts of aggravated sexual assault of a child.FN1 The jury assessed a total punishment of life in prison and $80,000 in fines. In seven issues, appellant argues that . . .the trial court abused its discretion in admitting photos seized from appellant's computer.

We affirm.

Legal and Factual Sufficiency

*246In his first four issues, appellant contests the legal and factual sufficiency of the evidence against him.

Motion to Suppress

In his seventh issue, appellant argues that the trial court erred in denying his motion to suppress and admitting evidence obtained from the computers taken from his home because the affidavit supporting the search warrant did not state probable cause to justify the seizure of the computers.

A. Facts Regarding Probable Cause Affidavit and Search Warrant

The search warrant was issued pursuant to an affidavit by Detective Grant asserting that he believed appellant "has possession of and is concealing at said suspected place ... pictures [and] photographs of the victims or other victims [including] all pictures of photos that depict a child younger than 18 years of age engaged in sexual conduct." Detective Grant also averred in his affidavit that property consisting of "all video and DVD recording material," "all computer hardware and software," and "all camera related equipment both digital [and] film" that could be used in depicting children younger than 18 years of age engaged in sexual conduct constituted evidence of the alleged offense. Detective Grant stated that he had probable cause for these beliefs because in the course of his interview with the complainants' mother Jamie, she advised that she spoke to her sister, Terry Moore who told her that she overheard her two daughters talking about someone touching them.... When she *247 questioned [the complainants'] about this both girls became very defensive and said that Grand-pa, meaning Donald Eubanks, said they would get in trouble if they told anyone what happened.

Detective Grant averred that he also interviewed Moore, who told him that the complainants told her that appellant touched them "in places he shouldn't." Detective Grant also related in the probable cause section of his affidavit disclosures made by the complainants during their interview with Kim Herd at the Child Advocacy Center in Galveston. Both girls told Herd that appellant would touch their "privates" and made them pose for pictures in which they were sometimes partially or totally nude. Detective Grant further averred that Bri.E. "said that she saw [appellant] put the pictures under his bed or in the closet in his bedroom."

Detective Grant averred that he "talked with League City evidence officer Thomas Garland and he advised that on a digital camera, even if the image has been deleted, if it was saved to the sim card or hard drive, then the deleted image would be recoverable." Detective Grant concluded his statement of probable cause by averring:

Your affiant believes that the foregoing facts establish probable cause that the offenses of sexual assault were committed on or before October 11th, 2006, in Galveston County, Texas; that pictures, video and DVD's, computers and related computer equipment and storage devices, cameras and video recording devices if found in the premises described above, constitute[ ] evidence of said offense; and that the evidence to be searched for is likely to be located in said premises.

The judge of the 56th District Court of Galveston County issued the search warrant, stating, "I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the issuance of this Warrant." The search warrant authorized officers to "search for the property described in said Affidavit, to-wit: Pictures, photos, videos and DVD's, rope or other binding material, all computer related equipment including storage devices, cameras and video recording devices."

B. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. McKissick v. State, 209 S.W.3d 205, 211 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd). We give almost total deference to the trial court's determination of historical facts that depend on credibility, while we review de novo the trial court's application of the law to those facts. Id. Thus, we review de novo the trial court's application of the law of search and seizure and probable cause. Id. However, our review of an affidavit in support of a search warrant is not de novo; rather, great deference is given to the magistrate's determination of probable cause. Id.

No search warrant may issue unless supported by an affidavit setting forth substantial facts establishing probable cause for its issuance. Tex.Code Crim. Proc. Ann. arts. 1.06, 18.01(b) (Vernon 2005 & Supp. 2009). The issuance of a search warrant for "items" requires that the peace officer first present to a magistrate a sworn affidavit setting forth sufficient facts to establish probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; and (3) the property or items constituting such evidence are

located at or on the particular person, place, or thing *248 to be searched. Tex.Code Crim. Proc. Ann. arts. 18.01(c), 18.02(10) (Vernon 2005).

"The test for determination of probable cause is whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing." McKissick, 209 S.W.3d at 211 (citing Illinois v. Gates, 462 U.S. 213, 236–37, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)). Probable cause exists when, under the totality of the circumstances, the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued. Id. A reviewing court may consider only the facts found within the four corners of the affidavit when evaluating a complaint that a search warrant affidavit does not establish probable cause. Id. at 212. Reasonable inferences may be drawn from the affidavit, and the affidavit must be interpreted in a common sense and realistic manner. Id.

C. Analysis

Here, appellant contends that the affidavit for the search warrant did not state probable cause to justify the seizure of the computers because the affidavit "afforded no basis for the magistrate to conclude that appellant even had a computer at home, much less that he took pornographic photos of the girls with a digital camera and transferred them onto a computer." Appellant points out that neither complainant "mentioned a computer or a digital camera" and that Bri.E. stated that she "saw him 'put the pictures under his bed or in the closet in his bedroom.' "

However, the affidavit (1) alleged that "the offenses of sexual assault were committed"; (2) specifically described "pictures, video and DVDs, computers and related computer equipment and storage devices, cameras and video recording devices" as property or items to be searched for or seized that constituted evidence of that offense or evidence that appellant committed that offense; and (3) stated that the property or items constituting such evidence are "likely to be located in said premises." See Tex.Code Crim. Proc. Ann. arts. 18.01(c), 18.02(10). The affidavit was supported by the complainants' allegations that appellant touched them inappropriately and that they posed for inappropriate photographs. Although neither complainant specifically mentioned the use of a digital camera or a computer, it was reasonable for the magistrate to infer from the information in the affidavit that the complainants were photographed and that a digital camera and computer could have been used in the process of taking inappropriate photographs of the girls and could probably be found on the premises to be searched. See McKissick, 209 S.W.3d at 211–12 (holding that reasonable inferences may be drawn from affidavit, and affidavit must be interpreted in common sense and realistic manner). Furthermore, all of the information in the affidavit indicated that all of the assaults and pictures of the girls engaged in sexual conduct were taken at appellant's residence and that Bri.E. saw appellant hide some of the pictures in his bedroom. Thus, it was likewise reasonable for the magistrate to conclude that any items like photographs, computer equipment, or cameras used in the commission of the offenses was located in appellant's home. See, e.g., State v. Barnett, 788 S.W.2d 572, 576 (Tex.Crim.App.1990) ("Once the probable cause has been established and the object of the search particularly described, the scope of the search 'generally extends to the entire area in which the object of the search may be found.' ") (quoting *249 United States v. Ross, 456 U.S. 798, 820, 102 S.Ct. 2157, 2170, 72 L.Ed.2d 572, —— (1982)).

Thus, considering the facts contained in the four corners of the affidavit and the reasonable inferences therefrom in the totality of the circumstances, we conclude that the magistrate had a "substantial basis for concluding that a search would uncover evidence of wrongdoing" and that the facts submitted to the magistrate were sufficient to justify a conclusion that the objects of the search were probably on the premises to be searched at the time the warrant is issued. See McKissick, 209 S.W.3d at 212.

We overrule appellant's seventh issue.

Conclusion
We affirm the judgment of the trial court.

Hankins v. State, 132 S.W.3d 380 (Tex.Crim.App. 2004).

*383 OPINION

Appellant was convicted in May 2002 of capital murder. Tex. Penal Code Ann. § 19.03(a). Pursuant to the jury's answers to the special issues set forth in

Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial judge sentenced appellant

to death. Art. 37.071 § 2(g).FN1 Direct appeal to this Court is automatic. Art. 37.071 § 2(h). Appellant raises five points of error with numerous subpoints. We affirm.

. . . . . .

*388 In point of error five, appellant claims that the trial court erred in failing to find the facts alleged in his arrest warrant affidavit insufficient to support a finding of probable cause. He also complains that trial testimony revealed that one of the facts alleged in the affidavit was incorrect. He argues that the taint on the evidence from the illegal arrest was not attenuated, thus making the evidence inadmissible. The only evidence appellant points to in connection with this complaint is his first written statement. FN5

FN5. In this point of error, appellant complains of the trial court's failure to suppress the arrest warrant, but at the close of his argument, appellant maintains that the taint from the illegal arrest calls for suppression of the evidence obtained as a result thereof. We assume appellant's complaint is directed at the failure to suppress evidence, not the arrest warrant itself.

In assessing the sufficiency of an affidavit for an arrest or a search warrant, the reviewing court is limited to the four corners of the affidavit. Jones v. State, 833 S.W.2d 118, 123 (Tex.Crim.App.1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 678 (1993). The reviewing court should interpret the affidavit in a common sense and realistic manner, recognizing that the magistrate was permitted to draw reasonable inferences. Id. at 124.

The facts that can be derived from the four corners of appellant's arrest warrant affidavit are: (1) three dead bodies were discovered in a mobile home; (2) the victims were appellant's wife and her two children; (3) appellant had recently been released from jail and was living with the victims in the mobile home where the bodies were found; (4) appellant's wife's car was missing from the scene; (5) the victims were killed with a gun and appellant was in possession of a gun; (6) an unsigned note stating "I am guilty of murder, incest, hatred, fraud, theft, jealously [sic], and envy" was found inside the mobile home on an envelope addressed to appellant; FN6 (7) appellant had previously assaulted another woman; (8) appellant's wife's car was parked outside of his girlfriend's apartment; (9) at 2 a.m., appellant asked his girlfriend to check to see if there was anything unusual outside of her apartment; and (10) when approached by officers outside of her apartment, appellant's girlfriend told the officers that appellant was inside her apartment, that he was armed with a pistol and had access to a *389 rifle and another pistol, that he had been staying with her for several days, and that he had been driving his wife's car.

FN6. The allegedly incorrect allegation concerned the envelope. At trial, two police officers testified that the envelope referred to in the affidavit did not in fact display an address. Rather, there was a window on the front of the envelope where the address was supposed to show through. Found next to the envelope at the crime scene was a bank notice of insufficient funds addressed to appellant. The handwritten note was written mostly on the back of the insufficient funds notice, with one line of the note written on the back of the envelope. The discrepancy between the evidence and the description in the affidavit was explained as a miscommunication over the phone between the officers at the scene and the officer who prepared the affidavit. We need not address the issue of incorrect facts since the affidavit is insufficient nonetheless.

While these facts together might create suspicion, we agree with appellant that they do not add up to probable cause that appellant committed the murders. There were no facts that would lead a neutral and detached magistrate to conclude that appellant was the perpetrator and not merely living with his wife and driving her car. There is nothing

to show that the note was written by appellant. Even if the envelope on which the note was written was, as alleged, addressed to appellant, it was found at the crime scene where appellant was living. The note could have been written by anyone who picked up the envelope while inside the residence. None of the facts as alleged specifically tie appellant to the commission of the offense. Compare Earhart v. State, 823 S.W.2d 607, 631 (Tex.Crim.App.1991)(holding that arrest warrant affidavit was sufficient to establish probable cause where it alleged that the child victim had disappeared, that defendant encountered the victim about a week before her disappearance at which time defendant "paid a lot of attention" to her, that defendant was seen by several people in the victim's neighborhood on the day she disappeared, that defendant specifically asked a neighbor when the victim's family was expected home on the date of her disappearance, that a car matching the description of defendant's car was seen at the victim's home, that the victim was seen talking to the car's occupant on the afternoon of her disappearance, and that defendant left town within two days of the victim's disappearance), vacated on other grounds, 509 U.S. 917, 113 S.Ct. 3026, 125 L.Ed.2d 715 (1993); Gibbs v. State, 819 S.W.2d 821, 830–31 (Tex.Crim.App.1991)(concluding that the arrest warrant affidavit established probable cause where it alleged facts demonstrating that defendant was in proximity of the location of the crime when the crime was committed, that defendant wore boots early in the evening on the night of the offense, but left for a while and was not wearing the boots when he returned, that these same boots were stained with human blood when they were recovered from defendant's apartment at the complex where the crime was committed, that defendant concocted a series of lies to divert the attention of police away from himself and the commission of the crime, and that property stolen from the victim was recovered from defendant's possession), cert. denied, 502 U.S. 1107, 112 S.Ct. 1205, 117 L.Ed.2d 444 (1992).

When the affidavit supporting an arrest warrant is insufficient, the question is then whether the resulting taint on the evidence was attenuated, such that the evidence was admissible notwithstanding the illegal arrest. Id. In assessing whether the taint on the evidence is sufficiently attenuated, the United States Supreme Court has identified the following factors for consideration:

(1) whether Miranda warnings were given;
(2) the temporal proximity of the arrest and the confession;
(3) the presence of intervening circumstances; and
(4) the purpose and flagrancy of the official misconduct.

Id. (citing Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The only evidence discussed by appellant in analyzing this issue is his first written statement.FN7

FN7. Complaint as to any other evidence is waived. Tex.R.App. P. 33.1.

*390 Appellant was informed of his rights by the judge during his arraignment at 4:05 p.m. on August 30, 2001. At 4:25 p.m., appellant agreed to talk with Detectives Ralph Standefer and Barry Moore. Standefer read appellant his Miranda rights at the outset of the interview. Appellant sat next to Standefer and read the warning sheet along with him, initialing each right stated therein. About an hour into the interview, appellant agreed to give a written statement. Before appellant signed the transcribed statement, Moore read appellant his Miranda rights from the statement form. Thus, the first factor weighs in the State's favor. As to proximity, appellant was arrested and taken into custody around 7:00 a.m. on August 30, 2001. He was initially taken to the Arlington police station, but was later transported to the Mansfield jail for arraignment. He was arraigned at 4:05 p.m. and his interview began immediately thereafter, at around 4:30 p.m. He began dictating his statement at 5:40 p.m. Nine and a half hours from the time of appellant's arrest until his interview is not so long that it becomes a particularly weighty factor for the State, but it is not so little that it favors appellant. Compare Bell v. State, 724 S.W.2d 780, 788–91 (Tex.Crim.App.1986)(concluding that one and a half to three hours before the first confession favored defendant but the passage of a day before the second confession favored the State), cert. denied, 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987). Thus, this factor does not weigh in favor of either party. The most important intervening circumstance in this case is appellant's arraignment before Judge Bill Lane at 4:05 p.m. Judge Lane gave appellant a written warning sheet, which appellant signed. The Judge also informed appellant of the charge against him, and read him

his constitutional rights. Appellant asked Judge Lane about the process for obtaining an attorney because he was worried that he would not be able to afford one. Judge Lane explained the process for the appointment of an attorney, and then asked appellant if he would like an attorney. Appellant declined. Finally, there is no suggestion or evidence of official misconduct. Given the various readings of appellant's rights, his arraignment, and the absence of any official misconduct, this factor weighs in the State's favor. Jones, 833 S.W.2d at 125 (stating that, coupled with Miranda warnings and the absence of official misconduct, taking defendant before a neutral magistrate was an intervening circumstance sufficient to attenuate taint). Accordingly, the four factors viewed together weigh most heavily in the State's favor such that appellant's first written statement was not tainted by his illegal arrest. Point of error five is overruled.

The judgment of the trial court is affirmed.

Kennedy v. State, 338 S.W.3d 84 (Tex.App.–Austin 2011).

Background: Defendant, pled guilty and was convicted in the District Court, Comal County, Gary L. Steel, J., of aggravated assault of a police officer. Defendant appealed denial of motion to suppress.

Holdings: The Court of Appeals, David Puryear, J., held that:
(1) affidavit to support issuance of warrant did not provide a substantial basis for determining whether there was probable cause to believe that there were illegal weapons on defendant's property;
(2) affidavit did not provide a substantial basis from which it could be inferred that there was probable cause to believe that there were items on defendant's property that were relevant to the shooting with which he was charged; and
(3) trial court's improper denial of motion to suppress evidence was reversible error.

Reversed and remanded.

OPINION

Michael Patrick Kennedy pleaded guilty to the crime of aggravated assault of a police officer. See Tex. Penal Code Ann. §§ 22.01(a) (defining assault), 22.01(b)(1) (providing that assault is third degree felony if it is committed against public servant engaged in his official duties), 22.02(a) (defining aggravated assault in relation to definition of assault found in section 22.01), 22.02(b)(2)(B) (West Supp.2010) (specifying that aggravated assault is first-degree felony if committed against public servant performing his official duties). After Kennedy was arrested, the police obtained a warrant to search Kennedy's residence and seized various items from his property. Prior to trial, Kennedy filed a motion to suppress the evidence that was seized under the warrant. The district court denied the motion, and Kennedy pleaded guilty. In his first three issues on appeal, Kennedy argued that the district court erred by denying his motion because there was no probable cause to issue the warrant. In his final issue, he alleged that the district court erred in admitting some of the evidence obtained from his home because the evidence was outside the scope of the warrant. When this case was initially presented for review before this Court, we determined that Kennedy waived the four issues discussed above. Kennedy v. State, 262 S.W.3d 454, 460 (Tex.App.-Austin 2008) (“ Kennedy I ”). Kennedy appealed the judgment of this Court. On appeal, the court of criminal appeals concluded that this Court erred by holding that Kennedy waived his appellate issues and remanded the case for consideration of those issues. Kennedy v. State, 297 S.W.3d 338, 342 (Tex.Crim.App.2009) (“ Kennedy II ”).FN1 On remand, we will reverse the judgment of the district court.

BACKGROUND
Late one night in March 2005, Officer Richard Kunz observed Kennedy speeding on I–35 and initiated a traffic stop. After Kennedy pulled his vehicle over to the side of the road and stopped his

car, Kunz approached Kennedy's car. Although the identity of the person who initiated the shooting is disputed, it is undisputed that shortly after Kunz reached Kennedy's car, multiple shots were fired by both Kennedy and Kunz. During the exchange, Kennedy was shot three times, but Kunz was not injured.

In response to a call by Kunz, several police officers arrived on the scene, and Kennedy was arrested and taken into custody. After being arrested, Kennedy was charged with attempted capital murder and deadly conduct. See Tex. Penal Code Ann. §§ 15.01 (West 2003) (explaining criminal attempt), 19.02 (defining murder), 22.05 (West 2003) (defining crime of deadly conduct), § 19.03(a)(1) (West Supp.2010) (providing that person commits capital murder if he "murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman").

Several days after Kennedy was arrested, the police prepared an affidavit for the purpose of obtaining a warrant to search Kennedy's home. See Tex.Code Crim. Proc. Ann. art. 18.01(b) (West Supp.2010) (requiring that sworn affidavit be filed when search warrant is requested); see also id. art. 18.01(a) (West Supp.2010) (defining search warrant as "a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate").

Shortly after the affidavit was filed, a search warrant was issued, and law-enforcement officers executed the warrant and seized various items from Kennedy's residence, including weapons and ammunition. Subsequent to the seizure, Kennedy filed a motion to suppress the seized items. In particular, Kennedy contended that the items should be suppressed because there was no probable cause to support the warrant, the information in the affidavit supporting the warrant was stale, the police did not properly establish the reliability and credibility of one of the sources of information mentioned in the affidavit, and the police seized items that were outside the scope of the warrant.

In early January 2006, a suppression hearing was held. After hearing testimony, the district court concluded that two types of items seized were beyond the scope of the warrant but admitted the remaining items and denied the motion to suppress.FN2 Further, the court found that the warrant was supported by probable cause, that "[t]here was reliability in the affidavit," and that the information in the affidavit was not stale.

Prior to the suppression hearing, Kennedy negotiated a plea agreement with the State in which he agreed to plead guilty to the crime of aggravated assault of a police officer in the event that the district court denied the motion to suppress. Under the agreement, Kennedy agreed to leave the terms of the punishment "open." In other words, the plea agreement did not recommend a specific punishment, and the court was free to impose any punishment allowable for the crime of aggravated assault of a police officer. As part of the agreement, the State agreed to dismiss the charges of attempted capital murder and deadly conduct. In addition, Kennedy retained the right to appeal the district court's ruling on his motion to suppress if it ruled against him.

Immediately after the court denied his motion to suppress, Kennedy pleaded guilty. Approximately two months later, in March 2006, a hearing was held to determine Kennedy's punishment. After hearing testimony from various witnesses, the district court sentenced Kennedy to a prison term of 75 years.

Kennedy appealed the judgment against him. In his first three issues, Kennedy alleged that the district court erred by denying his motion to suppress because the search warrant was not supported by probable cause. In his fourth issue, he alleged that the district court erred in admitting some of the evidence obtained from his home because the evidence was outside the scope of the warrant. On appeal, we initially determined that Kennedy waived these four issues. In reaching that conclusion, we relied on the rule established in Young v. State, 8 S.W.3d 656 (Tex.Crim.App.2000), which provides as follows:

Whether entered with or without an agreed recommendation of punishment by the State, a valid plea of guilty or nolo contendere "waives" or forfeits the right to appeal a claim of error only when the judgment of guilt was rendered independent of, and is not supported by, the error.

Kennedy I, 262 S.W.3d at 458 (quoting Young, 8

S.W.3d at 666–67). In light of that rule, we concluded that Kennedy waived those four issues because "Kennedy's adjudication of guilt was independent of and not supported by the district court's decision to deny his motion to suppress the evidence seized from his property" and because "the judgment would have been supported without the disputed evidence." Id. at 459–60.

After our opinion issued, Kennedy appealed our determination that he waived his four appellate issues. The State surprisingly agreed with Kennedy, and both parties asked the court of criminal appeals to remand the case so that this Court may address the issues originally raised by Kennedy. See Kennedy II, 297 S.W.3d at 340. When addressing the issue of waiver, the court of criminal appeals noted that this case is "a charge-bargain case." Id. In other words, the State and Kennedy entered into an agreement in which Kennedy agreed to "plead guilty to aggravated assault on a peace officer with a deadly weapon in exchange for a dismissal of the attempted capital murder and deadly conduct charges." Id. at 342. The court also noted that although Kennedy agreed to allow the district court to determine the sentence regarding the offense pleaded to, the agreement "effectively capped" Kennedy's punishment range because he was now only subject to a "single punishment for a first degree felony offense." Id.; see also Shankle v. State, 119 S.W.3d 808, 813 (Tex.Crim.App.2003) (explaining that agreement to dismiss charge "effectively puts a cap on punishment at the maximum sentence for the charge that is not dismissed"). Because the agreement at issue reduced the potential punishment that may be imposed on Kennedy, the court concluded that the case was governed by rule of appellate procedure 25.2(a)(2), which allows a defendant in a plea-bargain case to appeal "those matters that were raised by written motion filed and ruled on before trial, or" matters that the defendant obtained permission to appeal. Kennedy II, 297 S.W.3d at 342; see Tex.R.App. P. 25.2(a)(2); see also Tex.Code Crim. Proc. Ann. art. 44.02 (West 2006) (providing same rights as under rule 25.2). In other words, even though the waiver rule identified in Young by its terms applies to open pleas as well as traditional plea-bargain cases in which the State and the defendant agree to a punishment that is less than the maximum allowed in exchange for the defendant pleading guilty to the crime alleged, the court of criminal appeals seemingly determined that the waiver rule has no applicability to charge-bargain cases that effectively cap potential punishments through the dismissal of one or more charges. Accordingly, the court of criminal appeals remanded the case in order to allow this Court to address the issues that we previously determined that Kennedy had waived.

