SNAKEHANDLING AND FREEDOM OF RELIGION

State ex rel. Swann v. Pack, 527 S.W.2d. 99 (Tenn. 1975)

Defendants belonged to a religious sect whose members handled poisonous snakes and drank poison "to confirm the Word of God."[1] The Circuit Court of Cocke County, Tennessee, issued a temporary injunction against handling poisonous snakes or using deadly poisons in the county.[2] After a hearing on stipulated facts,[3] the court found

1. State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 106 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976). Pastor Listor Pack and one of his Elders, Albert Ball, were charged with drinking a strychnine solution. Both were members of the Holiness Church of God in Jesus Name located in Newport, Tennessee. *Id.* This church is one of a group that originated in Sale Creek at Grasshopper Valley, Tennessee, near Chattanooga, Tennessee, in 1909. W. LA BARRE, THEY SHALL TAKE UP SERPENTS 11 (1962) [hereinafter cited as LA BARRE]. Its founder and prophet, George Went Hensley, was thirty years old when he interpreted as a command the Biblical statement:

> *They shall take up serpents; and if they drink any deadly thing it shall not harm them*; they shall lay hands on the sick and they shall recover.

Mark 16:17-18 (King James ed.) (emphasis added). *But see Ecclesiastes* 10:11 and 1 *Corinthians* 10:9 (containing language that argues against snakehandling). Hensley climbed to White Oak Mountain in Tennessee; found a large rattlesnake; tested this command; and, began his evangelical work. LA BARRE 11. Hensley developed a cult following, left Tennessee, and "kept the religion alive" in Kentucky. *Id.* at 15. In 1943, the Dolley Pond Church of God with Signs Following was established in Grasshopper Valley, Tennessee, the religion's place of origin. *Id.* As the mother church of the movement in the South, it has expanded throughout the South and Southeast. *Id.*

Members of this church handle snakes and use poison, not as an individual test of faith or proof of godliness, but solely to "confirm the Word of God" as commanded by the Bible. State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 106 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976). Only those who are "anointed" or "moved" by the "spirit" handle the snakes or drink the poison. *Id.* In a description of "anointment," Pastor Pack stated:

> When I become anointed to handle serpents, my hands get real numb. It is a tremendous feeling. Maybe symbolic to an electric shock, only an electric shock could hurt you. This'll be pure joy.
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> . . . .
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> It comes from inside . . . [*sic*] If you've got the Holy Ghost in you, it'll come out and nothing can hurt you. . . . You can have faith, but if you never feel the anointing, you had better leave the serpent alone.

R. PELTON & K. GARDEN, SNAKE HANDLERS 32 (1974), *quoted in* 527 S.W.2d at 106.

Members of the religion abstain from drinking alcohol, carbonated beverages, tea, and coffee, from smoking, dancing, and the use of cosmetics and medicine. State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 105 (Tenn. 1975). Most of the members are rural inhabitants, and attempts to take the practice to urban centers have failed. LA BARRE 33. *See generally* N. CALLAHAN, SMOKEY MOUNTAIN COUNTRY 91-95 (1952).

2. State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 103 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976). The District Attorney General of the Second Judicial Circuit filed a petition seeking an injunction against handling snakes and drinking poison.

a continuing violation of the Tennessee snakehandling statute,[4] and issued a permanent injunction against handling poisonous snakes,[5] but unaccountably failed to enjoin drinking poison by consenting adults.[6] The court of appeals found the injunction overbroad and modified it to prohibit snakehandling dangerous to persons not consenting to the danger.[7] The Tennessee supreme court reversed and *held*: Under the common law of nuisance, the State of Tennessee may enjoin snakehandling and drinking of deadly poisons as part of a religious ritual without infringing on the free exercise of religion.[8]

The first amendment guarantee of free exercise of religion[9] applies

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The trial court found the charges were true and thus that defendants had violated the Tennessee snakehandling statute, TENN. CODE ANN. § 39-2208 (1975), *quoted in* note 4 *infra*.

Although the court had statewide jurisdiction, the temporary injunction was limited to snakehandling in Cocke County. 527 S.W.2d at 103. Why the court chose to limit its order geographically to the county is unclear.

3. The court characterized the issues as "not fully developed" and the record as "meager." 527 S.W.2d at 105. What evidence there was, however, cast serious doubt on the potential health harms of continued use of snakes in defendants' religious services. It was stipulated that several witnesses would testify that parishioners were never in immediate danger. An anthropologist was prepared to testify that "she had never seen *anyone* endangered by handling snakes" and that "proper precautions were *always* taken." *Id.* at 104 (emphasis added). The church was a half mile from the nearest paved road at the end of a dead end dirt road. The only evidence of harm was that an "Indian boy," aged 30, had once been bitten; other than the state's allegation that "his arm became swollen," *id.* at 103, there was no evidence of the consequences of this single bite. *Id.* at 104.