DISCUSSION

As mentioned above, Kennedy raises four issues on appeal. In his first three issues, Kennedy essentially asserts that the search warrant was not supported by probable cause and that the district court should therefore have granted his motion to suppress the evidence seized from his home. In his first issue, he generally asserts that information in the affidavit did not establish probable cause to search his home. In his second issue, Kennedy contends that the affidavit does not establish probable cause because it relies on material misstatements and omissions. In his third issue, Kennedy contends that the affidavit cannot establish probable cause because relevant portions of the affidavit were based on information that was stale at the time the warrant was issued. In his fourth issue, Kennedy argues that even if there was probable cause to issue the warrant, the district court erroneously admitted evidence that was seized during the search but was beyond the scope of the search warrant. As a corollary to these arguments, Kennedy asserts that if this Court rules in his favor on any of his four issues, we should reverse the district court's judgment and remand the case for a new trial rather than reverse for a new punishment determination.

Because the first and third issues contend that the warrant was not supported by probable cause, we will consider them together. The resolution of these issues is dispositive of the outcome of this appeal, and accordingly, we will not address Kennedy's second or fourth issue. However, before addressing any of the issues, we provide a general overview of the requirements for establishing probable cause and the manner in which courts review probable-cause determinations.

Probable Cause

Both the Federal and the Texas Constitutions dictate that no search warrants may be issued without probable cause. See U.S. Const. amend. IV; Tex. Const. art. I, § 9; FN3 see also Tex.Code Crim. Proc. Ann. art. 18.01(b) (providing that "[n]o search

warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance"). When determining whether probable cause exists to issue a search warrant, courts should be mindful of the proposition that there is a "strong preference for searches conducted pursuant to a warrant" over searches conducted without a warrant. Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); see United States v. Ventresca, 380 U.S. 102, 106–07, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (noting that fact that there are so few exceptions to warrant requirement "underscores the preference accorded police action taken under a warrant as against searches and seizures without one"). Because of the preference to be given search warrants, a search incident to a warrant may be upheld in doubtful or marginal cases in which a search without a warrant would be unsustainable. Ventresca, 380 U.S. at 106, 85 S.Ct. 741; see Massachusetts v. Upton, 466 U.S. 727, 734, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (recognizing that it may not be easy to determine if probable cause is present in particular case but emphasizing that resolution of inquiry should be made in light of preference given to warrants). The preference for warrants is based on the idea that it is more desirable to have a neutral magistrate review the evidence rather than to allow officers " 'engaged in the often competitive enterprise of ferreting out crime' " to make the determination. Gates, 462 U.S. at 240, 103 S.Ct. 2317 (quoting Johnson v. United States, 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)); see Aguilar v. Texas, 378 U.S. 108, 110–11, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (providing that informed and deliberate determinations by magistrates are preferred over hurried actions of police officers).

When determining whether probable cause exists, courts should consider the totality of the circumstances. Gates, 462 U.S. at 238, 103 S.Ct. 2317; see Upton, 466 U.S. at 728, 104 S.Ct. 2085 (explaining that magistrates should not employ fixed and rigid formulas when determining if probable cause is present). In making this determination, magistrates should only rely on the facts "found within the four corners of the affidavit" accompanying the request for a warrant, State v. Bradley, 966 S.W.2d 871, 873 (Tex.App.-Austin 1998, no pet.); see also Tex.Code Crim. Proc. Ann. art. 18.01(b) (requiring applicants for search warrant to file "sworn affidavit setting forth substantial facts establishing probable cause"), and should review the affidavit in a common sense, rather than a hypertechnical, manner, Rodriguez v. State, 232 S.W.3d 55, 59 (Tex.Crim.App.2007); see Ventresca, 380 U.S. at 108–09, 85 S.Ct. 741. But see Cates v. State, 120 S.W.3d 352, 355 n. 3 (Tex.Crim.App.2003) (explaining that reviewing courts are not limited to examination of four corners of affidavit if there are allegations that affidavit contains "known falsehoods"). As part of their probable-cause assessment, magistrates are permitted to make reasonable inferences from the information in the affidavit. Rodriguez, 232 S.W.3d at 61. Ultimately, the magistrate must determine whether "given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S.Ct. 2317; see United States v. Grubbs, 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006); Rodriguez, 232 S.W.3d at 60; see also Davis v. State, 202 S.W.3d 149, 154 (Tex.Crim.App.2006) (explaining that probable cause exists when facts justify conclusion that object of search is probably on property to be searched " at the time the warrant is issued ") (emphasis added).

To be proper, the accompanying affidavit must provide enough information to allow a magistrate to determine if probable cause exists and to ensure that the magistrate's determination is not "a mere ratification of the bare conclusions of others." Gates, 462 U.S. at 239, 103 S.Ct. 2317; see Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (explaining that affidavit "must set forth particular facts and circumstances underlying the existence of probable cause" that allow "magistrate to make an independent evaluation of the matter"); Mayfield v. State, 800 S.W.2d 932, 934 (Tex.App.-San Antonio 1990) (explaining that affidavit must contain "sufficient information" to support probable-cause finding). Stated differently, an affidavit will not justify the issuance of a search warrant if it simply contains conclusory statements that provide no basis for determining if probable cause actually exists, see Rodriguez, 232 S.W.3d at 61; Ashcraft v. State, 934 S.W.2d 727, 733 (Tex.App.-Corpus Christi 1996, pet. ref'd), and an affidavit will only be effective if it contains allegations that amount to something

greater than the affiant's suspicion or the "repetition of another person's mere suspicion," Adair v. State, 482 S.W.2d 247, 249 (Tex.Crim.App.1972). Importantly, there must be a nexus between the items sought to be seized and the alleged criminal behavior. See Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). That nexus is automatically established when the items sought are contraband or the fruits obtained from or the instruments used in the criminal activity at issue, but the nexus is not automatic when the items sought are "mere evidence." Id.; see also Joseph v. State, 807 S.W.2d 303, 307 (Tex.Crim.App.1991) (describing "mere evidence" as evidence that is "connected with a crime" but is not "fruits, instrumentalities, or contraband"). For mere evidence, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." Hayden, 387 U.S. at 307, 87 S.Ct. 1642.

In addition to the above requirements, to establish probable cause, the information contained in a warrant's accompanying affidavit must not be stale. McKissick v. State, 209 S.W.3d 205, 214 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd). In other words, the facts contained in the affidavit must have occurred recently enough to allow the magistrate to conclude that probable cause exists at the time that the warrant is requested and ultimately issued. Guerra v. State, 860 S.W.2d 609, 611–12 (Tex.App.-Corpus Christi 1993, pet. ref'd); see also McKissick, 209 S.W.3d at 214 (explaining that when determining whether information in affidavit is stale, courts should examine "the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued"). If so much time has passed that it is unreasonable to presume that the sought items are still located at the suspected place, the information in an affidavit is stale. See McKissick, 209 S.W.3d at 214; Guerra, 860 S.W.2d at 611. Although the passage of time should be considered when determining if the information in an affidavit is stale, the amount of time passed is less significant if the affidavit contains facts showing "activity of a protracted and continuous nature, i.e., a course of conduct." McKissick, 209 S.W.3d at 214. In addition, a determination regarding whether the information in an affidavit is stale should also involve consideration of the type of property to be seized and the probability that the property may have been relocated. See Bradley, 966 S.W.2d at 875.

When reviewing a magistrate's probable-cause determination, the reviewing court employs a "highly deferential standard," Rodriguez, 232 S.W.3d at 61, and should uphold a determination of probable cause provided that the magistrate had a "substantial basis" from which he could conclude that a "search would uncover evidence of wrongdoing," Gates, 462 U.S. at 236, 103 S.Ct. 2317; see Upton, 466 U.S. at 728, 104 S.Ct. 2085. However, the deference afforded a magistrate's determination "is not boundless," and a reviewing court "will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' " United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (stating that courts must insist that magistrates perform job in neutral and detached manner and not be rubber stamp for police) (quoting Gates, 462 U.S. at 239, 103 S.Ct. 2317); Davis, 202 S.W.3d at 157 (explaining that affidavit does not provide substantial basis when "too many inferences must be drawn"). Reviewing courts do not consider whether there are "other facts that could have, or even should have, been included in the affidavit"; instead, "we focus on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit." Rodriguez, 232 S.W.3d at 62. We review a trial court's ruling on a motion to suppress under an abuse-of-discretion standard. State v. Dixon, 206 S.W.3d 587, 590 (Tex.Crim.App.2006). Under that standard, we "give almost total deference to a trial court's express or implied determination of historical facts and review de novo the court's application of the law of search and seizure to those facts." Id.

The Affidavit Does Not Provide a Substantial Basis for a Probable–Cause Determination

As described previously, in his first and third issues, Kennedy contends that the affidavit did not establish probable cause to search his home. The affidavit was prepared by Dewayne Goll, a Texas Ranger. It recounted the events surrounding the shooting incident and the items found after searching Kennedy and his vehicle. In particular, the affidavit specified that the police recovered the following from the scene of the shooting:

A Smith and Wesson 9mm caliber, semi automatic handgun, with one spent magazine and three additional full magazines, a Colt "ponylite" 380 caliber semi automatic pistol with four additional magazines, an AK–47 Assault with one 30 round spent magazine with one 30 round magazine "taped opposite" the inserted magazine and an additional four magazines.

The affidavit alleged that Kennedy had committed attempted capital murder on the night of the shooting. See Tex. Penal Code Ann. §§ 15.01, 19.03. Furthermore, the affidavit also alleged that Kennedy was in possession of prohibited weapons and that he was keeping them at his house. See id. § 46.05(a) (West Supp.2010) (providing list of statutorily prohibited weapons). Accordingly, the affidavit sought permission to search for evidence of these two crimes at Kennedy's home and surrounding property, including an in-ground structure in the back of Kennedy's property, which the affidavit referred to as a "bunker." FN4 In particular, the affidavit sought permission to search for the following property:

Ammunition and reloader equipment of the same type and lot number utilized by KENNEDY in the Criminal Attempt to Commit Capital Murder on 03–03–2005 of Officer Richard Kunz, assault type weapons (AK–47), and semi automatic firearms, explosive devices and improvised explosive devices (IED's).

In addition, the affidavit contained several paragraphs detailing the basis for Goll's assertion that probable cause existed to search Kennedy's home. First, the affidavit recounted information that was given to the police by an acquaintance of Kennedy, Mike Hernandez, and by Kennedy's neighbor, Andy Poznecki. The affidavit stated that Hernandez informed the police that Kennedy had previously asked him to perform some construction work on the in-ground structure.FN5 Further, the affidavit related that when Hernandez went to Kennedy's property, approximately four months before the shooting incident, Hernandez personally observed weapons and ammunition inside the structure and that Kennedy told Hernandez that there were AK–47 rifles inside the structure. In particular, the affidavit provided, in relevant part, as follows:

The San Antonio Bureau of Alcohol, Tobacco, and Firearms advised that they were aware from a confidential informant identified as Mike Hernandez (d.o.b.11–20–1974) which provided that KENNEDY has a "bunker" on his property used to store additional weapons, ammunition, an ammunition reloader, generator, lights and "army style wooden lockers". Detective Michael "Mike" Weddel obtained a written statement from Hernandez and received the following information. Mike Hernandez is in a position to have knowledge of the property described above because he built a door on the bunker depicted.... Hernandez also personally observed in the "bunker" located on KENNEDY'S property "army style" boxes that KENNEDY advised Hernandez contained AK–47 rifles (your Affiant is aware that an AK–47 rifle was used by KENNEDY in the Criminal Attempt to Committ Capital Murder of Officer Kunz). Hernandez personally observed several "assault rifles", a generator, lights, and an ammunition loader also inside the "bunker."

Regarding Poznecki, the affidavit specified that he spoke with police officers a few days after the shooting and informed them that he saw a "booby trap" on a gun safe on Kennedy's property two years before the incident. In particular, the affidavit stated that "On 03–07–2005, a neighbor of KENNEDY identified as Andy [Poznecki] spoke with BATF Agent Alan Darilek and learned that [Poznecki] personally observed a 'shotgun shell booby trap' on a gun safe within the described residence approximately two (2) years ago." Further, the affidavit quoted Poznecki as warning the officers he spoke with to "be careful if they enter the KENNEDY property as he probably has more sophisticated explosives devices at this time."

Second, the affidavit described an interaction that Kennedy had with a police officer earlier on the day of the shooting in which he asked the officer to return a handgun that the police had previously taken from Kennedy. Specifically, the affidavit provided as follows:

On 03–04–2005, your affiant spoke with New Braunfels Police Department Lieutenant Mike Rust and learned that one of his subordinates Detective Scott Rankin spoke with KENNEDY on 03–03–2005 in reference to "getting his gun back". On 03–07–2005, your affiant spoke with Detective Rankin and learned that KENNEDY spoke with Rankin on

the morning of 03–03–2005 (the morning that KENNEDY attempted to kill Officer Krunz) and KENNEDY advised Rankin that he wanted to pick up his handgun previously seized by the New Braunfels Police Department.

The affidavit does not state why the gun had been seized and does not specify whether the police officer agreed to return the gun.
Third, the affidavit detailed inferences drawn by Goll and other law-enforcement personnel explaining why, in light of their training and experience and in light of the facts recounted above, they believed that there was sufficient cause to issue a warrant.

Finally, based on all the information provided, the affidavit specified that executing the search warrant would further the investigation of the shooting incident and would allow the police to search for evidence that Kennedy was in possession of illegal weapons at his home.

With the preceding in mind, we must now determine whether the affidavit provided an adequate basis to find probable cause to believe that there were statutorily prohibited weapons on Kennedy's property or to believe that the items sought were relevant to the charged offense of attempted capital murder.

Prohibited Weapons
For the reasons that follow, we believe that the affidavit did not provide a substantial basis for determining whether there was probable cause to believe that there were illegal weapons on Kennedy's property. See Tex.Code Crim. Proc. Ann. art. 18.02(4) (West 2005) (listing "weapons prohibited by the Penal Code" as one type of property that search warrant may be issued for). First, although the affidavit described the weapons and ammunition that were recovered from Kennedy's car on the night of the shooting, nothing in the affidavit indicated that any of the weapons were legally prohibited. In other words, nothing in the affidavit suggested that Kennedy's possession of the recovered items was, on its own, illegal.FN6 Similarly, although the affidavit mentioned that Kennedy had asked the New Braunfels police department to return a handgun that had been taken from him, the affidavit did not explain why the handgun was taken or allege that it was seized because it was a legally prohibited weapon. Consequently, these portions of the affidavit provided no basis to conclude that there was a fair probability that prohibited weapons would be found on Kennedy's property.

Second, although the affidavit specified that Hernandez observed weapons, ammunition, and other related items within the in-ground structure located on Kennedy's property and that Kennedy told Hernandez that there were additional weapons inside storage containers in the structure, nothing in the affidavit indicated that any of the items that Hernandez observed or that were described to him by Kennedy were illegal to own, nor did the affidavit demonstrate that Hernandez believed that any of the various items were illegal. In fact, the terms used to refer to the weapons observed and described—assault rifle and AK–47 FN7—can be used to refer to weapons that are completely legal to own.FN8

Third, the only information in the affidavit that might have led to an inference that there were illegal weapons at Kennedy's residence came from Poznecki, who stated that he had seen a "shotgun shell booby trap" on a gun safe somewhere on Kennedy's property and who warned the police to be careful when entering Kennedy's property because "he probably has more sophisticated explosives devices at this time." (Emphasis added.) The affidavit did not provide any basis from which it could be inferred that Poznecki had knowledge of or would be able to identify potentially explosive devices, nor did the affidavit contain any information indicating that Poznecki would have any reason to believe that explosive devices had been added to the property in the two years since his observation of the "booby trap." For these reasons, Poznecki's warning that the police should be careful when entering the property was simply that and was therefore, at most, a mere suspicion, which, without more, cannot help establish probable cause. Moreover, the affidavit did not provide any explanation of what the shotgun shell booby trap was, nor did it describe whether the booby trap was composed of items that were illegal to possess, of legal items that had been arranged in a manner that made the possession of the items illegal, or of legal items that were utilized in a legal manner. Consequently, the affidavit did not provide an adequate basis for inferring that the booby trap was, in fact, an illegal weapon.

Even if it were possible to glean that the "shotgun shell booby trap" was somehow illegal, the information provided by Poznecki still could not have served as a basis for concluding that probable cause existed to search Kennedy's property for illegal weapons because the information was stale. See United States v. Johnson, 461 F.2d 285, 287 (10th Cir.1972) (noting that when affidavit merely recites single violation, it is reasonable to surmise that probable cause vanishes "rather quickly with the passage of time"). The information obtained from Poznecki related to observations that he had made two years before the search warrant was issued. This is a significant span of time, and courts have generally overruled staleness challenges only when the amount of time passed was significantly less than two years. Compare Uresti v. State, 98 S.W.3d 321, 336 (Tex.App.-Houston [1st Dist.] 2003, no pet.) (concluding that information in affidavit relating to telephone calls received and made during time interval beginning two months before warrant issued and ending day before warrant issued was not stale), and Hafford v. State, 989 S.W.2d 439, 440–41 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd) (holding that information regarding drug transactions obtained six days before warrant issued was not stale), with Rowell v. State, 14 S.W.3d 806, 809–10 (Tex.App.-Houston [1st Dist.] 2000) (concluding that information that Rowell had sold firearms to pawn shop and then reclaimed them on two occasions, most recently six months before issuance of search warrant, was stale and insufficient to support probable cause to search Rowell's house for firearms), aff'd, 66 S.W.3d 279 (Tex.Crim.App.2001).

Moreover, although courts have upheld search warrants based on observations that were made several months before the warrants issued, those cases tend to involve situations in which the affidavit alleged criminal behavior that was continuous in nature, rendering the passage of time less important. See, e.g., United States v. Hershenow, 680 F.2d 847, 854 (1st Cir.1982) (holding that former employees' observations from several months earlier were not stale because affidavit alleged fraud scheme that was continuous in nature); Morris v. State, 62 S.W.3d 817, 823–24 (Tex.App.-Waco 2001, no pet.) (concluding that although it had been over one month since someone had seen Morris in possession of child pornography, information was not stale because affidavit also included facts showing that Morris had been in possession of child pornography over extended period of time). Nothing in the affidavit indicated that Kennedy was involved in a continuous activity of possessing illegal weapons. Although the affidavit listed several sources from which one could conclude that Kennedy had continually possessed weapons in recent history, the only source from which one might conclude that Kennedy ever possessed an illegal weapon was Poznecki's vague description of something that might not have even been illegal to own. For this reason, the significant passage of time from Poznecki's observations to the date of the warrant was not obviated by facts demonstrating a protracted and continuous behavior.FN9

Furthermore, as described previously, staleness determinations also involve consideration of the type of property to be seized and of the probability that the property may have been relocated. Bradley, 966 S.W.2d at 875. Consideration of these additional factors does not overcome the previously described deficiencies regarding the information in the affidavit. Although illegal weapons are not fungible in the same way that drugs are and may be retained for long periods of time, a single observation of a possibly illegal firearm two years prior to the warrant being issued would not establish a high probability that illegal firearms were on the property at the time of the warrant's issuance. Moreover, the description of the possibly illegal firearm did not provide any manner for ascertaining whether that object was likely to still be on the property. Specifically, the description of the object as simply a "shotgun shell booby trap" did not provide a basis to infer whether the booby trap was easily moveable or more permanently affixed to Kennedy's property.

Finally, the statements credited to Goll and other law-enforcement officials that were included in the affidavit to bolster the assertion that probable cause existed to search Kennedy's property were too conclusory to establish a basis for finding probable cause. As discussed previously, the affidavit included statements claiming that Goll and other law-enforcement personnel believed that Kennedy was "likely" in possession of statutorily prohibited weapons. In particular, the affidavit provided, in relevant part, as follows:

Your affiant from his training and experience and conferring with ATF Agent Alan Darilek is aware

that persons that carry and utilize numerous weapons as well as extra ammunition magazines are likely to collect and store numerous other weapons, ammunition and magazines both legal and illegal.

....

It is your affiant's belief that persons that utilize weapons and ammunition that Michael KENNEDY possessed and utilized in the [shooting], are likely to utilize improvised explosive devices (IED's), "booby traps" and similar tactics.

These statements were too conclusory to properly serve as support for a probable cause-determination. See State v. Davila, 169 S.W.3d 735, 739–40 (Tex.App.-Austin 2005, no pet.) (concluding that statement that officer had "knowledge that narcotic transactions occur frequently" at particular residence was conclusory and vague and could not provide magistrate with basis for making determination regarding probable cause). They did not provide enough information to allow the reviewing magistrate to make an independent evaluation and provided no basis for the officers' beliefs. On the contrary, the statements provided nothing more than a summary of Goll's and others' bare and unsubstantiated beliefs and suspicions that people who "possess and utilize" some legal weapons were more likely to possess and use illegal weapons. See Rodriguez, 232 S.W.3d at 61; see also Trimmer v. State, 135 Tex.Crim. 372, 120 S.W.2d 265, 266 (1938) (concluding that affidavit was insufficient because it was based on information and belief and contained no facts constituting probable cause); Ashcraft, 934 S.W.2d at 733 (explaining that statements in affidavit that "the three appeared to be in the process of making a drug deal as is common practice with drug dealers and users" and that "the couple left after an apparent exchange" were too conclusory by themselves to establish probable cause).

In addition, we note our strong concern regarding the use of these types of statements as support in a search-warrant affidavit. The statements postulated that individuals who possess and utilize legal weapons were likely to possess and utilize illegal weapons, and this type of rationalization is akin to the idea that individuals who legally use and possess over-the-counter or legally prescribed medications are more likely to use and possess illegal controlled substances. Regardless of whatever statistical significance statements of this sort might in fact possess, these types of overly generalized and unsubstantiated statements that seek to imply illegal conduct based on legal conduct cannot serve as a legitimate basis for a probable-cause determination.

We recognize that when the police pursue legitimate law-enforcement goals, innocent individuals must sometimes bear the cost of a mistake, and this unfortunate and perhaps unavoidable consequence does not, on its own, violate the sacrosanct constitutional prohibitions against unreasonable searches. See L.A. County v. Rettele, 550 U.S. 609, 615–16, 127 S.Ct. 1989, 167 L.Ed.2d 974 (2007) (explaining that standard employed in probable-cause determinations is one that is "short of absolute certainty" and, accordingly, will sometimes result in issuance of warrants to search innocent citizens). However, were we to conclude that the types of statements quoted above could legitimately serve as a basis for a probable-cause determination, then the law-enforcement net would become so wide that it would be able to ensnare virtually any citizen at any time for any reason, and the constitutional protections prohibiting unreasonable searches would effectively be rendered meaningless. Whatever powers may be imbued within the judicial pen, it cannot blot out one of the foundational rights of this country and of this State.

For the reasons previously stated, we believe that the affidavit did not provide a substantial basis for determining that there was probable cause to search Kennedy's property for prohibited weapons.

Attempted Capital Murder

In light of our previous conclusion, we must now consider whether the affidavit provided a substantial basis from which it could be inferred that there was probable cause to believe that there were items on Kennedy's property that were relevant to the shooting with which he was charged.

For the reasons that follow, we believe that it did not. First, as a preliminary matter, we note that a portion of the affidavit attempting to explain the necessity of searching Kennedy's property for evidence of the shooting was unclear. After the affidavit listed items to be searched for, it continued as follows:

Said property constitutes evidence that [sic] the offense described, (Criminal Attempt to Commit Capital Murder) in Paragraph 4, below, furthering the investigation of the Criminal Attempt to Commit Capital Murder ... and Possession of Prohibited Weapons.

Although we recognize that reviewing courts should not invalidate a search warrant by reviewing its accompanying affidavit "in a hypertechnical, rather than a common sense, manner," Ventresca, 380 U.S. at 108–09, 85 S.Ct. 741, the relevance of the items sought was not readily ascertainable from the affidavit. However, even though the meaning was unclear, we will construe the sentence, in light of the remainder of the affidavit, as conveying the idea that the sought evidence would be helpful to the investigation of the shooting.

Second, even under the above construction, the affidavit still failed to provide a substantial basis for concluding that probable cause existed to search for proof of the shooting. As described earlier, cases concerning search warrants have explained that the Constitution requires a link between the crime specified (attempted capital murder) and the place to be searched or the items to be searched for. See Hayden, 387 U.S. at 307, 87 S.Ct. 1642; see also id. (noting that for "mere evidence," probable cause needs to be examined in "terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction").

The code of criminal procedure also requires this type of link and sets out the types of items that may be sought through a search warrant and specifies the kind of information that must be contained within a search-warrant affidavit. In particular, the relevant portion of article 18.02 provides as follows:

A search warrant may be issued to search for and seize:

....

(10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.FN10

Tex.Code Crim. Proc. Ann. art. 18.02 (West 2005). Furthermore, for items searched pursuant to subarticle 10 (evidence of an offense), the code imposes additional requirements before a warrant may be issued, including the requirement that the affidavit contain information demonstrating that the items sought will constitute evidence of the offense or offenses described in the affidavit. Id. art. 18.01(c) (West Supp.2010). In particular, the code provides as follows:

A search warrant may not be issued pursuant to Subdivision (10) of Article 18.02 of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Id. (emphasis added).

The affidavit was not filed as support for the issuance of a warrant to search for evidence concerning the identity of the shooter or to confiscate the weapons used in the crime. In fact, the identity of the shooter and the weapons utilized were not in dispute, and Kennedy and the weapons that he used were taken into custody shortly after the shooting. Instead, the affidavit was filed as part of a request to search Kennedy's property in order to look for items that might have some relevance to the crime alleged. Although the affidavit partially complied with the requirements of article 18.01(c) by describing the offense in question and specifying that the property sought to be seized was believed to be on Kennedy's property, it failed to establish how the sought items constituted proof that Kennedy had attempted to commit capital murder on the night of the shooting. See Mulder v. State, 707 S.W.2d 908, 916 (Tex.Crim.App.1986) (concluding that affidavit for search warrant to obtain blood sample did not meet second requirement of subarticle 18.01(c) because it failed to show why blood was evidence of crime charged and noting that affidavit did not allege that defendant was injured or describe how his blood "might have been deposited at the scene"). The shooting was a self-contained event that occurred in response to a police officer pulling Kennedy over, and the affidavit failed to articulate how the potential recovery of the items listed in the affidavit

would help to establish that the offense occurred. Because the affidavit failed to specify how the evidence to be seized constituted proof that the offense occurred, it did not establish the crucial nexus between the property to be seized and the crime alleged.

In light of the preceding, we conclude that the affidavit failed to provide a substantial basis from which it could be determined that there was probable cause to search Kennedy's property for proof of the shooting.

Because we have concluded that the affidavit did not provide a substantial basis for either crime alleged in the affidavit, we hold that the district court abused its discretion by failing to suppress the evidence obtained from Kennedy's residence.

The Error Is Reversible Error

Having determined that the district court erred by failing to grant Kennedy's motion to suppress, we must now consider whether that error is reversible error. See Tex.R.App. P. 44.2 (listing types of reversible errors in criminal cases).

The court of criminal appeals has instructed appellate courts not to speculate regarding the reasons why a defendant enters a guilty plea and regarding what effect the denial of a motion to suppress may have had on the defendant's decision. McKenna v. State, 780 S.W.2d 797, 799–800 (Tex.Crim.App.1989); see Kraft v. State, 762 S.W.2d 612, 614–15 (Tex.Crim.App.1988) (stating that it is for defendant to decide "on what quantum of evidence to relinquish his rights and plead" and warning that courts should not speculate as to effect that ruling on motion to suppress had on defendant's ultimate decision to plead guilty). Moreover, the court has directed that if the evidence that should have been suppressed "would in any measure inculpate the accused," a reviewing court may presume that the denial of the motion to suppress influenced the defendant's decision to plead guilty. See McKenna, 780 S.W.2d at 799–800; Kraft, 762 S.W.2d at 615.

By obtaining a ruling in its favor, the State retained the option to use the unsuppressed evidence against Kennedy during a trial if Kennedy did not plead guilty, and in fact, the State did use the evidence during the punishment hearing. See Kraft, 762 S.W.2d at 614. But, as we noted in Kennedy I, "none of the items recovered from Kennedy's home has any bearing on any of the elements of the offense Kennedy pleaded guilty to" or "was used during the crime." 262 S.W.3d at 459. Moreover, unlike cases in which a defendant is attempting to suppress the admission of contraband, all of the items recovered in this case are perfectly legal to own. For that reason, an argument could be made that the admission of the items recovered through the search did not "inculpate" Kennedy. See Black's Law Dictionary 528 (6th ed. abridged 1991) (defining "inculpate" as meaning "[t]o impute blame or guilt; to accuse; to involve in guilt or crime"). However, whatever else the unsuppressed evidence may have been used for, the evidence was used to paint Kennedy in an unfavorable light, and the district court's denial of Kennedy's motion to suppress the evidence could have been "the straw that broke the proverbial camel's back" regarding Kennedy's decision to agree to plead guilty. See Kraft, 762 S.W.2d at 614. In light of that consideration, the court of criminal appeals' instruction to consider the merits of Kennedy's appellate issues, Kennedy II, 297 S.W.3d at 342, and the public-policy interest of allowing plea-bargaining defendants to appeal rulings on pre-trial motions in order to avoid the need for conducting full trials solely for the purpose of preserving an issue for appellate review, see Young, 8 S.W.3d at 666; McKenna, 780 S.W.2d at 800 (noting that addressing merits of denial of motion to suppress in plea-bargain context advances public interest by encouraging "guilty pleas in cases where the only contested issue between the defendant and the State is a matter that may be raised by a pretrial motion"), we conclude that the unsuppressed evidence could have been used to inculpate him during a trial if Kennedy had not pleaded guilty as demonstrated by the State's use of the evidence during the sentencing hearing. Accordingly, we presume that the trial court's erroneous denial of Kennedy's motion to suppress influenced his decision to agree to the plea bargain. See Kraft, 762 S.W.2d at 614 (presuming that State used contested evidence "at least to some extent" as result of trial court's improper denial of motion to suppress).

For the reasons previously given, we sustain Kennedy's first and third issues on appeal.

CONCLUSION

Having sustained Kennedy's first and third issues on appeal, we need not address Kennedy's second and

fourth issues on appeal. In accordance with our previous determinations, we reverse the judgment of the district court and remand the case for a new trial. See Ford v. State, 158 S.W.3d 488, 494 (Tex.Crim.App.2005) (reversing and remanding plea-bargain case to trial court after concluding that trial court erred by denying motion to suppress); Rowell v. State, 14 S.W.3d 806, 810 (Tex.App.-Houston [1st Dist.] 2000) (same), aff'd, 66 S.W.3d 279 (Tex.Crim.App.2001).

Justice PATTERSON Not Participating.

**Footnotes deleted from case materials

McKissick v. State, 209 S.W.3d 205 (Tex.App.—Houston [1st Dist.] 2006, pet. ref'd).

Background: Defendant was convicted pursuant to guilty plea of 19 counts of possession of child pornography Defendant appealed.

Holding: The Court of Appeals held that supporting affidavit was sufficient to establish probable cause to issue search warrant for defendant's personal computer. Affirmed.

OPINION

Appellant, Joe Irvin McKissick, pleaded guilty to 19 counts of possession of child pornography. See Tex. Pen.Code Ann. § 43.26 (Vernon 2003). The trial court assessed punishment at eight years' probation and a $300 fine. In his sole point of error, appellant argues that the trial court erred by denying his motion to suppress *208 evidence collected from his personal computer pursuant to a search warrant. We affirm.

BACKGROUND

On March 29, 2002, Robert Kite, a lifeguard for the Galveston County Sheriff's Department, received a radio dispatch stating that a man appeared to be taking pictures of young girls on Galveston Beach without their permission. Kite began to search for the man and observed appellant photographing the mid-sections of two girls who were walking along the beach. Kite stated that it did not appear that the girls had given appellant permission to photograph them. He estimated the girls were between the ages of 10 and 12. Kite approached appellant, identified himself, and asked appellant to sit on a nearby bench while Kite contacted the police.

Galveston Police Officers B. Gately and R. Steadham responded to Kite's call. Officer Gately informed appellant that a recently enacted statute prohibited photographing another person for the purposes of sexual gratification or arousal without first obtaining that person's consent. The statute cited by Gately, section 21.15 of the Texas Penal Code, provides that:

(a) A person commits an offense if the person photographs or by videotape or other electronic means visually records another:
(1) without the other person's consent; and
(2) with the intent to arouse or gratify the sexual desire of any person.
(b) An offense under this section is a state jail felony.
Act of June 11, 2001, 77th Leg., R.S., ch. 458, sec. 1, 2001 Tex. Gen. Laws 893, 893 (current version at Tex. Pen.Code Ann. § 21.15 (Vernon Supp.2005)). Appellant stated that he had been taking scenic pictures of the beach and water, and he granted the officers permission to view the photographs stored on his digital camera.

Kite turned appellant's camera on, and, using its preview pane, he and Officer Steadham examined the photographs stored on the camera. Kite described seeing pictures which matched those he had earlier witnessed appellant taking of the two young girls walking along the beach. Officer Steadham observed a picture of "the rear-end of a young female" and another depicting the "crotch area of a young female" who appeared to be exiting the Galveston ferry boat. Officer Gately then viewed the photographs, observing "the back of a female" and "a waist shot." Officer Gately testified that the photographs were inconsistent with appellant's statement that he had been taking general scenic photographs of the beach and ocean.

Appellant was taken into custody and transported to a police station.

Detective R. Sunley, who is assigned to the Galveston Police Department's Crimes Against Children section, was called to question appellant. Appellant admitted that he had been taking pictures of girls, but denied knowing that doing so for the purposes of sexual gratification or arousal was against the law. See Tex. Pen.Code Ann. § 21.15. Appellant further stated that after taking pictures of girls, he would transfer the photos from his digital camera to his personal computer. Detective Sunley reviewed the pictures on appellant's camera and observed images depicting "the front area and back area" of young girls. When he asked if appellant traded pictures over the internet, appellant became nervous and evaded the question. Appellant was then charged with the offense of improper photography or visual recording. See id.

Subsequently, Detective Sunley prepared an affidavit to present to a magistrate*209 to obtain a warrant to search appellant's residence, located in Fort Bend County, for evidence of improper photography or visual recording. See id. Detective Sunley's affidavit, subscribed and sworn to the magistrate on April 2, 2002, four days after appellant's arrest, read as follows:

The undersigned Affiant, being a Detective of the Galveston Police Department, and being duly sworn, on oath makes the following statements:

1. My name is Robert Sunley and I am a detective with the Galveston Police Department, located in Galveston County, Texas. I am assigned to the investigation relative to: Joe McKissick, who is being charged with the offense of Improper Visual Record to Arouse/Gratify;

2. Through my investigation, I have reason to believe that Joe McKissick, on or about March 29, 2002, in Galveston, Texas, did then and there photograph another without that person's consent with the intent to gratify his sexual desire, to wit, photographing the buttocks of several female beach goers.

3. Through my investigation, I have reason to believe that on march [sic] 29, 2002, the Galveston Police Department received a report of a man taking photographs of young females. Officer Bobby Steadham and Officer B. Gately responded to the call at 53rd Seawall, Galveston County, Texas, and, after searching for a few minutes, found a subject, later identified as Joe McKissick, who matched the description of the man taking the pictures of the young females.

4. Through my investigation, I have reason to believe that Robert Kite of the Galveston County Sheriff's Department Beach Patrol received a dispatch that a man was taking photographs of young females with a digital camera. Robert Kite observed a man matching the description of the subject taking photographs of young females. As Robert Kite observed the man, later identified as Joe McKissick, take a picture of two 12–14 year old girls from the waist down. He then detained the subject for Galveston Police Officers.

5. Through my investigation I have reason to believe that on March 29, 2002, Officers Steadham and Gately approached the man detained by Robert Kite and identified him as Joe Irvin McKissick, who resides at 509 Brand Lane # 90, Stafford, Fort Bend County, Texas. They asked Joe McKissick if they could view the photographs that he had taken, and Joe McKissick agreed to allow Officers Steadham and Gately to view the photographs.

6. Through my investigations, I have reason to believe that the photographs Officers Steadham and McKissick [sic] viewed on Joe McKissick's camera were mostly those of ... young female children showing them only from the waist down. There were pictures taken of frontal and rear views. It was obvious the photos were taken without the knowledge or consent of the people. Officers Steadham and Gately informed Joe McKissick that this was possibly a criminal offense and gave him a Miranda warning.

7. Through my investigation, I have reason to believe that when questioned by Officers Steadham and Gately, Joe McKissick denied knowing that taking these photographs *210 was a crime. Joe McKissick was transported to Galveston Police Station.

8. Through my investigation, I interviewed Joe McKissick at the Galveston Police Department. I gave Joe McKissick his Miranda warnings, and he agreed to waive his rights and speak with me about the case. Joe McKissick stated that he was taking pictures and that he did not know it was against the

law. He further stated that he had taken pictures of girls before and after he took the photographs, he downloaded them onto his computer at his home located at 509 Brand Lane # 90, Stafford, Fort Bend County, Texas. Joe McKissick was asked if he traded any of his pictures on the Internet, he became very nervous and did not answer the question, instead stating that he did not know his actions were illegal. I advised him of the charges and his bond amount.

9. I contacted Deputy Sean Costello of the Fort Bend County Sheriff's Office and asked him to get a description of the property located at 509 Brand Lane # 90, Stafford, Fort Bend County, Texas. Deputy Costello reported to me that the residence belonged to Joe McKissick located at 509 Brand Lane # 90, Stafford, Fort Bend County, Texas, is in the Fountain Head Mobile Home Villa. He reported that it is light brown with tan trim and further advised me that the home has the number "90" on it, and the property also contains a small shed on the east side of the property.
10. I know through my investigation that Joe McKissick says he has a personal computer on which he downloads pictures of young females that he takes without their permission.

11. In my experience as a law enforcement officer, persons who sexually exploit children keep copies of their correspondence, contacts with and photographs of children. In my experience such contacts, correspondence, and photographs are generally kept on a home personal computer;

12. In my experience as a law enforcement officer, correspondence and other contacts with children by sexual perpetrators are generally located in books, magazines, videotapes, still photographs, and reproductions of the above, computer disks, hard ware [sic] and software of computers located at the residence and on the property of the person exploiting children.

13. It is my belief, based on my investigation and my experience as a law enforcement officer, that Joe McKissick possesses such correspondence and contacts in his books, photographs, magazine, videotapes, computer disks, computer drives, DVD ROMs, CD ROMs, computer tapes and on the hardware and software of his computer at his residence and property located at 509 Brand Lane # 90, Stafford, Fort Bend County, Texas.

The magistrate agreed to issue a search warrant, and Detective Sunley, assisted by two other detectives, executed the search later that day.

Pursuant to the search, appellant's personal computer was seized FN1 and transported*211 to the Special Crimes unit of the Texas Department of Public Safety for analysis of the computer's hard drive. The analysis resulted in the discovery of child pornography, and appellant was charged in Fort Bend County with possession of child pornography.FN2

FN1. Several videotapes and various other items were also seized.

FN2. Tex. Pen.Code Ann. § 43.26 (Vernon 2003).

On August 27, 2002, a Galveston County grand jury no-billed appellant's charge for improper photography or visual recording. On December 9, 2002, appellant was indicted in Fort Bend County on 19 counts of possession of child pornography.FN3 On July 7, 2003, appellant filed a motion to suppress the search of his residence, arguing that the affidavit Detective Sunley used to obtain the warrant was fatally flawed. After a hearing, the trial court denied appellant's motion to suppress on August 30, 2004.

FN3. Id. § 43.26.

DISCUSSION
In his sole point of error, appellant contends that the trial court improperly denied his motion to suppress evidence obtained pursuant to the search warrant obtained by Detective Sunley. According to appellant, the affidavit Detective Sunley used to procure the warrant was fatally flawed because it (1) omitted material facts, (2) conveyed stale information, and (3) relied on conclusory statements, thereby rendering the warrant insufficient to show probable cause.

Standard of Review
In reviewing the trial court's ruling on a motion to suppress, we apply a bifurcated standard of review. Carmouche v. State, 10 S.W.3d 323, 327 (Tex.Crim.App.2000). We give almost total deference to the trial court's determination of historical facts that depend on credibility, while we conduct a de novo review of the trial court's

application of the law to those facts. Id. We review de novo the trial court's application of the law of search and seizure and probable cause. State v. Ross, 32 S.W.3d 853, 856 (Tex.Crim.App.2000); Wilson v. State, 98 S.W.3d 265, 271 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd). Appellate review of an affidavit in support of a search warrant, however, is not de novo; rather, great deference is given to the magistrate's determination of probable cause. Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983); Uresti v. State, 98 S.W.3d 321, 334 (Tex.App.-Houston [1st Dist.] 2003, no pet.). The test for determination of probable cause is whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. Gates, 462 U.S. at 236, 103 S.Ct. at 2331. Probable cause to support the issuance of a search warrant exists when the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued. Cassias v. State, 719 S.W.2d 585, 587 (Tex.Crim.App.1986).

To justify the issuance of a search warrant, the affidavit submitted in support must set forth facts sufficient to establish probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense; and (3) the property or items constituting such evidence are located at the particular place to be searched. Tex.Code Crim. Proc. Ann. art. 18.01(c) (Vernon Supp.2005). Whether the facts mentioned in the affidavit are adequate to establish probable cause depends on the totality of the circumstances. *212 Ramos v. State, 934 S.W.2d 358, 362–63 (Tex.Crim.App.1996). Statements made during a motion to suppress hearing do not factor into the probable cause determination; rather, we examine only the four corners of the affidavit to determine whether probable cause exists. Massey v. State, 933 S.W.2d 141, 148 (Tex.Crim.App.1996); Wilson, 98 S.W.3d at 270–71. Reasonable inferences may be drawn from the affidavit, and the affidavit must be interpreted in a common sense and realistic manner. Wilson, 98 S.W.3d at 271.

The task of a magistrate in issuing a search warrant is to make a practical, common sense decision whether, given all the circumstances set forth in the warrant's supporting affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Gates, 462 U.S. at 238, 103 S.Ct. at 2332. The duty of a reviewing court is simply to determine whether, considering the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed to support the issuance of the warrant when viewing the affidavit. Id.

Did the Trial Court Err in Denying Appellant's Motion to Suppress?

Appellant contends in a single point of error that the search warrant issued improperly because the affidavit upon which it was based
(3) relied on conclusory statements.
*215
3. Conclusory Statements

Third, appellant argues that Detective Sunley's affidavit includes conclusory statements that, taken as a whole, render the affidavit insufficient to show probable cause. Specifically, appellant contends that the affidavit relies on conclusory statements to account for two elements of a section 21.15 offense—lack of consent and intent to arouse or gratify the sexual desire of any person. See Tex. Pen.Code Ann. § 21.15. Appellant further notes that the affidavit, in paragraph eight, refers only to appellant admitting to downloading photographs of girls onto his computer while providing no description of what those downloaded photographs depicted, and thus no information regarding whether or not the downloaded photographs were taken without their subject's consent or for the purposes of sexual gratification or arousal. In addition, appellant asserts that Detective Sunley's statements regarding his experience investigating persons who sexually exploit children were conclusory because the affidavit contains no information indicating that appellant had ever perpetrated crimes of a sexual nature against children.

An affidavit for a search warrant is sufficient to establish probable cause if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. Gates, 462 U.S. at 238–39, 103 S.Ct. at 2332; Stone, 137 S.W.3d at 175. In determining the validity of the

trial court's ruling on a challenge to a search warrant affidavit, great deference should be paid to the magistrate's determination, and courts should interpret affidavits in a common sense, rather than a hypertechnical, manner. Gates, 462 U.S. at 236, 103 S.Ct. at 2331. It is the duty of the reviewing court, however, to ensure the magistrate had a substantial basis for concluding that probable cause existed. *216 Id. at 238–39, 103 S.Ct. at 2332. Referring to conclusory statements and "bare-bones" affidavits, the United States Supreme Court noted in Gate s that, "In order to ensure that ... an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." Id. at 239, 103 S.Ct. at 2332–33. Thus, a mere conclusory statement will not suffice for a showing of probable cause. See id.

Here, interpreting the totality of the circumstances reflected in the affidavit in a common sense manner, we conclude that the affidavit did not rely on conclusory statements to such an extent that it was insufficient to show probable cause. As noted, the affidavit, taken as a whole, demonstrates that Detective Sunley had reason to believe that appellant was taking "photograph [s] [of] another without that person's consent with the intent to gratify his sexual desire." Detective Sunley's affidavit explains the basis for his belief, namely, the fact that: (1) the pictures on appellant's camera "were mostly those of young female children showing them only from the waist down"; (2) "it was obvious the photos were taken without the knowledge or consent of the people"; (3) appellant admitted taking pictures of girls on previous occasions; and (4) appellant stated that he downloaded pictures of girls onto his computer. It is true, as appellant notes, that the affidavit does not describe the nature of the pictures appellant admits to downloading, but based on the totality of the circumstances, one could reasonably infer that the pictures were probably similar to those described in the affidavit. Similarly, while the affidavit is somewhat threadbare in terms of delineating how appellant's photographs were intended to arouse or sexually gratify the desire of another person, one could reasonably infer that pictures depicting the "[clothed] buttocks of several female beach goers" are probably intended to elicit some form of sexual arousal or gratification. We thus conclude that the affidavit is not insufficient to show probable cause due to excessive reliance on conclusory statements.
Having found, contrary to appellant's claims, that Detective Sunley's affidavit was not fatally flawed due to (1) material omissions, (2) staleness, or (3) conclusory statements, we overrule appellant's sole point of error.

CONCLUSION
We affirm the judgment of the trial court.