4. TENN. CODE ANN. § 39-2208 (1975):

> *Handling snakes so as to endanger life—Penalty.*—It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.

5. 527 S.W.2d at 105. The trial court relied on the snakehandling statute to provide the standard for determining whether defendants' actions could be enjoined. *Id.* at 103. Again, unaccountably, the court limited its order to Cocke County. *Id.* at 105.

6. *Id.* at 104. This failure was evidently not a mere oversight; the trial court had explicitly included in its temporary order an exception for drinking strychnine. *Id.*

7. 527 S.W.2d at 102.

8. *Id.* at 113.

9. U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

The Constitution of the State of Tennessee has a comparable provision:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain a minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference

to the states through the fourteenth amendment.[10] The free exercise clause guarantees absolute protection to religious belief;[11] the freedom of speech clause protects public expression of religious beliefs absent a "clear and present danger" to the public welfare.[12] Other actions

shall ever be given, by law, to any religious establishment or mode of worship. TENN. CONST. art. 1, § 3 (1956).

10. The Supreme Court in Cantwell v. Connecticut, 310 U.S. 296 (1940), found that the fourteenth amendment prohibits the states from infringing upon the first amendment guarantee of freedom of religion. *Id.* at 304. *See also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court held that the first amendment's stricter standards determine when state action infringes upon a person's rights to free thought and free exercise of religion rather than the "old" fourteenth amendment equal protection test, which required only a rational basis between the remedy and the practice to be restricted. *Id.* at 639. A first amendment right could be restricted only "to prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* When a court considers regulation of civil rights, the usual presumption in favor of a statute's constitutionality, *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938), does not apply. Schneider v. State, 308 U.S. 147 (1939). Today, the first and fourteenth amendment tests for determining the constitutionality of a restriction on religion are similar since both require a compelling state interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (one year residency requirement for welfare payments unconstitutional); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (state cannot withhold unemployment compensation from Seventh Day Adventist for failure to work on Saturdays). *See* note 22 *infra*.

11. The first amendment right of freedom of religious belief absolutely prohibits the state from requiring or prohibiting any religious belief. Torcaso v. Watkins, 367 U.S. 488 (1961) (requirement of declaration of belief in God in order to hold state public office held unconstitutional); Reynolds v. United States, 98 U.S. 145 (1878) (Mormon belief in religious polygamy protected by the first amendment although the practice was not).

A "belief" is a state of mind. United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (freedom of belief considered "freedom of conscience" and freedom to choose any form of religion).

Actions taken to implement religious beliefs, however, receive far less protection. *See* notes 13-29 *infra* and accompanying text.

12. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940). *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943). In discussing the regulation of speech and press, Mr. Justice Holmes first formulated the clear and present danger doctrine:

> The question in every case is whether the words used are used in such circumstances and are of such nature as to create *a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added). Cantwell v. Connecticut, 310 U.S. 296 (1940), applied the clear and present danger test to expression of religious beliefs by a Jehovah's Witness, whose religion required such proselytizing:

> When *clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

310 U.S. at 308 (emphasis added).

implementing religious beliefs, however, receive less protection.[13]

In *Reynolds v. United States*,[14] the Supreme Court held that the free exercise clause does not protect religious action.[15] Therefore, Con-

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Although the *Pack* court relied on several first amendment cases to extract a "clear and present danger" test for religious action, 527 S.W.2d at 108-09, these cases rest more firmly on the first amendment right to free expression than on free exercise of religion. *See, e.g.*, Tucker v. Texas, 326 U.S. 517 (1946) (state statute banning door to door peddlers held unconstitutional as applied to Jehovah's Witnesses); West Virginia State Bd. of Educ. v. Barnette, *supra* (holding unconstitutional state statute requiring children to salute American flag); Cantwell v. Connecticut, *supra* (state statute prohibiting public solicitation for religious groups held unconstitutional).

See generally Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 (1950); Antieau, *Clear and Present Danger—Its Meaning and Significance*, 25 NOTRE DAME LAW. 603 (1950); Corwin, *Freedom of Speech and Press Under the First Amendment*, 30 YALE L.J. 48 (1920); Comment, *Constitutional Law—Religious Freedom—Constitutionality of State Statute Prohibiting Solicitation for Religious Causes Without Approval of Administrative Official*, 26 IOWA L. REV. 126 (1940); Comment, *Current Limitations on Governmental Invasion of First Amendment Freedoms*, 13 OHIO ST. L.J. 237 (1952).

13. The belief-action dichotomy was articulated even before adoption of the first amendment. In 1785, Thomas Jefferson defined religious freedom in the preamble of a bill establishing religious freedom in Virginia. *See* 12 Hening's Stat. 84, codified at VA. CODE ANN. § 57-1 (1950):

> [T]o 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 . . . . [I]t 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 . . . .