Tolentino v. State, 638 S.W.2d 499 (Tex.Crim.App. 1982).

Defendants were convicted in joint trial before jury in the 171st Judicial District Court, El Paso County, Edwin F. Berliner, J., of felony offense of possession of marijuana, and defendants appealed. The Court of Criminal Appeals, Teague, J., held that defendant's motion to suppress marijuana seized in search pursuant to search warrant should have been granted on grounds that search warrant was issued upon invalid affidavit.

Reversed and remanded.

This is a joint appeal by Arturo Alberto Tolentino and Norma C. Tolentino, appellants. In a joint trial before a jury, they were each found guilty for committing the felony offense of possession of marihuana. The same jury assessed punishment for each appellant at five years' confinement in the penitentiary, but the punishment was ordered probated upon the jury's recommendation to the trial court.

Appellants raise only one ground of error in their joint appeal. They claim that the search warrant issued in this cause, which resulted in seizure of marihuana for which they were convicted of possessing, should not have issued because it was based upon an invalid affidavit. We agree and reverse.

The affidavit for the search warrant in pertinent part reads verbatim as follows:

ON OR ABOUT THE 3rd OF JANUARY 1979, OFFICER FOUND A TELEPHONE COMPANY BAG (SHOPPING *501 BAG) ABANDON ON TH GROUND AT THE INTERSECTION OF MESA HILLS AND SUNLAND PARK DR. UPON INVESTIGATION OFFICER FOUND THAT THE TELEPHONE BAG CONTAINED PACKAGING FOR APPROX. 5 PACKAGES OF WHAT IS KNOWN AS MARIJUANA BRICKS. IN THE PACKAGING OFFICER FOUND IT WAS LINED WITH A SMALL AMOUNT OF MARIJUANA (SEEDS AND STEMS). OFFICER ALSO FOUND A CONTENNETAL AIRLINE LUGGAGE CLAIM CHECK WITH THE NAME A. TOLENTINO WRITTEN ON IT. BEING THE LOCATION IS ISOLATED FROM ANY RESIDENTAL AREA EXCEPT FOR THE WEST TOWN APARTMENT COMPLEX APPROX. TWO CITY BLOCKS DUE EAST. OFFICER THEN WENT TO THE APARTMENT COMPLEX AND TALKED TO A RESIDENT OF THE COMPLEX, WHO STATED THAT THAT TOLENTINO LIVED IN APARTMENT # 118, AND IS 21–25 YOA. DUE TO THE TIME OFFICER FOUND THE BAG AND THE IT HAD NOT BEEN THERE EARLIER IN THE NIGHT OFFICER BELIEVES THAT THE BAG WAS RESENTLY ABANDONED, OFFICER BELIEVE THE SUBJECT TO HAVE THE MARIJUANA FROM THE EMPTY PACKAGING IN HIS APARTMENT 734 MESA HILLS # 118, FOR POSSIBLE DISTRIBUTIO AND SALE. THE RESIDENT WHO IS KNOWN TO BE RELIABLE TO OFFICER REQUEST TO REMAIN ANONYMOUS.

Other than to acknowledge that there was other testimony adduced at the hearing on the appellants' motion to suppress the search warrant, which was overruled by the trial court, we find that the above affidavit tells it all as to why the affiant went to a justice of the peace and obtained a search warrant. When the State relies upon a search warrant to establish the validity of a search, as they have done in this cause, and not from testimony of officers who testified at the motion to suppress hearing, then the question of probable cause is determined facially from the four corners of the affidavit. *Cherry v. State*, 479 S.W.2d 924 (Tex.Cr.App.1972); *Gaston v. State*, 440 S.W.2d 297 (Tex.Cr.App.1969), cert. denied, 396 U.S. 969, 90 S.Ct. 452, 24 L.Ed.2d 435 (1969); Cf. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *Ramsey v. State*, 579 S.W.2d 920 (Tex.Cr.App.1979).

By the provisions of the Federal and Texas Constitutions, as well as the statutory law of this State, a search warrant may not issue unless it is predicated or based upon probable cause. See Article IV, United States Constitution; Art. I, Sec. 9, Texas Constitution; Art. 18.01(b), V.A.C.C.P. In order for an affidavit for a search warrant to show probable cause, it must set forth sufficient circumstances to enable a magistrate to judge, independently, the validity of the affiant's belief that contraband is at the place to be searched. No magical formula exists for stating such information. *Frazier v. State*, 480 S.W.2d 375, 379 (Tex.Cr.App.1972). Probable cause will be found to exist if the affidavit shows facts and circumstances within the affiant's knowledge and of which the affiant has reasonable trustworthy information sufficient to warrant a person of reasonable caution to believe that the criteria set forth in Art. 18.01(c), V.A.C.C.P., has been met, that is, that the affidavit has set forth facts which establish that (1) a specific offense has been committed; (2) the property to be searched or items to be seized constitute evidence of the offense or evidence that a particular person committed the offense; (3) the property or items are located at or on the person, place or thing to be searched. See *Berger v. New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040 (1967); *Draper v. U. S.*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). It is axiomatic, however, that mere affirmation of belief or suspicion is not enough to sustain the issuance of a search warrant. *Nathanson v. U. S.*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933).

*502 The affidavit in this cause unquestionably fails on all grounds. The appellants' motion to suppress should have been sustained.

The affidavit in this cause is devoid of any recitation of underlying circumstances or facts to test the requirement that before a search warrant may issue probable cause must be shown. There is nothing shown in the affidavit to establish the inference and support the belief that marihuana was in the residence of the appellants. The affidavit before us reflects absolutely nothing more than the

possibility that because an airline claim ticket with the name "A. Tolentino" thereon was found in a grocery type bag which contained particles of illegal contraband, the type wrapping paper found was that which is ordinarily used to wrap marihuana, one of the appellants had the name Arturo Tolentino, and it was established that he lived nearby, that this connected one of the appellants with the bag found in a median of a roadway. Suspicion and conjecture do not constitute probable cause, and the facts as recited in the affidavit in this cause evidence nothing more than mere suspicion. The appellants' motion to suppress should have been granted. See also *Aguilar v. Texas,* 378 U.S. 408, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

The judgments of conviction are reversed and the cause is ordered remanded.

Wise v. State, --- S.W.3d ----, 2011 WL 754415 (Tex.App.—Fort Worth 2011)

Background: Defendant was convicted of four counts of sexual assault, one count of indecency with a child, and eleven counts of possession of child pornography. Defendant appealed.

Holdings: The Court of Appeals held that:

(1) search warrant affidavit was sufficient to establish probable cause necessary for issuance of search warrant . . .

OPINION

I. Introduction
*1 In two points, Appellant Jeffrey Shane Wise appeals his convictions for four counts of sexual assault, one count of indecency with a child, and

eleven counts of possession of child pornography. We affirm in part and reverse and render in part.

II. Background Facts
In the spring of 2007, when C.H. was sixteen years old, she began working at a McDonald's restaurant in Wichita Falls.FN1 Wise, who was in his forties, was her manager, and because she did not have a car and worked until late at night, he occasionally gave her a ride home. Wise and C.H. began to talk on the phone. One day, Wise took C .H. to his house, where they engaged in sexual intercourse. Wise and C.H. then had many other sexual encounters at various places on later dates. Also, C.H. took pictures of herself naked on a digital camera and on Wise's cell phone and gave them to him.

When the police learned about Wise's relationship with C.H., she agreed to let the police record a phone call from her to Wise.FN2 During the call, C.H. told Wise that her parents had discovered her relationship with him and wanted to talk to the police. She and Wise then talked about some details of their sexual acts.

Wichita Falls Police Detective Alan Killingsworth obtained an arrest warrant for Wise and a search warrant for Wise's house. When Detective Killingsworth executed the search warrant a few days after he recorded Wise and C.H.'s phone call, he found Wise at the house. While other officers stayed at the house, Detective Killingsworth arrested Wise and took him to the police station, where he received admonishments about his constitutional rights and gave a confession in an oral statement.FN3

During the search of Wise's house, officers seized, among other items, a digital camera that contained a pornographic image of C.H., pornographic DVDs, a laptop computer, a Gateway desktop computer tower, phone cards, condoms, and a blindfold that Wise used during a sexual encounter with C.H. The police took photographs of the inside of Wise's house and took the laptop and Gateway tower to a forensics computer lab. Detective Killingsworth received a CD containing images that had been copied from the Gateway tower.

A Wichita County grand jury indicted Wise for four counts of sexual assault of C.H. (counts one through four of the indictment), eleven counts of possession of child pornography (count five, based on a picture of C.H., and counts eight through seventeen, based

on images stored on the Gateway tower), and two counts of indecency with a child concerning other complainants (counts six and seven). FN4 Wise filed a motion to suppress the evidence that police found at his house, contending that the warrant was not supported by an affidavit showing probable cause. After the trial court denied the motion, Wise pleaded not guilty to all counts.

The jury convicted Wise of committing sixteen of the seventeen acts alleged in the indictment; it acquitted him of count seven, which concerned an alleged sexual encounter in 1997. The jury assessed Wise's punishment, and the trial court entered judgment on the verdict: counts one, two, and three-eighteen years' confinement and a $10,000 fine for each count; count four and six-twenty years' confinement and a $10,000 fine for each count; count five-eight years' confinement and a $10,000 fine; and for counts eight through seventeen-ten year's confinement and a $10,000 fine for each count. The trial court ordered that each of Wise's sentences run consecutively. This appeal followed.

III. Suppression

*2 In his first point, Wise argues that the trial court erred by denying his motion to suppress, contending that the facts recited in the search warrant affidavit "were insufficient from the totality of the circumstances" to show probable cause for seizing the computers at his house.

A. Standard of Review

A search warrant cannot issue unless it is based on probable cause as determined from the four corners of an affidavit. U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex.Code Crim. Proc. Ann. art. 18.01(b) (Vernon Supp.2010) ("A sworn affidavit ... establishing probable cause shall be filed in every instance in which a search warrant is requested."); Nichols v. State, 877 S.W.2d 494, 497 (Tex.App.-Fort Worth 1994, pet. ref'd). When reviewing a magistrate's decision to issue a warrant, we apply a highly deferential standard in keeping with the constitutional preference for a warrant. Rodriguez v. State, 232 S.W.3d 55, 60 (Tex.Crim.App.2007) ("[E]ven in close cases we give great deference to a magistrate's determination of probable cause to encourage police officers to use the warrant process rather than making a warrantless search and later attempting to justify their actions by invoking some exception to the warrant requirement."); Swearingen v. State, 143 S.W.3d 808, 810-11 (Tex.Crim.App.2004); Emenhiser v. State, 196 S.W.3d 915, 924-25 (Tex.App.-Fort Worth 2006, pet. ref'd).

Under the Fourth Amendment and the Texas constitution, an affidavit supporting a search warrant is sufficient if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. Swearingen, 143 S.W.3d at 810-11; Nichols, 877 S.W.2d at 497. Probable cause exists to issue an evidentiary search warrant if the affidavit shows facts and circumstances to warrant a person of reasonable caution to believe that the criteria set forth in article 18.01(c) of the code of criminal procedure have been met. Tolentino v. State, 638 S.W.2d 499, 501 (Tex.Crim.App. [Panel Op.] 1982); see Tex.Code Crim. Proc. Ann. art. 18.01(c). The affidavit must set forth facts establishing that (1) a specific offense has been committed, (2) the item to be seized constitutes evidence of the offense or evidence that a particular person committed the offense, and (3) the item is located at or on the person, place, or thing to be searched. See Tex.Code Crim. Proc. Ann. art. 18.01(c); Tolentino, 638 S.W.2d at 501.

A reviewing court should not invalidate a warrant by interpreting the affidavit in a hypertechnical manner. See Rodriguez, 232 S.W.3d at 59; Tolentino, 638 S.W.2d at 501 (explaining that "[n]o magical formula exists" for an affidavit's explanation of probable cause); Nichols, 877 S.W.2d at 498. Rather, when a court reviews an issuing magistrate's determination, the court should interpret the affidavit in a commonsense and realistic manner, recognizing that the magistrate may draw reasonable inferences. See Rodriguez, 232 S.W.3d at 61 ("When in doubt, we defer to all reasonable inferences that the magistrate could have made."); Davis v. State, 202 S.W.3d 149, 154 (Tex.Crim.App.2006); Nichols, 877 S.W.2d at 498. "The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; we focus on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit." Rodriguez, 232 S.W.3d at 62; see Nichols, 877 S.W.2d at 498 ("A warrant is not invalid merely because the officer failed to state the obvious."). The magistrate's determination should prevail in doubtful or

marginal cases. Flores v. State, 319 S.W.3d 697, 702 (Tex.Crim.App.2010).

B. Analysis

*3Wise argues that Detective Killingsworth's affidavit did not show that any evidence related to the offenses against C.H. would be found on the computers that the police seized from his house. The affidavit states in relevant part,FN5

1. There is in Wichita County, Texas a suspected place and premises....

2. Said suspected place and premises are in charge of and controlled by ... Jeffrey Shane Wise....

3. It is the belief of the Affiant that a specific criminal offense has been committed, and he hereby charges and accuses that: Jeffrey Shane Wise did intentionally and knowingly commit the offense of sexual assault of a child....

4. There is at said suspected place and premises, property and items concealed and kept, constituting evidence of said offense ..., described as follows: a) Computers....

....

Affiant has probable cause for said belief by reason of the following facts:....

On 03-01-08 a sexual assault report was filed with the WFPD alleging that Jeffery Shane Wise, a 41 year old male, had engaged in sexual intercourse with a 16 year old female.

On 03-03-08 during a recorded statement the victim disclosed information consistent with the offense of sexual assault of a child....

The victim advised that Wise requested on several occasions that she provide him with pictures of herself unclothed. The victim said while working at McDonald's she took pictures of her breasts and vagina with Wise's Motorola cellular phone in the bathroom. She said each time this was done she would give the phone back to Wise after taking the pictures. The victim said at some point Wise provided her with a digital camera. The victim said this was possibly a Kodak digital camera.... The victim said she took three pictures of herself unclothed at her house with this camera. She said after taking these pictures she gave the camera back to Wise. The victim said Wise later advised her that he had saved these pictures on a memory card. The victim advised that Wise does have a desk top computer in his residence. She said she does not know if he saved these pictures on this computer or on some other storage device. The victim advised that during the time period she was talking to Wise she does not believe he was connected to the internet, however there was an occasion when he became [so] mad at her that he threatened to post the above pictures of her on the internet. The victim also advised that Wise had a lap top computer. However she said that Wise told her that this lap top did not work and that he needed to buy a part for it.

Wherefore, based on the ... information noted in this document, Affiant asks for the issuance of a warrant that will authorize him to search said suspected place and premises for said personal property and seize the same.

Contrary to Wise's argument, we have held that a search warrant affidavit was sufficient to justify the seizure of a computer from a defendant's residence when the affidavit stated that the defendant had sex with an underage girl, told the girl that he had photos and a video of their sexual encounter, and threatened to put the photos "on the internet and show them to some people." State v. Duncan, 72 S.W.3d 803, 804-08 (Tex.App.-Fort Worth 2002, pet. ref'd). Likewise, the First Court of Appeals recently overruled a defendant's challenge to the denial of a motion to suppress evidence of child pornography discovered on computers seized from his home. See Eubanks v. State, 326 S.W.3d 231, 246-49 (Tex.App.-Houston [14th Dist.] 2010, pet. ref'd). In Eubanks, the detective who drafted the search warrant affidavit stated that he had probable cause to seize computer hardware because sexual assault victims had told someone that the defendant had assaulted them and had "made them pose for pictures in which they were sometimes partially or totally nude." Id. at 247. The detective then wrote that he "talked with League City evidence officer Thomas Garland and he advised that on a digital camera, even if the image has been deleted, if it was saved to the sim card or hard drive, then the deleted image would be recoverable." Id. The detective concluded his statement of probable cause, averring:

*4 Your affiant believes that the foregoing facts establish probable cause that the offenses of sexual assault were committed on or before October 11th, 2006, in Galveston County, Texas; that pictures, video and DVD's, computers and related computer equipment and storage devices, cameras and video recording devices if found in the premises described above, constitute[ ] evidence of said offense; and

that the evidence to be searched for is likely to be located in said premises.

Id. The court held that although these facts did not establish that the defendant had a computer or digital pornographic images, they were sufficient to establish probable cause for the seizure of the defendant's computer. Id. at 248. The court reasoned,

[t]he affidavit was supported by the complainants' allegations that appellant touched them inappropriately and they posed for inappropriate photographs. Although neither complainant specifically mentioned the use of a digital camera or a computer, it was reasonable for the magistrate to infer from the information in the affidavit that the complainants were photographed and that a digital camera and computer could have been used in the process of taking inappropriate photographs of the girls and could probably be found on the premises to be searched. Furthermore, all of the information in the affidavit indicated that all of the assaults and pictures of the girls engaged in sexual conduct were taken at appellant's residence and that [one of the complainants] saw appellant hide some of the pictures in his bedroom. Thus, it was likewise reasonable for the magistrate to conclude that any items like photographs, computer equipment, or cameras used in the commission of the offenses [were] located in appellant's home.

Id. (emphasis added and citations omitted).

This case is factually similar to Duncan, and the facts here more strongly support probable cause for seizing Wise's computers than those in Eubanks. Here, after the affidavit recited details about Wise's sexual assaults of C.H., it explained that Wise had digital pictures of C.H. on two devices, that he had saved some of those pictures on a memory card, that he had a desktop computer in his house, and that he threatened to post the pictures of C.H. on the internet, which would likely have required the photos to be stored or transferred to a computer.

We conclude that a magistrate could reasonably conclude from these facts that the police had probable cause to believe that pictures of C.H. were located on Wise's computers. See Rodriquez, 232 S.W.3d at 60 (stating that probable cause is a "flexible and nondemanding" standard and that it exists when "there is a 'fair probability' that contraband or evidence of a crime will be found at the specified location"); see also McKissick v. State, 209 S.W.3d 205, 212 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd) (holding that an affidavit was sufficient to show probable cause for searching a defendant's computer when the affidavit said that the defendant had taken inappropriate photographs of young females and that he had previously downloaded similar pictures onto his home computer); Porath v. State, 148 S.W.3d 402, 408-09 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (concluding that a search warrant affidavit was sufficient to allow seizure of the defendant's personal computer when the affidavit outlined the defendant's sexually-oriented communications with an underage boy over the internet). Therefore, we hold that the trial court did not err by denying Wise's motion to suppress, and we overrule his first point.

V. Conclusion

Having overruled Wise's first point and sustained his second point, we affirm the trial court's judgment on counts one through six and reverse the trial court's judgment with respect to counts eight through seventeen and render a judgment of acquittal on those counts.

RELIGION/PARENTAL RIGHTS CASES AND STATUTES

U.S. Const. amend I.

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Const. art. I, § 6.

Sec. 6. FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Tex. Civ. Prac & Rem. Code Ann § 110.001.

DEFINITIONS. (a) In this chapter:

(1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

(2) "Government agency" means:

(A) this state or a municipality or other political subdivision of this state; and

(B) any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education.

(b) In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.

Tex. Civ. Prac & Rem. Code Ann § 110.002.

APPLICATION. (a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.

(b) This chapter applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual.

(c) This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.

Tex. Civ. Prac & Rem. Code Ann § 110.003.

RELIGIOUS FREEDOM PROTECTED. (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

Braunfeld v. Brown, 366 U.S. 599 (1961)

Excerpts from case

***603** Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213; Reynolds v. United States, 98 U.S. 145, 166, 25 L.Ed. 244. Thus, in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public shool, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. Cantwell v. State of Connecticut, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in Reynolds v. United States, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when ***604** the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

'Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.' (Emphasis added.) 8 Works of Thomas Jefferson 113.[FN2]

FN2. Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice, wrote: 'But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment.' (Emphasis added.) Written in the Connecticut Courant, Dec. 17, 1787, as quoted in 1 Stokes, Church and State in the United States, 535.

And, in the Barnette case, the Court was careful to point out that 'The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. * * * It is * * * to be noted that the compulsory flag salute and ***605** pledge requires affirmation of a belief and an attitude of mind.' 319 U.S. at pages 630, 633, 63 S.Ct. at page 1181. (Emphasis added.)

Thus, in Reynolds v. United States, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the duty to practice polygamy. And, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious duty to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., 321 U.S. at page 165, 64 S.Ct. at page 441, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday.[FN3] And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives***606** open to appellants and others similarly situated-retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor-may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion

requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test ***607** for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell v. State of Connecticut, supra, 310 U.S. at pages 304-305, 60 S.Ct. at pages 903-904. [FN4]

Cantwell v. State, 310 U.S. 296 (1940).

Excerpts from case

***303** The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the ***304** second cannot be. Conduct remains subject to regulation for the protection of society.

***306** Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

***531 II**

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." (Emphasis added). The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Indiana Employment

Security Div., 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). Given the historical association between animal sacrifice and religious worship, see supra, at 2, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834, n. 2, 109 S.Ct. 1514, 1518, n. 2, 103 L.Ed.2d 914 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Employment Div., Dept. of Human Resources of Ore. v. Smith, supra. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance ***532** that interest. These ordinances fail to satisfy the Smith requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, e.g., Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248, 110 S.Ct. 2356, 2370–71, 110 L.Ed.2d 191 (1990) (plurality opinion); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389, 105 S.Ct. 3216, 3225–26, 87 L.Ed.2d 267 (1985); Wallace v. Jaffree, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489–90, 86 L.Ed.2d 29 (1985); Epperson v. Arkansas, 393 U.S. 97, 106–107, 89 S.Ct. 266, 271–72, 21 L.Ed.2d 228 (1968); School Dist. of Abington v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963); Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15–16, 67 S.Ct. 504, 511–12, 91 L.Ed. 711 (1947). These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. See, e.g., Braunfeld v. Brown, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961) (plurality opinion); Fowler v. Rhode Island, 345 U.S. 67, 69–70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." Bowen v. Roy, 476 U.S. 693, 703, 106 S.Ct. 2147, 2154, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.). See J. Story, Commentaries on the Constitution of the United States §§ 991–992 (abridged ed. 1833) (reprint 1987); T. Cooley, Constitutional Limitations 467 (1868) (reprint 1972); McGowan v. Maryland, 366 U.S. 420, 464, and n. 2, 81 S.Ct. 1153, 1156, and n. 2, 6 L.Ed.2d 393 (1961) (opinion of Frankfurter, J.); Douglas v. Jeannette, 319 U.S. 157, 179, 63 S.Ct. 882, 888, 87 L.Ed. 1324 (1943) (Jackson, J., concurring in result);***533** Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), for example, we invalidated a State law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of ... religious status," Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S., at 877, 110 S.Ct., at 1599. On the same principle, in Fowler v. Rhode Island, supra, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service. See also Niemotko v. Maryland, 340 U.S. 268, 272–273, 71 S.Ct. 325, 327–28, 95 L.Ed. 267 (1951). Cf. Larson v. Valente, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (state statute that treated some religious denominations more favorably than others violated the Establishment Clause).

1

Although a law targeting religious beliefs as such is never permissible, McDaniel v. Paty, supra, 435 U.S., at 626, 98 S.Ct., at 1327–28 (plurality opinion); Cantwell v. Connecticut, supra, 310 U.S., at 303–304, 60 S.Ct., at 903 if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra, 494 U.S., at 878–879, 110 S.Ct., at 1599–1600; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words ***534** "sacrifice" and "ritual," words with strong religious connotations. Brief for Petitioners 16–17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. See Webster's Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 ("[T]he word sacrifice ultimately became very much a secular term in common usage"). The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971), and "covert suppression of particular religious beliefs," Bowen v. Roy, supra, 476 U.S., at 703, 106 S.Ct., at 2154 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. ***535** Resolution 87–66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. McGowan v. Maryland, 366 U.S., at 442, 81 S.Ct., at 1113–14. See, e.g., Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879); Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890). See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1319 (1970). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," Walz v. Tax Comm'n of New York City, supra, 397

U.S., at 696, 90 S.Ct., at 1425 (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the ***536** primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter, see 723 F.Supp., at 1480. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. Cf. Larson v. Valente, 456 U.S., at 244–246, 102 S.Ct., at 1683–84. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess [ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if ***537** the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87–40 incorporates the Florida animal cruelty statute, Fla.Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever ... unnecessarily ... kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13–14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See id., at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. See Kiper v. State, 310 So.2d 42 (Fla.App.), cert. denied, 328 So.2d 845 (Fla.1975). Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S., at 884, 110 S.Ct., at 1603. As we noted in Smith, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Ibid., quoting Bowen v. Roy, 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C.J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligiousreasons.***538** Thus, religious practice is being singled out for discriminatory treatment. Bowen v. Roy, 476 U.S., at 722, and n. 17, 106 S.Ct., at 2164, and n. 17 (STEVENS, J., concurring

in part and concurring in result); id., at 708, 106 S.Ct. 2156 (opinion of Burger, C.J.); United States v. Lee, 455 U.S. 252, 264, n. 3, 102 S.Ct. 1051, 1059, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment).

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, McGowan v. Maryland, 366 U.S., at 520, 81 S.Ct., at 1186 (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.FN* If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also id., at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest ***539** in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. See 723 F.Supp., at 1486–1487, and nn. 58–59. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. See, e.g., Schneider v. State, 308 U.S. 147, 162, 60 S.Ct. 146, 151–52, 84 L.Ed. 155 (1939).

FN* Respondent advances the additional governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city not zoned for slaughterhouses, see Brief for Respondent 28–31, and the District Court found this interest to be compelling, see 723 F.Supp. 1467, 1486 (SD Fla.1989). This interest cannot justify Ordinances 87–40, 87–52, and 87–71, for they apply to conduct without regard to where it occurs. Ordinance 87–72 does impose a locational restriction, but this asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it. In our discussion, therefore, we put aside this asserted interest.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87–40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"—the method used in kosher slaughter—is approved as humane. See 7 U.S.C. § 1902(b); Fla.Stat. § 828.23(7)(b) (1991); Ordinance 87–40, § 1. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. See 723 F.Supp., at 1472–1473. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87–72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and ***540** not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87–72 was passed the same day as Ordinance 87–71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87–72, had as their object the suppression of religion. We need not decide whether the Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it

must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." Walz v. Tax Comm'n of New York City, 397 U.S., at 696, 90 S.Ct., at 1425 (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 563–64, 50 L.Ed.2d 450 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. Id., at 267–268, 97 S.Ct., at 564–65. These objective factors bear on the question of discriminatory object. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279, n. 24, 99 S.Ct. 2282, 2296, n. 24, 60 L.Ed.2d 870 (1979).

That the ordinances were enacted " 'because of,' not merely 'in spite of,' " their suppression of Santeria religious practice, id., at 279, 99 S.Ct., at 2296 is revealed by the events preceding their enactment. Although respondent claimed at oral argument ***541** that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, Tr. of Oral Arg. 27, 46, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Taped excerpts of Hialeah City Council Meeting, June 9, 1987.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised ***542** the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you ... not to permit this Church to exist." The city attorney commented that Resolution 87–66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens...." Ibid. Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are

not neutral, and the court below committed clear error in failing to reach this conclusion.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S., at 879–881, 110 S.Ct., at 1600–1601. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148, 107 S.Ct. 1046, 1053, 94 L.Ed.2d 190 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that ***543** the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669–670, 111 S.Ct. 2513, 2518–2519, 115 L.Ed.2d 586 (1991); University of Pennsylvania v. EEOC, 493 U.S. 182, 201, 110 S.Ct. 577, 588–89, 107 L.Ed.2d 571 (1990); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371–72, 75 L.Ed.2d 295 (1983); Larson v. Valente, 456 U.S., at 245–246, 102 S.Ct., at 1683–84; Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969). In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions ***544** euthanasia of "stray, neglected, abandoned, or unwanted animals," Fla.Stat. § 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e).

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." Brief for Respondent 21. It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. Ibid. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." Id., at 22. These ipse dixits do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat, see Brief for Respondent 32, citing 723 F.Supp., at 1474–1475, 1485. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing

preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, see 11 Record 566,***545** 590–591, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, 723 F.Supp., at 1485, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." Fla.Stat. § 585.88(1)(a) (1991). The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." See Fla.Stat. § 828.24(3) (1991). Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." Florida Star v. B.J.F., 491 U.S. 524, 542, 109 S.Ct. 2603, 2614, 105 L.Ed.2d 443 (1989) (SCALIA, J., concurring in part and concurring in judgment). This ***546** precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S., at 628, 98 S.Ct., at 1328, quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed] ... down" but "really means what it says." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S., at 888, 110 S.Ct., at 1605. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see supra, at 16–18, 21–24, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987).

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible ***547** measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." Florida Star v. B.J.F., supra, 491 U.S., at 541–542, 109 S.Ct., at

2613–14 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119–120, 112 S.Ct. 501, 510–11, 116 L.Ed.2d 476 (1991). Cf. Florida Star v. B.J.F., supra, at 540–541, 109 S.Ct., at 2612–13; Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104–105, 99 S.Ct. 2667, 2671–72, 61 L.Ed.2d 399 (1979); id., at 110, 99 S.Ct., at 2674–75 (REHNQUIST, J., concurring in judgment). As we show above, see supra, at 21–24, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

Commonwealth v. Barnhart, 497 A.2d. 616 (Pa. Super. 1985).

***16** OLSZEWSKI, Judge:

This matter comes before us on appeal from judgment of sentence for involuntary manslaughter[1] and endangering the welfare of a child.[2] Appellants' convictions follow the death of their infant son. The child, Justin Barnhart, age 2 years and 7 months, died as a result of an untreated Wilms' tumor. Appellants, life-long members of the Faith Tabernacle ***17** Church, had relied on God to the exclusion of modern medicine to cure the boy's cancer. Justin's death sparked an inquiry. As a result of that investigation, appellants were tried and convicted by a jury on counts of involuntary manslaughter and endangering the welfare of a child. Their post-verdict motions denied, appellants received terms of probation. They now appeal.

Appellants raise five points of error. The first squarely frames the conflict in this case: the competing interests of parent and state in a child's life.

I

Appellants argue that the criminal statutes were unconstitutionally applied to punish conduct protected by the free exercise clause of the First Amendment. At issue was appellants' failure, for religious reasons, to seek medical treatment for their child. The statutes provide:

Endangering welfare of children
A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
18 Pa.C.S. Sec. 4304, and:

Involuntary manslaughter
A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, he causes the death of another person.

18 Pa.C.S. Sec. 2504(a). Against these statutory proscriptions, appellants assert a claim of religious right. They contend their conduct as parents raising children within a particular religious order, by the principles and tenets of that order, is protected by the First Amendment. *See* U.S. Const.Amend. I. Conceding that the state may lawfully abridge their religious freedom, appellants argue that the state has failed to define with specificity what conduct, otherwise protected, is forbidden by Sections 4304 and ***18** 2504(a). "When the Commonwealth acts to limit this basic freedom, it must do so in clear and unambiguous terms so that potential Appellants

know what conduct is proscribed." Appellants' Brief at 15.

Section 4304 speaks of a "duty of care."[3] The Crimes Code nowhere defines this duty. The Commonwealth, in response to appellants' request for "the specific law which imposes the duty of care which is alleged to have been violated by the Defendants," stated:

The duty to render care for one's child arises out of the relationship of parent and child. The right to receive medical care is one created by natural law, attributable to the nature of mankind rather than to enactments of law. Various statutes of the Commonwealth of Pennsylvania impliedly recognize this natural right and corresponding duty by providing for remedies to ensure the welfare of children whose parents fail to provide reasonable medical care necessary for the child's health.

Although the Commonwealth failed to elaborate, ample authority exists for its proposition. A parent is charged with the duty of care and control, subsistence and education necessary for the child's physical, mental and emotional health and morals. *See* 42 Pa.C.S. Sec. 6302 (defining "dependent child"). At the very least, he or she must act to avert the child's untimely death. *See* *Commonwealth v. Breth*, 44 Pa.C. 56 (Clearfield Co. 1915); *Commonwealth v. Hoffman*, 29 Pa.C. 65 (Blair Co. 1903) (parent found guilty of involuntary manslaughter for failure to seek medical assistance for sick child); *see also* *Commonwealth v. Howard*, 265 Pa.Super. 535, 538, 402 A.2d 674, 676 (1979) ("A parent has the legal duty to protect her child, and the discharge of this duty requires affirmative performance."). "The inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself, supports imposition 19*19 of such a duty upon the parent." *Commonwealth v. Konz*, 498 Pa. 639, 644, 450 A.2d 638, 641 (1982) (explaining *Breth* and *Hoffman*).

Appellants' vagueness challenge rests ultimately on the procedural due process requirement of notice. Due process requires a minimum degree of definiteness in the statutory prescription of standards, language which conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-232, 71 S.Ct. 703, 707-708, 95 L.Ed. 886 (1951). Appellants were charged with consciously disregarding "a substantial and unjustifiable risk that death would result after observing the presence and continuous growth of a tumor in the stomach of Justin Barnhart which caused a continuous weight loss and which ultimately resulted in Justin Barnhart's death by starvation." At the coroner's inquest, appellant William G. Barnhart testified that he and his wife were aware of his son's condition: "Well we realized he was going downhill and in his body — our little neighbor boy, Scotty Gates, died with leukemia and Justin seemed like he fell that same rut in that short time and it took a lot of faith to keep looking up." William G. Barnhart's inquest testimony would indicate appellants knew Justin's death was imminent. Little remains, therefore, of appellants' "no-notice" claim.[4]

20*20 What does remain is troublesome. Our decision today directly penalizes appellants' exercise of their religious beliefs. Appellants ask how we can hold them criminally liable for putting their faith in God. No easy answer attends. A central tenet of appellants' faith is that life rests ultimately in God's hands. Three generations of appellants' family have adhered to that belief.[5] As Pastor Charles Wallace Nixon explained, more than concern for the child's physical well-being, the church's "greater concern" was for the child's spiritual interest or eternal interest:

Well, the only greater concern would have been his spiritual interest or eternal interest.

It has been stated by our presiding elder, by Pastor Reinert, he said, "that the courts and people would not possibly as a whole accept a statement like that, but it has been said that that is an abuse or child abuse or in other words harmful to the child." We would consider ***21** going to a doctor and trusting in medicine doing greater harm because it would be harmful as we believe in our belief, it would be harming the spiritual and eternal interest of the child and the parents as well in doing so.

Accepting as true these statements of appellants' religious beliefs, the question becomes one of degree: to what extent may a parent impose these beliefs on a minor child?

Appellants' right to hold and to practice their religious beliefs free from governmental interference is guaranteed by the free exercise clause of the First Amendment of the United States Constitution, as applied to the states by the

Fourteenth Amendment, and by Article I, Section 3 of the Pennsylvania Constitution. Appellants' right to raise their child by these beliefs follows from the guarantee of religious freedom and the state's traditional deference to the parents' authority over their child. *See* *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (unless the child's life is immediately imperiled, the state's interest must give way to the parent's religious beliefs precluding medical treatment); *see also* *Bellotti v. Baird*, 443 U.S. 622, 639 n. 18, 99 S.Ct. 3035, 3046 n. 18, 61 L.Ed.2d 797 (1979) (suggesting there exists a constitutional parental right against undue, adverse interference by the state). Appellants' exercise of these rights has brought them in conflict with other established law. An examination of the bases of these rights makes clear that the conflict was all but inevitable.

The guarantee of freedom of religion is intended to secure the rights of the individual as against the state. Underlying the guarantee is a principle of neutrality, a belief that religion is "not within the cognizance of civil government." *Reynolds v. United States*, 8 Otto 145, 163, 98 U.S. 145, 163, 25 L.Ed. 244 (1878). However nice the distinction in theory, as the case at bar attests it sometimes fails in practice.

Assertion of a claim of religious right does not vouchsafe the parents secure from state influence in every aspect of their children's lives. As the United States Supreme ***22** Court in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), explained:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the society can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death.

Id. at 166-167, 64 S.Ct. at 442 (citations omitted). For its last proposition, the Court cites the case of *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903).

The question whether a parent may be held criminally liable when the exercise of his or her religion results in the child's death is one of first impression for our appellate courts. The court in *Green*, concluding that the child's life was not in immediate physical peril, did not reach that question. 448 Pa. at 345, 292 A.2d at 392.[6] Neither this Court nor our Supreme Court have addressed the issue on the merits. *See* *Commonwealth v. Konz*, 498 Pa. at 644, ***23** 450 A.2d at 641 (dicta); *Commonwealth v. Comber*, 170 Pa.Super. 466, 469, 87 A.2d 90, 93 (1952) (dicta), rev'd on other grounds, 374 Pa. 570, 97 A.2d 343 (1953). Of the pair of lower court cases which have grappled with the issue, one attempted to dissolve the dilemma, *Commonwealth v. Breth*, 44 Pa.C. 56 (Clearfield Co. 1915), while the other rode roughshod through it, *Commonwealth v. Hoffman*, 29 Pa.C. 65 (Butler Co. 1903).

In *Hoffman*, a child died of scarlet fever after his father called in the elders of a Christian Scientist Church rather than a physician who was near and available. Framing the issue as a question of reasonableness, the court asked the jury to determine whether an ordinarily prudent man would have relied on these remedies alone. The court answered defendant's claim of religious right with its own reading of the scriptures:

And we may well believe that the demands of ordinary prudence do not run counter to divine authority, for the same inspired writer, whose injunctions the defendant has sought so literally and conscientiously to observe, informs us that "as the body, without the spirit, is dead, so faith without works is dead also." *Id.* at 69. In the case at bar, appellant testified that: "In my belief I know no other way but the way I pointed out to live and if I would go to a doctor I would be turning my back on my faith." The First Amendment precludes scrutiny of the verity or validity of religious beliefs. *See*

United States v. Ballard, 322 U.S. 78 (1944). Adoption of the *Hoffman* approach would entail our pitting one set of beliefs against another. Such a course would clearly violate the spirit of neutrality. We decline, therefore, to follow the *Hoffman* approach.

The *Breth* decision presents its own set of problems. There a father failed, apparently for religious reasons, to furnish medical attendance and proper medicines for his critically ill son. The child died. The parent was prosecuted for manslaughter. The trial court charged the jury:

***24** It would not be a lawful excuse for the non-performance of this duty that he entertained some religious or conscientious belief that it was unnecessary or that he had no intent to do anything which would interfere with the recovery of the child nor that he was honestly mistaken as to the efficacy of the means which he did use. As a citizen of this commonwealth and the parent of this dependent child, the law of Pennsylvania, so long as he remains within its borders, puts upon him the duty of doing those things for its protection which the ordinary judgment of prudent men at the time and place would dictate, and his failure so to do would be negligence, and if the circumstances indicated that the child's condition required great care, his failure to provide the means ordinarily used by prudent men and at his disposal would be gross or culpable negligence. 44 Pa.C. at 66. So doing, the court focused on the parent's civil duty to the exclusion of any religious concerns.

The court in *Breth* simply assumed that civil law took precedence over religious convictions. As the United States Supreme Court decision in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), makes clear, that assumption does not always hold. The civil law may, at times, give way to religious beliefs. At issue in *Yoder* was a claim by members of the Old Order Amish religion and the Conservative Amish Mennonite Church that application to them of a state compulsory school-attendance law violated their rights under the free exercise clause. In sustaining the Amish claim, Mr. Chief Justice Burger for the majority reasoned that the state's interest in universal compulsory education was outweighed by the harm enforcement of the law would cause the Amish in the free exercise of their religion:

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable. For the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform ***25** acts undeniably at odds with fundamental tenets of their religious beliefs. 406 U.S. at 218, 92 S.Ct. at 1534 (citations omitted). The *Yoder* Court rejected the argument that the state as *parens patriae* has the power to extend the benefit of secondary education to children regardless of their parents' wishes. *Id.* at 229, 92 S.Ct. at 1540. The majority rested safe in its assurance that no harm to the child or to the public safety, peace, order, or welfare could be demonstrated or properly inferred. *Id.* at 230, 92 S.Ct. at 1540.

Mr. Justice Douglas, dissenting in part, argues that the case necessarily involved not only the free exercise claims of the parents but also those of the high-school-age children:

These children are "persons" within the meaning of the Bill of Rights. We have held so over and over again. In *Haley v. Ohio*, 332 U.S. 596, [68 S.Ct. 302, 92 L.Ed. 224] we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault*, 387 U.S. 1, 13, [87 S.Ct. 1428, 1436, 18 L.Ed.2d 527] we held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship*, 397 U.S. 358, [90 S.Ct. 1068, 25 L.Ed.2d 368] we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards. . . .

Id. at 243, 92 S.Ct. at 1547 (citations corrected). Chief among these safeguards for Douglas was the child's right to be heard.

Although his life hung in the balance, Justin Barnhart here had no voice in his parents' decision to rely on religious rather than medical help. Precisely because a child of two years and seven months cannot speak on his own behalf, the state has charged the parents with the affirmative duty of providing medical care to protect that child's life. Faced with a condition which threatened their child's life, the parents had no choice but to seek medical help.

***26** We recognize that our decision today directly penalizes appellants in the practice of their religion. We emphasize that the liability attaches not to

appellants' decisions for themselves but rather to their decision effectively to forfeit their child's life. *Accord* *Prince v. Massachusetts*, 321 U.S. at 170, 64 S.Ct. at 444 ("Parents 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 (the children) have reached the age of full and legal discretion when they can make that choice for themselves."). Admittedly, the distinction is not a happy one. An integral part of family life is the transmission of values from one generation to the next. In the case at bar, the values include a set of religious beliefs. Sitting as a court of law, we abjure even the suggestion that, by our decision today, we are passing on the content of those beliefs.

* * *

***36** Judgment of sentence as modified affirmed.

[1] 18 Pa.C.S.Sec. 2504.
[2] 18 Pa.C.S.Sec. 4304.
[3] Appellants direct their challenge toward the child welfare statute, 18 Pa.C.S.Sec. 4304. A proven violation of Section 4304 would establish the "unlawful act" necessary under Section 2504, the involuntary manslaughter statute. 18 Pa.C.S.Sec. 2504.
[4] Further, as our Supreme Court has explained, it must be borne in mind that we are dealing with a juvenile statute:
The purpose of juvenile statutes, as the one at issue here, is basically protective in nature. Consequently, these statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be circumscribed, these statutes are necessarily drawn broadly. It clearly would be impossible to enumerate every particular type of adult contact against which society wants its children protected. We have therefore sanctioned statutes pertaining to juveniles which proscribe conduct producing or tending to produce a certain result . . . rather than itemizing every undesirable type of conduct.
* * * * * *
The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.
Commonwealth v. Mack, 467 Pa. 613, 617-618, 359 A.2d 770, 772 (1976) (upholding, as against a "vagueness" challenge, Section 4304, Endangering Welfare of Children) (citations omitted).
[5] Appellant William G. Barnhart testified that he, his four sisters and one brother had been born at home without medical care.
Both his mother and his father had belonged to the Faith Tabernacle Congregation. Appellant's father had come into the church when he (the father) was severely ill. On repenting of his sins and being anointed, the father recovered from his illness and returned to work in the mines. Appellant testified that his father had lived to be in his sixties.
Because of his religious beliefs, appellant served without pay in World War II. He received an honorable discharge.
Appellant has visited a doctor only for employment physicals. His children have never received medical treatment.
Appellant has two children by his current marriage and two by a former marriage. The children of the first marriage, now full-grown, are both practicing members of the Faith Tabernacle Church. Appellant testified that his son by the first marriage:
Bill, when he was about five years old, had a severe sick spell, lost all his hair, his eyebrows. I don't know what the disease was. He was practically yellow. We had him anointed and it was — I don't know if it was overnight or the next day he started to recover and he received all his hair back, his color and that is him sitting there now.
The son Bill testified at trial.
[6] *Green* involved a suit for judicial declaration that the minor was a "neglected child" under 11 P.S.Sec. 243. The statute defined "neglected child" as "a child whose parent . . . neglects or refuses to provide proper or necessary . . . medical or surgical care." Section 243 was repealed in 1972. The current statute is silent on this point.
[7] Although appellants filed a boilerplate post-verdict motion challenging the weight of the evidence, the motion pre-dated this Court's decision in *Commonwealth v. Holmes*, 315 Pa.Super. 256, 461 A.2d 1268 (1983). We deem the issue preserved for review. *See* Pa.R. Crim.P., Rule 1123(a), 42 Pa.C.S.A.

*874 Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore.Rev.Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812, as modified by the State Board of Pharmacy. Ore.Rev.Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see, § 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant Lophophora williamsii Lemaire. Ore.Admin.Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment.

*875 On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim-since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and Thomas v. Review Bd., Indiana Employment Security Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. Smith v. Employment Div., Dept. of Human Resources, 301 Or. 209, 217-219, 721 P.2d 445, 449-450 (1986). We granted certiorari. 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." Employment Div., Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660, 670, 108 S.Ct. 1444, 1450, 99 L.Ed.2d 753 (1988) (Smith I). We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." Id., at 673, 108 S.Ct., at 1452. Accordingly, we *876 vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. Id., at 674, 108 S.Ct., at 1452.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell

within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari. 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

II

Respondents' claim for relief rests on our decisions in Sherbert v. Verner, supra, Thomas v. Review Bd. of Indiana Employment Security Div., supra, and Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in Smith I, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 485 U.S., at 672, 108 S.Ct., at 1451. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into *877 the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... " U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." Sherbert v. Verner, supra, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, see Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, United States v. Ballard, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, see McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); cf. Larson v. Valente, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445 452, 89 S.Ct. 601, 604-608, 21 L.Ed.2d 658 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119, 73 S.Ct. 143, 143-56, 97 L.Ed. 120 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388, 49 L.Ed.2d 151 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used *878 for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that

requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom ... of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. Compare Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S.Ct. 927, 931-32, 22 L.Ed.2d 148 (1969) (upholding application of antitrust laws to press), with Grosjean v. American Press Co., 297 U.S. 233, 250-251, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369-70, 75 L.Ed.2d 295 (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs ***879** excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this 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." Id., at 166-167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." United States v. Lee, 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1058, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment); see Minersville School Dist. Bd. of Ed. v. Gobitis, supra, 310 U.S., at 595, 60 S.Ct., at 1013 (collecting cases). In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), we held that a mother could be prosecuted under the child labor laws ***880** for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." Id., at 171, 64 S.Ct., at 444. In Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v. United States, 401 U.S. 437, 461, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was United States v. Lee, 455 U.S., at 258-261, 102 S.Ct., at 1055-1057. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no

way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." Id., at 260, 102 S.Ct., at 1056-57. Cf. Hernandez v. Commissioner, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

***881** The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see Cantwell v. Connecticut, 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). FN1 ***882** Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

FN1. Both lines of cases have specifically adverted to the non-free-exercise principle involved. Cantwell, for example, observed that "[t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." 310 U.S., at 307, 60 S.Ct., at 905. Murdock said:

"We do not mean to say that religious groups and the press are free from all financial burdens of government.... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.... Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." 319 U.S., at 112, 63 S.Ct., at 874.