Numerous decisions involving state regulation of religious activity recognize this belief-action dichotomy. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 448 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, *cert. denied*, 264 Ala. 617, 88 So. 2d 887 (1956); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947). *See generally* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Fernandez, *The Free Exercise of Religion*, 36 So. CAL. L. REV. 546 (1963); Lake, *Freedom to Worship Curiously*, 1 U. FLA. L. REV. 203 (1948); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L. J. 1217.

14. 98 U.S. 145 (1878).

15. *Id.* at 163-64. The Court relied on the Virginia statute establishing religious freedom, *quoted in* note 13 *supra*, and an address by Thomas Jefferson in which he stated the rule that "the legislative powers of the Government reach actions only, not opinions." 98 U.S. at 164. Hence the dichotomy: Congress could in no way restrict

gress could prohibit actions "in violation of social duties or subversive of good order."[16] Subsequent cases followed this belief-action dichotomy and upheld state regulation of conduct threatening "public safety, peace or order"[17] without seriously considering infringement on religious freedom of action.[18]

In *Sherbert v. Verner*,[19] the Court adopted a balancing test which weighed the importance of the action to the religious beliefs against the state's interest in regulating the disputed religious conduct.[20]

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opinion, but retained the power to prohibit all action which the state police power reached.

16. *Id.* at 164. Defendant, a member of the Mormon Church, was charged with the offense of polygamy. Rejecting the argument that his religion required multiple marriages of members when possible, the Court held that although the defendant had a right to believe in polygamy, he did not have a right to practice it because polygamy violated a federal statute. *Id.* at 167.

The Court found ample grounds for Congress' concern with this social evil:

> 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 . . . . 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.

Id. at 164-66. Faced with such consequences, the Court thought the prohibition plainly within Congressional power: "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.* at 166.

17. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

18. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding blue laws against attack by Orthodox Jewish businessmen); Cleveland v. United States, 329 U.S. 14 (1946) (prohibition of Mormon polygamy); Prince v. Massachusetts, 321 U.S. 158 (1944) (prohibition of minors selling literature on city streets valid against Jehovah's Witnesses' children); Cox v. New Hampshire, 312 U.S. 569 (1941) (prohibition of unlicensed parades by Jehovah's Witnesses); Davis v. Beason, 133 U.S. 333 (1890) (prohibition of Mormon polygamy); McCartney v. Austin, 57 Misc. 2d 525, 293 N.Y.S.2d 188 (Sup. Ct. 1968) (compulsory vaccination statute for school children); Kraus v. Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955) (fluoridation of water).

19. 374 U.S. 398 (1963).

20. *Id.* at 402-09. In *Sherbert*, complainant, a member of the Seventh Day Adventist Church, was refused state unemployment compensation when she refused employment which required her to work on Saturdays, claiming that her religion prohibited this. *Id.* at 399, 401. The Court held that denying unemployment benefits violated her right to the free exercise of religion by forcing her to choose between religion and an income. *Id.* at 410. Recognizing that both direct and indirect burdens on free exercise of religion could be unconstitutional, *see* Braunfeld v. Brown, 366 U.S. 599, 607 (1961), the *Sherbert* Court applied a balancing test involving two determinations: first, does the regulation impose any burden on the free exercise of religion? second, if so,

Because of the importance of the effective exercise of religious freedom,[21] the Court permitted only regulation that furthered a compelling state interest that could not be protected by less restrictive means.[22] The Court reaffirmed and strengthened the balancing test in *Wisconsin v. Yoder*[23] when it struck down the state's compulsory education law as applied to the Amish: "only those interests of the highest order and not otherwise served" justify regulations that stifle religious action.[24]

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may this burden be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .?" *Id.* at 403. *See* People v. Woody, 61 Cal. 2d 716, 718, 394 P.2d 813, 816, 40 Cal. Rptr. 69, 72 (1964). *Accord,* NAACP v. Button, 371 U.S. 415, 438 (1963). In addition, the Court held that the state must use the least restrictive form of regulation to further its compelling interest. *Id.* at 407. *See* note 22 *infra. See generally* Clark, *supra* note 13; Comment, *Constitutional Law—Freedom of Religion—Unemployment Law Applied So As to Exclude Sabbatarians from Benefits Unconstitutional*—Sherbert v. Verner, 28 ALBANY L. REV. 133 (1964); Comment, *Constitutional Law—Free Exercise of Religion—Sabbatarian Exemptions,* 49 IOWA L. REV. 952 (1964); Comment, *Religious Accommodation Under Sherbert v. Verner; The Common Sense of the Matter,* 10 VILL. L. REV. 337 (1965).