Yoder said that "the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S., at 233, 92 S.Ct., at 1542.

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the

convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Gillette v. United States, supra, 401 U.S., at 461, 91 S.Ct., at 842.

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Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

It is so ordered.

HCA, Inc. v. Miller, 36 S.W.3d 187 (Tex.App.–Houston [14 Dist.] 2000), aff'd by 118 S.W.3d 758 (Tex. 2003).

MAJORITY OPINION

HCA, Inc., HCA–Hospital Corporation of America, Hospital Corporation of America, and Columbia/HCA Healthcare Corporation (collectively, "HCA") appeal a judgment entered in favor of Sidney Ainsley Miller ("Sidney"),FN1 by and through her next friend, Karla H. Miller, and Karla H. Miller ("Karla") and J. Mark Miller ("Mark"), individually (collectively, the "Millers"). Among other things, HCA contends that a health care provider is not liable in tort for administering urgently needed life-sustaining medical treatment to a newborn infant contrary to the pre-birth instructions of her parents not to do so. After a lengthy struggle with the difficult issues presented, we conclude that HCA is not liable under the facts of this case, reverse the judgment of the trial court, and render a take-nothing judgment.

FN1. Although the jury charge submitted liability and damage questions in favor of only Karla and Mark, individually, and not on behalf of Sidney, the trial court's judgment awards damages to the "plaintiffs," which includes Sidney. However, because HCA's issue based on lack of duty is not limited to the claims of Karla and Mark, individually, and because our sustaining of that issue negates HCA's liability to Sidney as well as to Karla and Mark, the discrepancy between the jury charge and judgment does not affect our disposition of the case.

Background

Although the tragic circumstances of this case are far more numerous, those pertinent to this appeal can be summarized ***190** as follows. Early on August 17, 1990, Karla was admitted to Woman's Hospital of Texas (the "hospital") with symptoms of premature labor. An ultrasound revealed that her fetus, weighing approximately 629 grams, had an estimated gestational age of 23 weeks. In addition, Karla was feared to have an infection that could endanger her life. Dr. Jacobs, Karla's attending obstetrician, and Dr. Kelley, a neonatologist, informed the Millers that if the baby were born alive and survived, she would suffer severe impairments.FN2 Accordingly, the Millers orally requested that no heroic measures be performed on the baby after her birth.FN3 Dr. Kelley recorded the Millers' oral request in the medical records, and Dr. Jacobs informed the nursing staff that no neonatologist would be needed at delivery.

FN2. Mark testified that medical personnel at the hospital indicated to him that they had never had such a premature child live and that anything they did to sustain life on such an infant would be

guesswork on their part. They further told him that every year for the past five years, the weights of children being born successfully had gotten lower, but they were still learning.

FN3. Dr. Jacobs testified that abortion was not an option for Karla because of her infection. As contrasted from a birth, an abortion is a procedure that is generally fatal to an infant. See tex. Fam.Code Ann. §§ 161.006(b) (Vernon 1996) (defining abortion as being for the purpose of causing the death of the fetus), 33.001(1) (Vernon Supp.2000) (defining abortion as being reasonably likely to cause such death); tex. Health & Safety Code Ann. §§ 170.001(1) (Vernon Supp.2000) (defining abortion as being other than to increase the probability of a live birth), 245.002(1) (defining abortion as being other than for the purpose of a live birth) (Vernon 1992).

However, after further consultation, Dr. Jacobs concluded that if the Millers' baby was born alive and weighed over 500 grams, the medical staff would be obligated by law and hospital policy to administer life-sustaining procedures even if the Millers did not consent to it. Dr. Jacobs explained this to Mark who verbally reiterated his and Karla's desire that their baby not be resuscitated.

Sidney was born late that night. The attending neonatologist, Dr. Otero, determined that Sidney was viable and instituted resuscitative measures. Although Sidney survived, she suffers, as had been anticipated, from severe physical and mental impairments and will never be able to care for herself.

The Millers filed this lawsuit against HCA,FN4 asserting: (1) vicarious liability for the actions of the hospital in: (a) treating Sidney without consent; and (b) having a policy which mandated the resuscitation of newborn infants weighing over 500 grams even in the absence of parental consent; and (2) direct liability for failing to have policies to prevent such treatment without consent. Based on the jury's findings of liability FN5 and damages, the trial court entered ***191** judgment in favor of the Millers in the amount of $29,400,000 in past and future medical expenses, $13,500,000 in punitive damages, and $17,503,066 in prejudgment interest.

FN4. The Millers also sued the hospital, which was a subsidiary of HCA, Inc. in 1990. However, the trial court decided to try the claims against HCA prior to, and separately from those against the hospital. Accordingly, the hospital was not a party at trial and is not a party to this appeal. Although HCA challenges the trial court's decision to try the claims against the hospital separately from those against HCA, our sustaining of HCA's issue regarding lack of tort duty makes it unnecessary for us to address that challenge.

FN5. Liability was predicated on the jury's findings that: (1) the hospital performed resuscitative treatment on Sidney without Karla's or Mark's consent; and (2) the (unspecified) negligence of both the hospital and Columbia/HCA Healthcare Corporation proximately caused the occurrence in question. According to the Millers' brief, this negligence consisted of: (a) failing to have a policy that precluded treatment on a patient without consent; and (b) formulating and implementing a policy that required treatment without consent.
Although the Millers' did not sue any of the individual doctors involved, their assertion of liability against HCA was based in part on: (1) an alleged agency relationship between the hospital and Dr. Otero, the neonatologist who resuscitated Sidney; and (2) alter ego and single business enterprise theories whereby HCA was found liable for the acts of the hospital and, thus, Dr. Otero with whom the hospital was found to have an agency relationship. Although HCA challenges the sufficiency of the evidence to establish the agency, alter ego, and single business enterprise theories, our sustaining of HCA's issue regarding lack of tort duty makes our addressing that challenge unnecessary as well.

In addition, although the Millers contend that the resuscitation performed on Sidney itself contributed to her impairment, they do not assert that the liability imposed against HCA was predicated on negligence in the manner that the resuscitation was performed but only in that it was performed at all, i.e., without their consent and against their instructions. This is consistent with the fact that although the jury charge based HCA's liability, in part, on an agency relationship between the hospital and Dr. Otero, no question was submitted as to any negligence by Dr. Otero (or any other doctor).

. . . . .

On the one hand, Texas law expressly gives parents a right to consent to their children's medical care. See tex. Fam.Code Ann. § 151.003(a)(6) (Vernon

1996) (former version at tex. Fam.Code Ann. § 12.04(6)).FN6 Thus, unless a child's need for life-sustaining medical treatment is too urgent for consent to be obtained from a parent or other person with legal authority (the "emergency exception"), a doctor's treatment of the child without such consent is actionable even if the condition requiring treatment would eventually be life-threatening and the treatment is otherwise provided without negligence. See Moss v. Rishworth, 222 S.W. 225, 226–27 (Tex. Comm'n App.1920, holding approved).FN7 Obviously, the logical corollary of a right of consent is a right not to consent, i.e., to refuse medical treatment. See Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 270, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).FN8 In addition, in ***192** Texas, the Advance Directives Act,FN9 formerly the Natural Death Act FN10 (collectively, the "Act"), allows parents to withhold or withdraw life-sustaining medical treatment from their child where the child's condition has been certified in writing by a physician to be terminal, i.e., incurable or irreversible, and such that even providing life-sustaining treatment will only temporarily postpone death. See tex. Health & Safety Code Ann. §§ 166.002(13), 166.031, 166.035 (Vernon Supp.2000) (former versions at tex. Health & Safety Code Ann. §§ 672.002, 672.003, 672.010).FN11

FN6. The liberty interest of parents in the care, custody, and control of their children is also a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, e.g., Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). The Due Process Clause does not permit a State to infringe on this fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made. See id. at 2064.

FN7. See also Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (noting that because every adult of sound mind has a right to determine what will be done with his body, a surgeon who performs an operation without a patient's consent is liable for assault); Gravis v. Physicians & Surgeons Hosp., 427 S.W.2d 310, 311 (Tex.1968) ("In the absence of exceptional circumstances, ... a surgeon is subject to liability for assault and battery where he operates without the consent of the patient or the person legally authorized to give such consent.")

FN8. Depending on the circumstances, a parent's refusal of non-urgently needed or non-life-sustaining medical treatment for their child might legitimately be based, for example, on a desire to seek additional medical opinions on the treatment options or to select a different health care provider to administer the treatment.

FN9. See tex. Health & Safety Code Ann. §§ 166.001–.166 (Vernon Supp.2000).

FN10. The provisions of the Natural Death Act, in effect at the time of Sidney's birth, have since been amended and recodified in the Advance Directives Act. See Act of June 14, 1989, 71st Leg., R.S., ch. 678, § 1, 1989 Tex. Gen. Laws 2982 (formerly tex. Health & Safety Code Ann. §§ 672.001–.021), amended & renumbered by Act of June 18, 1999, 76th Leg., R.S., ch. 450, §§ 1.02–.03, 1999 Tex. Gen. Laws 2836 (current version at tex. Health & Safety Code Ann. §§ 166.001.166 (Vernon Supp.2000)). However, the differences between these statutes are not material to the disposition of this appeal because it is not argued that the conditions for withholding or withdrawing medical treatment were satisfied in this case under either version, either at the time the Millers requested no resuscitation for Sidney, the time of her birth, or thereafter. Nor is it contended that the conditions that would have permitted the hospital to withhold treatment from Sidney under applicable federal regulations were met in this case, i.e., that: (1) she was chronically and irreversibly comatose, (2) the provision of treatment would not have merely prolonged her dying, or (3) the provision of treatment would not have been effective in ameliorating or correcting all of Sydney's life threatening conditions. See 42 U.S.C. § 5106g(6) (Supp.2000).

FN11. Although Texas does so by way of the Act, states are not required to authorize anyone besides the individual patient to exercise that patient's right to refuse life-sustaining medical treatment. See Cruzan, 497 U.S. at 286–87, 110 S.Ct. 2841. The choice between life and death is obviously a deeply personal decision of overwhelming finality. See id. at 281, 110 S.Ct. 2841. Sustaining life maintains the status quo (albeit sometimes at tremendous financial and emotional cost). See id. at 283, 110 S.Ct. 2841. It keeps open the option to act on a

change of heart, subsequent advancements in medical treatment, or natural improvement in a patient's medical condition. A decision to withhold life-sustaining medical treatment ends life permanently and irrevocably. The decision whether to do so in a particular case can obviously differ among those who are similarly afflicted, but the decision an infant might have made for herself about consenting to medical treatment under the circumstances cannot be known by others.

On the other hand, parents have a legal duty to provide needed medical care to their children. See tex. Fam.Code Ann. § 151.003(a)(3) (Vernon 1996) (former version at tex. Fam.Code Ann. § 12.04(3)). Thus, the failure of a parent to provide such care is a criminal offense when it causes injury or impairment to the child.FN12

FN12. See tex. Pen.Code Ann. § 22.04(a), (b)(1) (Vernon Supp.2000); Ahearn v. State, 588 S.W.2d 327, 336–37 (Tex.Crim.App.1979); Ronk v. State, 544 S.W.2d 123, 124–25 (Tex.Crim.App.1976); Fuentes v. State, 880 S.W.2d 857, 860-61 (Tex.App.—Amarillo 1994, pet. ref'd).

The third competing legal and policy interest is that of the state, acting as parens patriae, to guard the well-being of minors, even where doing so requires limiting the freedom and authority of parents over their children. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944); see also Bowen v. American Hosp. Ass'n, 476 U.S. 610, 627 & n. 13, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986). In addition, the state's authority over children's activities is broader than over like actions of adults. See Prince, 321 U.S. at 168, 64 S.Ct. 438. In other words, parents are not free to make all decisions for their children that they are free to make for themselves. See id., at 170, 64 S.Ct. 438. Thus, for example, in Texas, the rights and duties of a parent are subject to a court order affecting those rights and duties,FN13 including an ***193** order granting a governmental entity temporary conservatorship of a child with authority to consent to medical treatment refused by the child's parents.FN14 See tex. Fam.Code Ann. §§ 102.003(a)(5), 105.001(a)(1), 262.201(c) (Vernon 1996 & Supp.2000) (former versions at tex. Fam.Code Ann. §§ 11.03(a)(5), 11.11(a)(1), 17.04(c)); O.G. v. Baum, 790 S.W.2d 839, 840–42 (Tex.App.—Houston [1st Dist.] 1990, orig. proceeding). Notably, however, it is not the health care provider who has the right or obligation to seek such court intervention, but the appropriate governmental agency, which the provider must notify in order for intervention to be sought pursuant to the State's interest in protecting the child. See, e.g., In re Dubreuil, 629 So.2d 819, 823–24 (Fla.1994). Therefore, until ordered to do otherwise by a court of competent jurisdiction, a health care provider's obligation is generally to comply with a patient's (or parent's) refusal of medical treatment. See id. at 823.

FN13. See tex. Fam.Code Ann. § 151.003(d)(1) (Vernon 1996) (former version at tex. Fam.Code Ann. § 12.04).

FN14. Compare O.G. v. Baum, 790 S.W.2d 839, 840–41 (Tex.App.—Houston [1st Dist.] 1990, orig. proceeding) (affirming appointment of child protective services as temporary custodian of minor after parents refused to consent on religious grounds to blood transfusion necessary for surgery to save arm); Mitchell v. Davis, 205 S.W.2d 812, 813–15 (Tex.Civ.App.—Dallas 1947, writ ref'd) (affirming award of custody of child to child welfare authorities when parent refused on religious grounds to take child to hospital for diagnosis of illness); In re Cabrera, 381 Pa.Super. 100, 552 A.2d 1114, 1120 (1989) (affirming appointment of hospital as guardian to consent to blood transfusion for child with sickle-cell anemia and high probability of recurrent strokes, with fatal complications, after parents refused to consent on religious grounds); Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053, 1066 (1978) (affirming appointment of guardian ad litem for child with leukemia to be treated with chemotherapy over parents' objections on finding that there was substantial chance of recovery with treatment, but certain death without treatment); and In re McCauley, 409 Mass. 134, 565 N.E.2d 411, 413–14 (1991) (affirming authorization to hospital to provide medical treatment to child because the best interests of the child and the interest of the state in protecting children's welfare, preserving life, and maintaining the ethical integrity of the medical profession outweighed the parents' parental and religious rights); with Newmark v. Williams, 588 A.2d 1108, 1118 (Del.1991) (denying state's petition for custody of child with advanced and aggressive form of cancer where the proposed chemotherapy would be highly invasive and painful, involve terrible temporary and permanent

side effects, and pose an unacceptably low chance of success and a high risk of itself causing death); and In re Phillip B., 92 Cal.App.3d 796, 156 Cal.Rptr. 48, 52 (1979) (dismissing state's petition that a child with Down's Syndrome be declared a dependent of the court for purpose of allowing surgery for congenital heart defect because evidence in support of the petition was "inconclusive").

But does a parent have a right to deny urgently needed life-sustaining medical treatment to their child, i.e., to decide, in effect, to let their child die? In Texas, the Legislature has expressly given parents a right to withhold medical treatment, urgently needed or not, for a child whose medical condition is certifiably terminal,FN15 but it has not extended that right to the parents of children with non-terminal impairments, deformities, or disabilities, regardless of their severity.FN16 In addition, although the Act expressly states that it does not impair or supersede any legal right a person may have to withhold or withdraw life-sustaining treatment in a ***194** lawful manner,FN17 the parties have not cited and we have found no other statutory or common law authority allowing urgently needed life-sustaining medical treatment to be withheld from a non-terminally ill child by a parent.FN18 To infer that parents have a general common law right to withhold such treatment from a non-terminally ill child would, in effect, mean that the Legislature has afforded greater protection to children who are terminally ill than to those who are not. FN19 On the contrary, if anything, the state's interest in preserving life is greatest when life can be preserved and then weakens as the prognosis dims. See Cruzan, 497 U.S. at 270–71, 110 S.Ct. 2841.

FN15. See tex. Health & Safety Code Ann. §§ 166.002(13), 166 .031, 166.035 (Vernon Supp.2000).

FN16. Compare tex. Health & Safety Code Ann. § 170.002(a), (b) (Vernon Supp.2000) (allowing abortion of a viable unborn child during the third trimester of pregnancy where the fetus is diagnosed with severe and irreversible abnormality). Although a doctor who performs an abortion on a viable fetus in the third trimester must certify in writing the medical indications supporting his judgment that the abortion was authorized, the statute does not specify what types of abnormalities would be sufficient to comply with the statute. See id. § 170.002(c). As noted previously, abortion was not an option in this case due to Karla's infection. See supra, note 3.

FN17. See id. § 166.051 (formerly § 672.021).

FN18. In the absence of any other authority allowing treatment to be withheld or withdrawn for another person, we interpret section 166.051 to refer to a competent adult's common law right to refuse medical treatment for himself.

FN19. Indeed, there would seem to be little reason for a parent to comply with the Act's procedures to certify that a terminally ill child is terminally ill if no such impediments applied to withholding treatment from a child who was not terminally ill or had not been certified as such.

More importantly, to infer that parents have a common law right to withhold urgently needed life-sustaining treatment from non-terminally ill children would pose imponderable legal and policy issues. For example, if parents had such a right, would it apply to otherwise healthy, normal children or only to those with some degree of abnormality? If the latter, which circumstances would qualify, which would not, and how could any such distinctions be justified legally? See, e.g., Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex.1984) (recognizing the impossibility of making any calculation of the relative benefits of an impaired life versus no life at all). In light of the high value our law places on preserving human life, and especially on protecting the life and well-being of minors, we perceive no legal basis or other rationale for concluding that Texas law gives parents a common law right to withhold urgently needed life-sustaining medical treatment from children in circumstances in which the Act does not apply.FN20 Moreover, in Texas, a child born alive after a premature birth (or abortion) is entitled to the same rights as are granted by the State to any other child born alive after normal gestation. See tex. Fam.Code Ann. § 151.004 (Vernon 1996) (former version at tex. Fam.Code Ann. § 12.05(a)).

FN20. In Stolle, the Stolles issued a written directive not to apply life-sustaining procedures to their brain-damaged child if her condition became terminal and such procedures would only artificially prolong the moment of her death. See Stolle v.

Baylor College of Med., 981 S.W.2d 709, 711 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). When the child ceased breathing after regurgitating food, a nurse administered chest compressions which ended the episode, and the child remained alive thereafter. See id. Suing only in their own behalf, the Stolles alleged that the defendants' disregard of their instructions resulted in further brain damage to their child, prolonged the child's life, and caused them extraordinary costs for the life of the child. See id. at 710. In affirming the trial court's summary judgment in favor of the health care providers, the First Court of Appeals reasoned that if the baby had been terminal, the defendants would have been immune from liability under the Natural Death Act, whereas if she was not terminal, she would not have satisfied the conditions for issuing a directive under that Act in the first place. See id. at 713. Implicit in the latter proposition is that if the child was not terminal, and thereby subject to the Natural Death Act, the parents had no right to withhold urgently needed life-sustaining medical treatment from her.

Having recognized, as a general rule, that parents have no right to refuse urgently-needed life-sustaining medical treatment to their non-terminally ill children, a compelling argument can be made to carve out an exception for infants born so prematurely and in such poor condition that sustaining their life, even if medically possible, cannot be justified. To whatever extent such an approach would be preferable from a policy standpoint to having no *195 such exception, and to whatever extent such an approach is available to the Legislature or a higher court, we do not believe it is an alternative available to this court because: (1) a sufficient record does not exist in this case to identify where to "draw the line" for such an exception; and, more importantly, (2) it is not within the province of an intermediate appellate court to, in effect, legislate in that manner.

Mitchell v. Davis, 205 S.W.2d 812 (Tex.Civ.App.—Dallas 1947).

The suit involves appellant minor under Art. 2330 et seq., Vernon's Ann.Civ.St. (laws relating to dependent and neglected children), and, upon jury answer to special issue, the court found appellant to be a neglected child, awarding custody to Sam Davis, Chief, Juvenile Officer of Dallas County, in order that said child, age twelve, 'may receive proper medical care, education and maintenance * * * subject to the further orders of this court.' Upon application, the judgment was superseded and appeal prosecuted by the minor through next friend.

Pertinent allegations of appellees' petition were 'that the father, William Aaron Mitchell, is deceased; that the mother, Mittie Lee Mitchell, neglects the child and refuses to provide medical treatment for him when he is seriously ill; that the child has been ill since Fall, 1946 and his life is now in danger.' The issue, answered affirmatively, was: 'Do you find from a preponderance of the evidence that the minor child, Leroy Mitchell, is a neglected child as that term is herein defined to you?'; the following instruction being given in such connection: 'The term 'dependent or neglected child' as used in this charge, means a child who has not peoper parental care or guardianship. The term 'proper parental care or guardianship' as used in this charge, means such care as an ordinarily prudent parent would exercise over the child for its physical welfare, under the same or similar circumstances.'

Points of appeal, thirteen in all, complain in substance of (1) insufficient pleading to state any offense under above statute and a like insufficiency of evidence to warrant any change of custody; (2) error of court in failing to proceed under Art. 2338–1 (Juvenile Delinquency Act) instead of Art. 2330 et seq., as stated; (3) further error in defining the phrase 'dependent or neglected' in the disjunctive; (4) challenging, in effect, authority of the juvenile officers to maintain the instant proceedings in view of specified laws, both State and Federal; (5) appellant's right of religious worship was thereby infringed.

It may first be pointed out that the action alleged by appellee is predicated upon dependency or neglect articles of the statute, to which the Child Delinquency Act (Art. 2338–1) has no application; distinction between the two procedures having been heretofore clearly demonstrated by the courts. See

Oldfield v. Lester, 144 Tex. 112, 188 S.W.2d 982; Nelson v. Clifton, Tex.Civ.App., 202 S.W.2d 471, 473.

The words 'dependent or neglected child,' under Art. 2330, include 'any child under sixteen years of age * * * who has not proper parental care or guardianship * * *'; appellant through several points arguing that a failure on part of the mother to provide him with medical treatment when seriously ill, was insufficient to raise the issue of improper parental care within meaning of the statute. Contrary to the contention made, appellees' petition is seen to disclose a statutory cause of action. Medicines, medical treatment and attention, are in a like category with food, *814 clothing, lodging and education as necessaries from parent to child, for which the former is held legally responsible. 23 Tex.Jur. 719; and proof that the parent is failing to provide any of these legal necessities to minor constituents of the family would, in our opinion, sustain a charge of parental neglect. 'It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent.' 39 Am.Jur., sec. 46, p. 666.

In the court's charge the words 'dependent or neglected child' were properly given their statutory meaning, the term 'proper parental care or guardianship' being in turn correctly defined. 39 Am.Jur. 780. Also properly left for determination by the jury was the fact question of neglect relative to appellant. 'Whether a child is a neglected child under the law is a fact question. 43 C.J.S., Infants, § 98. page 230. The court having submitted such question to the jury under appropriate instructions and the jury having found that the children were neglected children, such finding being supported by ample evidence, is binding upon this court.' Nelson v. Clifton, supra. Likewise we must overrule the several points charging that appellees' petition is insufficient even under Art. 2330. These allegations, though short, were to the effect that the parent was failing and refusing to provide medical treatment for the child in its serious and continuing illness. 'The Commission of Appeals has held that pleadings are of little importance in a child custody hearing and tht the trial court's efforts to exercise broad, equitable powers in determining what will be best for the future welfare of the children should be unhampered by narrow technical rules. Williams v. Perry, Tex.Com.App., 58 S.W.2d 31; Tunnell v. Reeves, Tex.Com.App., 35 S.W.2d 707.' Sawyer v. Bezner, Tex.Civ.App., 204 S.W.2d 19, 21. 'Any pleading which shows upon its face that the welfare of a minor child requires that an order be made in regard to his custody is sufficient.' Kell v. Texas Children's Home & Aid Soc., Tex.Civ.App., 191 S.W.2d 900; see also Nelson v. Clifton, supra.

But appellant further contends that any charge of parental neglect is refuted by the overwhelming weight of the testimony, and the fact record is extensively appealed to in support. Of course, in passing upon sufficiency of evidence to sustain a jury verdict, an appellate court must view all evidence in a light most favorable to the findings made. There was evidence that Leroy was a normally alert and energetic boy before August 1946, when he grew ill, progressively becoming worse; right knee swelling, face pale, moving about with difficulty and using crutches. During first six weeks of fall term, he attended school about one-half the time; second six weeks, about one-sixth time and last six weeks, not at all. Prior to suit he was observed to move about with much pain; appearance in courtroom contrasting greatly with that previous to illness, according to Mrs. Albrech, school nurse. She stated that he had lost considerable weight, was thinner, paler, eyes red-rimmed, knee greatly swollen, as was ankle; not appearing alert, energetic or interested. Such was the report of this witness from several visits up to December 1946. Dr. Bumpass, family physician, was called to the Mitchell home on February 3d (after filing of suit); testifying that Leroy was probably suffering from arthritis or complications following rheumatic fever; no positive diagnosis being obtainable without complete clinical tests and medical observation; the mother being then advised to secure the services of an orthopedist. Mrs. Mitchell refused to further consult a regular physician, though frequently urged to do so, continuing to rely on home remedies and prayer. During the trial she refused to permit a commitment of the boy to a hospital where he could receive diagnosis and treatment by the family physician free of charge. Prior to trial, the mother took appellant to a chiropractor and an osteopath who were unable to positively diagnose his condition

(except that X-rays indicated a calcium deficiency), and who failed to recommend or suggest a cure or course of treatment. In this connection, *815 an excerpt from the testimony of Mrs. Albrech, school nurse who called at the home on November 26, 1946, is somewhat revealing: 'Q. Did you have any further conversation with Mrs. Mitchell at that time with reference to medical treatment? A. Yes, sir. I asked her if she had consulted a doctor on this particular case and she said she hadn't and furthermore she didn't think it was necessary so long as she was praying for him, that this condition had persisted since school opened. She told me it started last summer before school started and at times it was far worse and I should have seen him sometimes when he was in far worse condition than that; that sometimes he couldn't get our of bed and they prayed and when she and the child prayed he had strength to get up and go and sometimes he would be out playing and come in crying, in the mother's words, 'with tears streaming down his face,' and asking her to pray and do something for him and at one time she was sewing at the sewing machine and he sank to the floor and begged her to do something and she got down on her knees by the side of the child and prayed.'

Mrs. Mitchell, mother, on the other hand stoutly denied any charge of child neglect, it being evident that her rejection of orthodox medical treatment and adherence to home remedies and prayer, was because of religious belief in the fact of Divine Healing and her absolute faith in the power of religion to overcome all physical ailments and disease.

The legal point of interference with the freedom of religious worship is thus raised. Says the United States Supreme Court, in Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244: 'Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.' It is well settled that 'Opposition to medical treatment because of religious belief does not constitute a defense to a prosecution for breach of a statutory duty to furnish a child with such treatment. Conscientious obedience to what the individual may consider a higher power or authority must yield to the law of the land where duties of this character are involved, and since a wicked intent is not an essential element of the crime, peculiarities of belief as to the proper form of treatment, however honestly entertained, are not necessarily a lawful excuse.' 39 Am.Jur. sec. 115, p. 781.

The case narrows, therefore, to the fact question of neglect, answered by the jury adversely to appellant's claim and the evidence offered in support. We have given due consideration to the argument made of the mother's natural and constitutional right to appellant's care and custody. While a considerable amount of discretion is vested in a parent charged with the duty of maintaining and bringing up her children, the right of appellant and his mother here to live their own lives in their own way is not absolute. 'While ordinarily the natural parents are entitled to the custody and care of their child, this is not an absolute unconditional right. The State has such an interest in the welfare of its citizens as will authorize the enactment of suitable legislation by which the State may assume the custody of children and the parents may be deprived of the custody thereof where the parents abandon the children or neglect them in such manner as to cause them to become a public charge, or where the parents otherwise prove to be unsuitable.' (Citing authorities.) Dewitt v. Brooks, 143 Tex. 122, 182 S.W.2d 687, 690.

Onerous as this order of custody may appear to the parties herein complaining, its entry was solely in the interest of appellant. It is not irrevocable, yielding always to changed conditions. The medical treatment outlined and recommended by the mother's own physician, followed by a reasonable cooperation on her part with juvenile authorities in the matter of appellant's physical welfare, will doubtless conclude this unhappy incident and result in his restoration to the usual routine of family life. But as the record now stands, the order of custody must be affirmed.

O. G., P.G. and M.G. v. Baum, 790 S.W.2d 839 (Tex.App.—Houston [1st Dist] 1990, no writ).

Excerpts from Case

***840** Relators seek relief from the respondent's order appointing the real party in interest, Harris County Child Protective Services ("CPS"), as temporary managing conservator of the minor relator, a 16–year–old male Jehovah's Witness, which includes the authority to consent to a blood transfusion for the minor. The other relators are the minor's parents.

The record reflects that the minor was struck by a train and severely injured. He will undergo surgery in an attempt to save his right arm. In the trial court, the minor's doctor provided a sworn statement that says

Child needs surgery—If pt undergoes attempt to save right arm, he will definitely need transfusion—If, on the other hand, pt undergoes amputation of right upper extremity he may or may not need transfusion"

Blood transfusions are prohibited by relators' religious beliefs.

The minor signed a form in which he refused to consent to a transfusion and released his physician and the hospital "from all liability or responsibility to me for following my request." CPS filed suit under Tex.Fam.Code Ann. § 11.03(a)(5) & (6) (Vernon Supp.1990) and under chapter 17 of the Family Code seeking its appointment as temporary managing conservator of the minor. The sole ground that CPS alleged was the parents' refusal to allow physicians to administer a transfusion during the minor's upcoming surgery, if necessary. The respondent conducted a hearing and heard the testimony of CPS' caseworker and the minor's father, who stated that the minor understood that the minor's refusal of a transfusion could be fatal. The respondent then entered an order appointing CPS as temporary managing conservator and setting a show cause hearing for May 7, 1990.

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Relators claim that the respondent clearly abused his discretion because the order appointing CPS as the minor's temporary managing conservator deprives relators of their authority to refuse a blood transfusion for the minor. This deprivation, they contend, constitutes an impairment of their right to freely exercise their religion and their right to privacy in contravention of the United States and Texas Constitutions and the Texas common law.

The Parents' Rights

The parents' first and fourteenth amendment guarantee of religious freedom does not include the liberty to expose their child to ill health or death. In ***841** Prince v. Massachusetts, 321 U.S. 158, 166–67, 64 S.Ct. 438, 442–43, 88 L.Ed. 645 (1944), the custodian of a nine-year-old girl was convicted of violating a state child labor law. The custodian had encouraged the child to sell Bible tracts on the public streets. The custodian challenged the constitutionality of the statutes and argued that the child was exercising the child's right to "preach the gospel" under the first and fourteenth amendments. Id. at 164, 64 S.Ct. at 441. The custodian further asserted that the statute violated the custodian's "parental rights" in violation of the due process clause of the fourteenth amendment. Id. In affirming the custodian's conviction, the court noted that

the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.... The right to practice religion freely does not include liberty to expose ... the child ... to ill health or death.

321 U.S. at 166–67, 64 S.Ct. at 442–43 (emphasis added) (citations omitted).

Subsequently, other federal courts addressed the issue of whether parents have constitutional rights to refuse blood transfusions for their minor children when a court appoints a guardian with the authority to consent to a transfusion over the parents' objections. In Jehovah's Witnesses v. King County Hospital, 278 F.Supp. 488 (W.D.Wash.1967), aff'd, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968) a special three-judge district court confronted the issue of the constitutionality of a state statute under which the trial court had entered an order that declared the child in question a ward of the court and authorized the attending physician to administer blood transfusions. The parents contended that the

statutes, as applied, facilitated 1) state impairment of their religious freedom, contrary to the first and fourteenth amendments, and 2) state impairment of their parental rights as guaranteed by the due process clause of the fourteenth amendment. Id. at 504. Relying on the reasoning in Prince, the court held that the statutes were not unconstitutional as applied. Id. at 505. In a one-sentence per curiam opinion, the United States Supreme Court affirmed, citing Prince, 390 U.S. at 598, 88 S.Ct. 1260. In Staelens v. Yake, 432 F.Supp. 834, 839 (N.D.Ill.1977), the trial court dismissed the parents' complaint alleging violation of their civil rights arising from an order appointing, over the parents' religious objections, a guardian to consent to the administration of blood transfusions for their minor son. The court held that the complaint failed to state a cause of action for the deprivation of the parents' constitutional rights under 42 U.S.C. § 1983. Thus, federal authority has refused to recognize parental constitutional rights to refuse blood transfusions for their minor children when a court appoints a guardian with the authority to consent to a transfusion over the parents' objections.

Relators cite no authority holding to the contrary. Thus, relators' have shown no infringement of the parents' right to freely exercise their religion in violation of the first and fourteenth amendments to the United States Constitution.

***842** We overrule the motion for leave to file the petition for writ of mandamus.

People v. Pierson, 68 N.E. 243 (N.Y. App. Div. 1903).

*****244*** The indictment accused the defendant of the crime of violating section 288 of the Penal Code in that he 'did willfully, maliciously, and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there willfully, maliciously, and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regularly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided.'

The facts disclosed upon the trial are without substantial dispute, and are in substance as follows: The defendant and his wife lived at Valhalla, near White Plains, N. Y., with an infant girl, 16 1/2 months old, whom they had adopted. In January, 1901, the child contracted whooping cough, which continued to afflict her until about the 20th day of February, at which time catarrhal pneumonia developed, resulting in death on the 23d of February, 1901. The defendant testified that for about 48 hours before the child died he observed that her symptoms were of a dangerous character, and yet he did not send for or call a physician to treat her, although he was able financially to do so. His reason for not calling a physician was that he believed in Divine healing, which could be accomplished by prayer. He stated that he belonged to the Christian Catholic Church of Chicago; that he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease.

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****245** We are thus brought to a consideration of what is meant by the term 'medical attendance.' Does it mean a regularly licensed physician, or may some other person render 'medical attendance?' The foundation of medical science was laid my Hippocrates, in Greece, 500 years before the Christian era. His discoveries, experiences, and observations were further developed and taught in the schools of Alexandria and Salerno, and have come down to us through all the intervening centuries, yet medicine, as a science, made but little advance in northern Europe for many years thereafter-practically none until the dawn of the eighteenth century. After the adoption of Christianity by Rome, and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the church,

and are to-day looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the Church, held at the beginning of the thirteenth century, physicians were forbidden, under pain of expulsion from the church, to undertake medical treatment without calling in a priest: and as late as 250 years thereafter Pope Pius V renewed the command of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine power, continued throughout Christian Europe during the entire period of the Middle Ages, and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I, and Charles I, all possessed the power to cure epilepsy, scrofula, and other diseases known as the 'king's evil'; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this miraculous gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.

With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery, which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics in drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and such it has come to be recognized in the law of our land. By the middle of the eighteenth century the custom of calling upon practitioners of medicine in case of serious illness had become quite general in England, France, and Germany, and, indeed, to a considerable extent, throughout Europe and in this country. From that time on, the practice among the people of engaging physicians has continued to increase, until it has come to be regarded as a duty devolving upon persons having the care of others to call upon medical assistance in case of serious illness. Schouler, in his work on Domestic Relations, at page 318, speaking upon the ***246** subject of parental duty in the maintenance of children, says: 'It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents, and this precept have all nations enforced.' And again, at page 548, speaking upon the subject of what constitutes necessary maintenance, he says: 'Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessaries.' In England the first statute upon the subject to which our attention has been called, was that of 31 & 32 Vict. c. 122, § 37, which made it the duty of persons having the care of infants to provide them with 'medical aid.' This statute was amended in 1894 by 57 & 58 Vict. c. 41, so as to read substantially the same as section 289 of our Penal Code, to which we have referred. Our own statute upon the subject was adopted as part of the Penal Code, chapter 676, p. 70, of the Laws of 1881, containing the section under which the defendant is indicted.

Formerly no license or certificate was required of a person who undertook the practice of medicine. A certificate or diploma of an incorporated medical college was looked upon by the public as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of several statutes upon the subject. The first statute to which we call attention is chapter 513, p. 723, of the Laws of 1880, in which every person, before commencing to practice physic and surgery, is required to procure himself to be registered in the office of the clerk of the county where he intends to practice, giving the authority under which he claims the right to engage in the profession, either by diploma or license, and making a violation of the provisions of the act a misdemeanor. Although this statute was an amendment of chapter 746, p. 1793, of the Laws of 1872, it is the first statute that we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical

college conferring upon him the degree of doctor of medicine, or a certificate from the constituted authorities giving him the right to practice. This was followed by the Laws of 1887, p. 853, c. 647, entitled, 'An act to regulate the licensing and registration of physicians and surgeons, and to codify the medical laws of the state of New York,' which has been further amended and carried into the public health law of 1893, pp. 1541-1547, §§ 143-153, inclusive, in which there is an absolute prohibition to practice physics unless the person be a regularly licensed physician in accordance with the provisions of the act.

It will be observed that the provision of the Penal Code under consideration was first adopted in 1881, following the statute of 1880 prohibiting the practice of medicine by other than physicians duly qualified in accordance with the provisions of the act. This, we think, is significant. The Legislature first limits the right to practice medicine to those who have been licensed and registered, or have received a diploma from some incorporated college, conferring upon them the degree of doctor of medicine; and then the following year it enacts the provision of the Penal Code under consideration, in which it requires the procurement of medical attendance under the circumstances to which we have called attention. We think, therefore, that the medical attendance required by the Code is the authorized medical attendance prescribed by the statute; and this view is strengthened from the fact that the third subdivision of this section of the Code requires nurses to report certain conditions of infants under two weeks of age 'to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for,' thus particularly specifying the kind of practitioner recognized by the statute as a medical attendant.

The remaining question which we deem it necessary to consider is the claim that the provisions of the Code are violative of the provisions of Const. art. 1, § 3, which provides that 'the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.' The peace and safety of the state involve the protection of the lives and health of its children, as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guarantied, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy, and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children, when born into the world, are utterly helpless, having neither the power to care for, protect, or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of ***247** caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong, which the state, under its police powers, may prevent. The Legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. While it has no power to deprive persons of life, liberty, or property without due process of law, it may, in case of the commission of acts which are public wrongs or which are destructive of private rights, specify that for which the punishment shall be death, imprisonment, or the forfeiture of property. Barker v. People, 3 Cow. 686-704, 15 Am. Dec. 322; Lawton v. Steele, 119 N. Y. 226-236, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; Thurlow v. Massachusetts, 5 How. 504-583, 12 L. Ed. 256.

We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but the agent of the Almighty through which He accomplishes results; and that

both science and Divine power may be invoked together to restore diseased and suffering humanity. But sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs, and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the Legislature. We have considered the legal proposition raised by the record, and have found no error on the part of the trial court that called for a reversal. The other questions in the case involve questions of fact which are not brought up for review, and consequently are not before us for consideration.

The order of the Appellate Division reversing the judgment of conviction should be reversed, and the judgment of conviction of the trial court affirmed.

Prince v. Massachusetts, 321 U.S. 158 (1944).

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. This time Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

When the offenses were committed she was the aunt and custodian of Betty M. Simmons, a girl nine years of age. Originally there were three separate complaints. They ***160** were, shortly, for (1) refusal to disclose Betty's identity and age to a public officer whose duty was to enforce the statutes; (2) furnishing her with magazines, knowing she was to sell them unlawfully, that is, on the street; and (3) as Betty's custodian, permitting her to work contrary to law. The complaints were made, respectively, pursuant to Sections 79, 80 and 81 of Chapter 149, Gen.Laws of Mass. (Ter.Ed.). The Supreme Judicial Court reversed the conviction under the first complaint on state grounds;FN1 but sustained the judgments founded on the other two. FN2 313 Mass. 223, 46 N.E.2d 755. They present the only questions for our decision. These are whether Sections 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

FN1 The court found there was no evidence that appellant was asked Betty's age. It then held that conviction for refusal to disclose the child's name, based on the charge under Section 79, would violate Article 12 of the Declaration of Rights of the Commonwealth, which provides in part: 'No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself.'

FN2 Appellant received moderate fines on each complaint, first in the District Court of Brockton, then on pleas of not guilty by trial de novo without a jury in the Superior Court for Plymouth County. Motions to dismiss and quash the complaints, for directed findings, and for rulings, were made seasonably and denied by the Superior Court.

Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law. FN3 They provide methods for enforcing the prohibitions of Section 69, which is as follows:

FN3 Mass.Gen. Laws, Ter.Ed., c. 149, as amended by Acts and Resolves of 1939, c. 461.

'No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any ***161** description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.'

Section 80 and 81, so far as pertinent, read:

'Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the

enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.' (Section 80)

'Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, * * * shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; * * *.' (Section 81)

The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute 'Watchtower' and 'Consolation,' according to the usual plan.FN4 She had permitted the children to ***162** engage in this activity previously, and had been warned against doing so by the school attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

FN4 Cf. the facts as set forth in Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 82; Busey v. District of Columbia, 75 U.S.App.D.C. 352, 129 F.2d 24. A common feature is that specified small sums are generally asked and received but the publications may be had without the payment if so desired.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children 'to engage in the preaching work with her upon the sidewalks.' That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passersby to see, copies of 'Watch Tower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation 5¢ per copy.' No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

Mrs. Prince and Betty remained until 8:45 p.m. A few minutes before this Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warnings and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, '(N)either you nor anybody else can stop me * * *. This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands.' However, Mrs. Prince and Betty departed. She remarked as she went, 'I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed.' It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was excluded,***163** to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'

As the case reaches us, the questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' within Section 69FN5 or was 'work' within Section 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law.FN6 The only question remaining therefore is whether, as construed and applied, the statute is valid. Upon this the court said: 'We think that freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen and in the further statutory provisions herein considered, which have been adopted as a means of enforcing ***164** that prohibition.' 313 Mass. 223, 229, 46 N.E.2d 755, 758.

FN5 In this respect the Massachusetts decision is contrary to the trend in other states. Compare State

v. Mead, 230 Iowa 1217, 300 N.W. 523; State v. Meredith, 197 S.C. 351, 15 S.E.2d 678; State ex rel. Semansky v. Stark, 196 La. 307, 199 So. 129; City of Shreveport v. Teague, 200 La. 679, 8 So.2d 640; People v. Barber, 289 N.Y. 378, 46 N.E.2d 329; Thomas v. City of Atlanta, 59 Ga.App. 520, 1 S.E.2d 598; City of Cincinnati v. Mosier, 61 Ohio App. 81, 22 N.E.2d 418. Contra: McSparran v. City of Portland (Circuit Court, Multnomah County, Oregon, June 8, 1942), appeal dismissed, 169 Or. 377, 129 P.2d 65, certiorari denied, 318 U.S. 768, 63 S.Ct. 759.

FN6 The court's opinion said: 'The judge could find that if a passerby should hand over five cents in accordance with the sign on the bag and should receive a magazine in return, a sale would be effected. The judge was not required to accept the defendant's characterization of that transaction as a 'contribution.' He could believe that selling the literature played a more prominent part in the enterprise than giving it way. He could find that the defendant furnished the magazines to Betty, knowing that the latter intended to sell them, if she could, in violation of section 69. * * * The judge could find that the defendant permitted Betty to 'work' in violation of section 81. * * * (W)e cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature.' 313 Mass. 223, 227, 228, 46 N.E.2d 755, 757.

Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done.FN7 Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.FN8 Cf. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is 'to preach the gospel * * * by public distribution' of 'Watchtower' and 'Consolation,' in conformity with the scripture: 'A little child shall lead them.'

FN7 Appellant's brief says: 'The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children.' And at the argument counsel stated the prohibition would be valid as against a claim of freedom of the press as a nonreligious activity.

FN8 The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter.

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and ***165** functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here

in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in ***166** West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178. Previously in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance,FN9 regulating or prohibiting the child's labor,FN10 and in many other ways. FN11 Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.FN12 The right to practice religion freely does not include liberty to expose the community or the child ***167** to communicable disease or the latter to ill health or death. People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am.St.Rep. 666.FN13 The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

FN9 State v. Bailey, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435; compare Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178.

FN10 Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 34 S.Ct. 60, 58 L.Ed. 245, L.R.A.1915A, 1196; compare Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957.

FN11 Cf. People v. Ewer, 141 N.Y. 129, 36 N.E. 4, 25 L.R.A. 794, 38 Am.St.Rep. 788.

FN12 Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765.

FN13 See also State v. Chenoweth, 163 Ind. 94, 71 N.E. 197; Owens v. State, 6 Okl.Cr. 110, 116 P. 345, 36 L.R.A.,N.S., 633, Ann.Cas.1913B, 1218.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger, cf. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of

validity. Cf. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155. And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. Young v. California, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Nichols v. Massachusetts, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 82; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313.FN14 ***168** But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a 'sale' or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

FN14 Pertinent also are the decisions involving license features: Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423.

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and an matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment,FN15 more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.FN16 It is too late now to doubt ***169** that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.

FN15 See, e.g., Volumes 1-4, 6-8, 14, 18, Report on Condition of Woman and Child Wage Earners in the United States, Sen. Doc. No. 645, 61st Cong., 2d Sess.; The Working Children of Boston, U.S. Dept. of Labor, Children's Bureau Publication No. 89 (1922); Fuller, The Meaning of Child Labor (1922); Fuller and Strong, Child Labor in Massachusetts (1926).

FN16 See, e.g., Clopper, Child Labor in City Streets (1912); Children in Street Work, U.S. Dept. of Labor, Children's Bureau Publication No. 183 (1928); Children Engaged in Newspaper and Magazine Selling and Delivering, U.S. Dept. of Labor, Children's Bureau Publication No. 227 (1935).

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses.FN17 But, for obvious reasons, notwithstanding appellant's contrary view,FN18 the validity of such a prohibition applied to children not accompanied by an older person hardly would seem open to question. The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations ***170** difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful

possibilities could be stated, of emotional excitement and psychological or physical injury. Parents 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. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. 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.

FN17 Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396; Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031.

FN18 Although the argument points to the guardian's presence as showing the child's activities here were not harmful, it is nowhere conceded in the briefs that the statute could be applied, consistently with the guaranty of religious freedom, if the facts had been altered only by the guardian's absence.

In so ruling we dispose also of appellant's argument founded upon denial of equal protection. It falls with that based on denial of religious freedom, since in this instance the one is but another phrasing of the other. Shortly, the contention is that the street, for Jehovah's Witnesses and their children, is their church, since their conviction makes it so; and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The argument hardly needs more than statement, after what has been said, to refute it. However Jehovah's Witnesses may conceive them, the public highways have not become their religious property ***171** merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do.

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

The judgment is affirmed.

Affirmed.

Quilloin v. Walcott, 434 U.S. 246 (1978).

***255** We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 **U. S.** 205, 231-233 (1972); *Stanley* v. *Illinois, supra*; *Meyer* v. *Nebraska*, 262 **U. S.** 390, 399-401 (1923). "It is cardinal with **us** that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 **U. S.** 158, 166 (1944). And it is now firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur*, 414 **U. S.** 632, 639-640 (1974).

Reynolds v. U.S., 98 U.S. 145 (1878).

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The assignments of error, when grouped, present the following questions:--

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?

These questions will be considered in their order.

* * * *

5. As to the defence of religious belief or duty.

***161** On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.' He also proved 'that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church.'

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he 'was married as ***162** charged-if he was married-in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty." This request was refused, and the court did charge 'that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,-under an inspiration, if you please, that it was right,-deliberately married a second time, having a first wife living, the want of consciousness of evil intent-the want of understanding on his part that he was committing a crime-did not excuse him; but the law inexorably in such case implies the criminal intent.'

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

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

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts

as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining ***163** heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States.' Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. ***164** 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three-New Hampshire, New York, and Virginia-included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id. 113), took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical ***165** courts, and until the time of James I., it was punished through

the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth.' 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of ***166** the people, to a greater or less extent, rests. Professor, Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. 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? 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?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? ***167** To permit this 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 only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary

and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

In Regina v. Wagstaff (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, 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. No case, we believe, can be found that has gone so far.

* * *

***168** Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

Judgment affirmed.

Sherbert v. Verner, 374 U.S. 398 (1963).

*399 Mr. Justice BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.FN1 When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work,FN2 she filed a claim for ***400** unemployment compensation benefits under the South Carolina Unemployment Compensation Act.FN3 That law provides that, to be eligible for benefits, a claimant must be 'able to work and * * * is available for work'; and, further,***401** that a claimant is ineligible for benefits '(i)f * * * he has failed, without good cause * * * to accept available suitable work when offered him by the employment office or the employer * * *.' The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered * * * by the employment office or the employer * * *.' The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment. The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute 'places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.' 240 U.S. 286, 303-304, 125 S.E.2d 737, 746.FN4 We noted probable ***402** jurisdiction of appellant's appeal.371 U.S. 938, 83 S.Ct. 321, 9 L.Ed.2d 273. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

FN1. Appellant became a member of the Seventh-day Adventist Church in 1957, at a time when her

employer, a textile-mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday, for all three shifts in the employer's mill. No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible.

FN2. After her discharge, appellant sought employment with three other mills in the Spartanburg area, but found no suitable five-day work available at any of the mills. In filing her claim with the Commission, she expressed a willingness to accept employment at other mills, or even in another industry, so long as Saturday work was not required. The record indicates that of the 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment.

FN3. The pertinent sections of the South Carolina Unemployment Compensation Act (S.C.Code, Tit. 68, ss 68-1 to 68-404) are as follows:'s 68-113. Conditions of eligibility for benefits.-An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that: * * *'(3) He is able to work and is available for work, but no claimant shall be considered available for work if engaged in self-employment of such nature as to return or promise remuneration in excess of the weekly benefit amounts he would have received if otherwise unemployed over such period of time. * * *'s 68-114. Disqualification for benefits.-Any insured worker shall be ineligible for benefits: * * *'(2) Discharge for misconduct.-If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request, and continuing not less than five nor more than the next twenty-two consecutive weeks (in addition to the waiting period), as determined by the Commission in each case according to the seriousness of the misconduct * * *'(3) Failure to accept work.-(a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, such ineligibility shall continue for a period of five weeks (the week in which such failure occurred and the next four weeks in addition to the waiting period) as determined by the Commission according to the circumstances in each case * * *.'(b) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence.'

FN4. It has been suggested that appellant is not within the class entitled to benefits under the South Carolina statute because her unemployment did not result from discharge or layoff due to lack of work. It is true that unavailability for work for some personal reasons not having to do with matters of conscience or religion has been held to be a basis of disqualification for benefits. See, e.g., Judson Mills v. South Carolina Unemployment Compensation Comm., 204 S.C. 37, 28 S.E.2d 535; Stone Mfg. Co. v. South Carolina Employment Security Comm., 219 S.C. 239, 64 S.E.2d 644. But appellant claims that the Free Exercise Clause prevents the State from basing the denial of benefits upon the 'personal reason' she gives for not working on Saturday. Where the consequence of disqualification so directly affects First Amendment rights, surely we should not conclude that every 'personal reason' is a basis for disqualification in the absence of explicit language to that effect in the statute or decisions of the South Carolina Supreme Court. Nothing we have found in the statute or in the cited decisions, cf. Lee v. Spartan Mills, 7 CCH Unemployment Ins.Rep.S.C. 8156 (C.P. 1944), and certainly nothing in the South Carolina Court's opinion in this case so construes the statute. Indeed, the contrary seems to have been that court's basic assumption, for if the eligibility provisions were thus limited, it would have been unnecessary for the court to have decided appellant's constitutional challenge to the application of the statute under the Free Exercise Clause. Likewise, the decision of the State Supreme Court does not rest upon a finding

that appellant was disqualified for benefits because she had been 'discharged for misconduct'-by reason of her Saturday absences-within the meaning of s 68-114(2). That ground was not adopted by the South Carolina Supreme Court, and the appellees do not urge in this Court that the disqualification rests upon that ground.

I.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213. Government may neither compel affirmation of a repugnant belief, Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828; nor employ the taxing power to inhibit the dissemination of particular religious views, Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; cf. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. On the other hand, ***403** the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12.

Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore. the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *.' NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405.

II.

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our ***404** inquiry.FN5 For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, 366 U.S., at 607, 81 S.Ct., at 1148. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

FN5. In a closely analogous context, this Court said:'* * * the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature.' American Communications Ass'n v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 686, 94 L.Ed. 925. Cf. Smith v. California, 361 U.S. 147, 153-155, 80 S.Ct. 215, 218-219, 4 L.Ed.2d 205.

Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.FN6 ***405** American Communications Ass'n v. Douds, 339 U.S. 382, 390, 70 S.Ct. 674, 679, 94 L.Ed. 925; Wieman v. Updegraff, 344 U.S. 183, 191-192, 73 S.Ct. 215, 218-219, 97 L.Ed. 216; Hannegan v. Esquire, Inc., 327 U.S. 146, 155-156, 66 S.Ct. 456, 461, 90 L.Ed. 586. For example, in Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435, the Court recognized with respect to Federal Social Security benefits that '(t)he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.' In Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.' ***406** 357 U.S., at 526, 78 S.Ct., at 1342. 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.' Id., 357 U.S., at 518, 78 S.Ct., at 1338. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

FN6. See for examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity, Steinberg v. United States, 163 F.Supp. 590, 143 Ct.Cl. 1; Syrek v. California Unemployment Ins. Board, 54 Cal.2d 519, 7 Cal.Rptr. 97, 354 P.2d 625; Fino v. Maryland Employment Security Board, 218 Md. 504, 147 A.2d 738; Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522; Housing Authority of Los Angeles v. Cordova, 130 Cal.App.2d Supp. 883, 279 P.2d 215; Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605; Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885; American Civil Liberties Union v. Board of Education, 55 Cal.2d 167, 10 Cal.Rptr. 647, 359 P.2d 45; cf. City of Baltimore v. A. S. Abell Co., 218 Md. 273, 145 A.2d 111. See also Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 Cornell L.Q. 12 (1955); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 942-943 (1963); 36 N.Y.U.L.Rev. 1052 (1961); 9 Kan.L.Rev. 346 (1961); Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595, 1599-1602 (1960).

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of 'national emergency' the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, 'no employee shall be required to work on Sunday * * * who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious * * * objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.' S.C.Code, s 64-4. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

III.

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area,

'(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation,' Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. ***407** No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148-a question as to which we intimate no view since it is not before us-it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. FN7 Cf. ***408** Shelton v. Tucker, 364 U.S. 479, 487-490, 81 S.Ct. 247, 251-253, 5 L.Ed.2d 231; Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559; Schneider v. State of New Jersey, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155; Martin v. Struthers, 319 U.S. 141, 144-149, 63 S.Ct. 862, 863-866, 87 L.Ed. 1313.

FN7. We note that before the instant decision, state supreme courts had, without exception, granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work. E.g., In re Miller, 243 N.C. 509, 91 S.E.2d 241; Swenson v. Michigan Employment Security Comm., 340 Mich. 430, 65 N.W.2d 709; Tary v. Board of Review, 161 Ohio St. 251, 119 N.E.2d 56. Cf. Kut v. Albers Super Markets, Inc., 146 Ohio St. 522, 66 N.E.2d 643, appeal dismissed sub nom. Kut v. Bureau of Unemployment Compensation, 329 U.S. 669, 67 S.Ct. 86, 91 L.Ed. 590. One author has observed, 'the law was settled that conscientious objections to work on the Sabbath made such work unsuitable and that such objectors were nevertheless available for work. * * * A contrary opinion would make the unemployment compensation law unconstitutional, as a violation of freedom of religion. Religious convictions, strongly held, are so impelling as to constitute good cause for refusal. Since availability refers to suitable work, religious observers were not unavailable because they excluded Sabbath work.' Altman, Availability for Work: A Study in Unemployment Compensation (1950), 187. See also Sanders, Disqualification for Unemployment Insurance, 8 Vand.L.Rev. 307, 327-328 (1955); 34 N.C.L.Rev. 591 (1956); cf. Freeman, Able To Work and Available for Work, 55 Yale L.J. 123, 131 (1945). Of the 47 States which have eligibility provisions similar to those of the South Carolina statute, only 28 appear to have given administrative rulings concerning the eligibility of persons whose religious convictions prevented them from accepting available work. Twenty-two of those States have held such persons entitled to benefits, although apparently only one such decision rests exclusively upon the federal constitutional ground which constitutes the basis of our decision. See 111 U. of Pa.L.Rev. 253, and n. 3 (1962); 34 N.C.L.Rev. 591, 602, n. 60 (1956).

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served 'to make the practice of (the Orthodox Jewish merchants') religious beliefs more expensive,' 366 U.S., at 605, 81 S.Ct., at 1147. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case-a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative ***409** problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme

unworkable.FN8 In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.FN9

FN8. See Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv.L.Rev. 729, 741-745 (1960).

FN9. These considerations also distinguish the quite different case of Flemming v. Nestor, supra, upon which appellees rely. In that case the Court found that the compelling federal interests which underlay the decision of Congress to impose such a disqualification justified whatever effect the denial of social security benefits may have had upon the disqualified class. See 363 U.S., at 612, 80 S.Ct., at 1373. And compare Torcaso v. Watkins, supra, in which an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public was held insufficient to justify the substantial infringement upon the religious freedom of applicants for that position which resulted from a required oath of belief of God. See 74 Harv.L.Rev. 611, 612-613 (1961); 109 U. of Pa.L.Rev. 611, 614-616 (1961).

IV.

In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. See School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part ***410** of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. See note 2, supra. Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' Everson v. Board of Education, 330 U.S. 1, 16, 67 S.Ct. 504, 512, 91 L.Ed. 711.

In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment.

The judgment of the South Carolina Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Troxel v. Granville, 530 U.S. 57 (2000).

*60 Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the

Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed ***61** the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith*, 137 Wash. 2d 1,6, 969 P. 2d 21, 23-24 (1998); *In re Troxel*, 87 Wash. App. 131, 133, 940 P. 2d 698, 698-699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash. App., at 133-134, 940 P. 2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash. 2d, at 6, 969 P. 2d, at 23; App. to Pet. for Cert. 76a—78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash. 2d, at 6, 969 P. 2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

"The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners ***62** can provide opportunities for the children in the areas of cousins and music.

". . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.*, at 60a—67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash. App., at 135, 940 P. 2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.*, at 138, 940 P. 2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. 137 Wash. 2d, at 12, 969 P. ***63** 2d, at 26-27. The Washington Supreme

Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.*, at 15-20, 969 P. 2d, at 28-30. Second, by allowing "`any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.*, at 20, 969 P. 2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision." *Ibid.*, 969 P. 2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.*, at 21, 969 P. 2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. *Id.*, at 23-43, 969 P. 2d, at 32-42.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and ***64** grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post*, at 89 (dissenting opinion). Rather, our terminology is intended to highlight the fact that these ***65** statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg*, 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720; see also *Reno* v. *Flores*, 507 U. S. 292, 301-302 (1993).

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary ***66** function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg*, *supra*, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

***67** Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time*," and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.* " § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e. g.*, 137 Wash. 2d, at 5, 969 P. 2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child,

without regard to changed circumstances, and without regard to harm"); *id.*, at 20, 969 P. 2d, at 30 ("[The statute] allow[s] `any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child").

***68** Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham:*

"[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the ***69** best decisions concerning the rearing of that parent's children. See, *e. g.*, *Flores*, 507 U. S., at 304.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

"The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, *[sic]* there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re Troxel*, No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.*, at 214.

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra*, at 602. In that respect, the court's presumption ***70** failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e. g.*, Cal. Fam. Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me. Rev. Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (court may award

grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43-1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable); Utah Code Ann. § 30-5—2(2)(e) (1998) (same); *Hoff* v. *Berg*, 595 N. W. 2d 285, 291-292 (N. D. 1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

***71** Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash. App., at 133-134, 940 P. 2d, at 699; Verbatim Report 216-221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e. g.*, Miss. Code Ann. § 93-16-3(2)(a) (1994) (court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R. I. Gen. Laws §§ 15-5— ***72** 24.3(a)(2)(iii)—(iv) (Supp. 1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the

Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220-221. As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right ***73** of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[*] See, *e. g., Fair- ***74** banks* v. *McCarter*, 330 Md. 39, 49-50, 622 A. 2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams* v. *Williams*, 256 Va. 19, 501 S. E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post,* at 82 (dissenting opinion). Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post,* at 102 (dissenting opinion). We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed ***75** entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra,* at 67.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post,* at 101. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

***207** Mr. Chief Justice BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.FN1 The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law,FN2 and they are conceded to be subject to the Wisconsin statute.

FN1. * * *

FN2. * * *

***208** On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each.FN3 Respondents defended on the ground that the application ***209** of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. FN4 The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

FN3. * * *

FN4. The First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..'

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish ***210** sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the Ordnung, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young

people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community. FN5

FN5. * * *

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach ***211** are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith-and may even be hostile to it-interposes a serious barrier to the integration of the Amish child into ***212** the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to wordly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as 'ideal' and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent ***213** record as law-abiding and generally self-sufficient members of society.

Although the trial court in its careful findings determined that the Wisconsin compulsory school-attendance law 'does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief' it also concluded that the requirement of high school attendance until age 16 was a 'reasonable and constitutional' exercise of governmental power, and therefore denied the motion to dismiss the charges. The Wisconsin Circuit Court affirmed the convictions. The Wisconsin Supreme Court, however, sustained

respondents' claim under the Free Exercise Clause of the First Amendment and reversed the convictions. A majority of the court was of the opinion that the State had failed to make an adequate showing that its interest in 'establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.' 49 Wis.2d 430, 447, 182 N.W.2d 539, 547 (1971).

I

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their off-spring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing ***214** and education of their children in their early and formative years have a high place in our society. See also Ginsberg v. New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); cf. Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare (them) for additional obligations.' 268 U.S., at 535, 45 S.Ct., at 573.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. ***215** Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). See also Everson v. Board of Education, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947).

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. E.g., Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); McGowan v. Maryland, 366 U.S. 420, 459, 81 S.Ct. 1101, 1122, 6 L.Ed.2d 393 (1961) (separate opinion of Frankfurter, J.); Prince v. Marssachusetts, 321 U.S. 158, 165, 64 S.Ct. 438, 441, 88 L.Ed. 645 (1944).

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forbears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life,

however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question,FN6 the very concept of ordered liberty precludes ***216** allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

FN6. See Welsh v. United States, 398 U.S. 333, 351-361, 90 S.Ct. 1792, 1802-1807, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result); United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world . . ..' This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant-perhaps some would say static-in a period of unparalleled progress in human knowledge generally and great changes in education. FN7 The respondents ***217** freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call 'life style' have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and 'worldly' influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

FN7. See generally R. Butts & L. Cremin, A History of Education in American Culture (1953); L. Cremin, The Transformation of the School (1961).

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict.FN8 ***218** The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith

community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

FN8. Hostetler, supra, n. 5, c. 9; Hostetler & Huntington, supra, n. 5.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See Braunfeld v. Brown, 366 U.S. 599, 605, 81 S.Ct. 1144, 1147, 6 L.Ed.2d 563 (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.FN9

FN9. Some States have developed working arrangements with the Amish regarding high school attendance. See n. 3, supra. However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, e.g., Everson v. Board of Education, 330 U.S. 1, 9-10, 67 S.Ct. 504, 508-509, 91 L.Ed. 711 (1947); Madison, Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).

***219** In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion-indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that ‘actions,’ even though religiously grounded, are outside the protection of the First Amendment. FN10 But our decisions have rejected the idea that ***220** religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, e.g., Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. E.g., Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). This case, therefore,

does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. Lemon v. Kurtzman, 403 U.S., at 612, 91 S.Ct., at 2111, 29 L.Ed.2d 745.

FN10. That has been the apparent ground for decision in several previous state cases rejecting claims for exemption similar to that here. See, e.g., State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), cert. denied, 389 U.S. 51, 88 S.Ct. 236, 19 L.Ed.2d 50 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa.Super. 462, 79 A.2d 134 (1951).

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. Sherbert v. Verner, supra; cf. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Court must not ignore the danger that an exception ***221** from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses

'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed.' Walz v. Tax Commission, supra, at 672, 90 S.Ct., at 1413.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. See, e.g., Sherbert v. Verner, supra; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

***222** However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. See Meyer v. Nebraska, 262 U.S., at 400, 43 S.Ct., at 627, 67 L.Ed. 1042.

The State attacks respondents' position as one fostering 'ignorance' from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself

recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.FN11

FN11. * * *

***223**

FN12. * * *

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is ***224** 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in 'ignorance.' To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal' vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the ***225** State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.FN13 When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ***226** ideal of a democratic society.FN14 Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

FN13. All of the children involved in this case are graduates of the eighth grade. In the county court, the defense introduced a study by Dr. Hostetler indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills. Supp.App. 9-11. See generally Hostetler & Huntington, supra, n. 5, at 88-96.

FN14. * * *

The requirement for compulsory education beyond the eighth grade is a relatively recent development

in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed.FN15 The independence***227** and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

FN15. * * *

We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts, and that the age limits of both laws have been coordinated to achieve their related objectives.FN16 In the context of this case, such considerations,***228** if anything, support rather than detract from respondents' position. The origins of the requirement for school attendance to age 16, an age falling after the completion of elementary school but before completion of high school, are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938.FN17 It is true, then, that the 16-year child labor age limit may to some degree derive from a contemporary impression that children should be in school until that age. But at the same time, it cannot be denied that, conversely, the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults.

FN16. * * *

FN17. * * *

The requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced idleness.FN18 The two kinds of statutes-compulsory school attendance and child labor laws-tend to keep children of certain ages off the labor market and in school; this regimen in turn provides opportunity to prepare for a livelihood of a higher order than that which children could pursue without education and protects their health in adolescence.

FN18. * * *

In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance ***229** for children generally. For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws.FN19 There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

FN19. * * *

IV

Finally, the State, on authority of Prince v. Massachusetts, argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as parens patriae to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in Prince, might be read to give support to the State's position. However, the Court was not confronted in Prince with a situation comparable to that of the Amish as revealed in this record; this is shown by the ***230** Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. 321 U.S., at 169-170, 64 S.Ct., at 443-444. The Court later took great care to confine Prince to a narrow scope in Sherbert v. Verner, when it stated:

'On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 . . ..' 374 U.S., at 402-403, 83 S.Ct., at 1793.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.FN20 The record is to the contrary, and any reliance on that theory would find no support in the evidence.

FN20. * * *

Contrary to the suggestion of the dissenting opinion of Mr. Justice DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it ***231** is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. FN21 The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents-that is, without regard to the wishes of the child. That is the claim we reject today.

FN21.* * *

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here ***232** and those presented in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). On this record we neither reach nor decide those issues.

The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parents' faith.

Indeed it seems clear that if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is

now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed:

'Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act ***233** of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S., at 534-535, 45 S.Ct., at 573.

The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. Pierce, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince ***234** if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the fact of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.FN22 Our disposition of this case, however, in no way ***235** alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.

FN22. * * *

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play

in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing ***236** showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Sherbert v. Verner, supra.

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.FN23

FN23. Several States have now adopted plans to accommodate, Amish religious beliefs through the establishment of an ‘Amish vocational school.’ See n. 3, supra. These are not schools in the traditional sense of the word. As previously noted, respondents attempted to reach a compromise with the State of Wisconsin patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation with the Amish in light of what we now hold, so as to serve its interests without impinging on respondents' protected free exercise of their religion.

Affirmed.