Although *Sherbert v. Verner* was the first freedom of religion case in which the Court explicitly employed a balancing test, the Court earlier appeared to use this approach in applying the "clear and present danger" standard in Dennis v. United States, 341 U.S. 494 (1951), a case involving freedom of speech. For a discussion of a pre-*Sherbert* balancing test, see Comment, *Current Limitations on Governmental Invasion of First Amendment Freedoms, supra* note 12. *See also* Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability, supra* note 12, at 837-40.

21. First amendment rights occupy an elevated position because the basic individual liberties the amendment grants are necessary to maintain democracy. Thomas v. Collins, 323 U.S. 516, 530 (1945); Schneider v. State, 308 U.S. 147, 161 (1939). *Accord,* Murdock v. Pennsylvania, 319 U.S. 105 (1943) ("[F]reedom of press, freedom of speech, freedom of religion are in a preferred position"); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) ("All [first amendment freedoms] have preferred positions in our basic scheme").

The difference between *Reynolds* and *Sherbert* is that the latter granted some first amendment protection to religious action as well as belief. The *Sherbert* Court recognized that even indirect burdens could impede the "free exercise" of religion: "Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the *practice* of her religion, but the pressure upon her to forego that *practice* is unmistakable." 374 U.S. at 404 (emphasis added). Unless justified by compelling state interests, this "substantial infringement of appellant's First Amendment right" was unconstitutional. *Id.* at 406.

22. 374 U.S. at 407. The Court has often held that when regulating personal liberties the restriction must be drawn as narrowly as possible. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Schneider v. State, 308 U.S. 147, 161 (1939). *See also* Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 23-24 (1951); note 20 *supra.*

23. 406 U.S. 205 (1972).

24. *Id.* at 215. Amish parents were convicted of violating the state compulsory school attendance law by refusing to send their children to any high school. Defendants

The Supreme Court has not applied the balancing test to invalidate state regulations intended to protect public health, safety, or order.[25] Only the California supreme court in *People v. Woody*[26] has held unenforceable a public health measure on the basis of religious freedom. Since the use of peyote was the "theological heart" of peyotism, the *Woody* court concluded that the state's interest in protecting the health of its citizenry did not justify the effective prohibition of the religion itself.[27] Other courts, however, have uniformly upheld public health,

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argued that attendance of public or private high school by their children was detrimental to the Amish way of life. *Id.* at 210. They feared that a "worldly" high school education would alienate their children from God. *Id.* at 213. After the children have learned the "three R's" in the first eight grades, they are withdrawn from school and taught the skills necessary to be productive members of the agrarian Amish society. *Id.* at 212. The *Yoder* Court reasoned that although the state's interest in compulsory education was strong, it was not absolute. *Id.* at 216. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Prince v. Massachusetts, 321 U.S. 158 (1944). Rejecting a strict action-belief dichotomy, *see* note 13 *supra*, the *Yoder* Court stated:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. . . .
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> [T]here 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. . . . [I]n this context belief and action cannot be neatly confined in logic-tight compartments.

406 U.S. at 219-20. The Court then held the state's interest in compulsory education insufficient to permit governmental infringement upon the religious rights of the defendants; in the specific context of Amish children, the interests served by compulsory education were not overwhelming. 406 U.S. at 225-35. *See* Note, *Constitutional Law—First Amendment—The Balancing Process for Free Exercise Needs a New Scale*, 51 N.C. L. REV. 302 (1972); Comment, *Constitutional Law—Freedom of Religion—Amish Parents Not Required to Enroll Children in Secondary School*, 48 Notre Dame Law. 741 (1973).

25. The Court in *Yoder* took pains to distinguish the Wisconsin compulsory education law from a statute regulating public health or safety:

> 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. The record is to the contrary . . . .

406 U.S. at 230.

26. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

27. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77. Defendants, Navajo Indians and members of the Native American Church of the State of California, were arrested in an Indian hogan in the desert near Needles, California, while participating in a religious ceremony involving the use of peyote. *Id.* at 717, 394 P.2d at 814-15, 40 Cal. Rptr. at 71. Upon their arrest, defendants handed the police a photostatic copy of the articles of incorporation of their church which declared "[t]hat we further pledge ourselves to work for unity with the sacramental use of peyote and its religious use." *Id.* at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.

The California supreme court found that precluding the use of peyote virtually prohibited the practice of the defendants' religion since "[t]o forbid the use of peyote is to

welfare and safety measures which seriously infringed religious beliefs.[28] In practice, the "compelling state interest" necessary to prohibit religious action has often been insubstantial.[29]

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remove the theological heart of Peyotism." *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. By contrast, the danger to the state and to the enforcement of its laws was relatively light. In applying the *Sherbert* balancing test the court thus found that "[t]he scale tips in favor of the constitutional protection." *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

The California supreme court distinguished *Woody* from Reynolds v. United States, 98 U.S. 148 (1878), on two grounds: First, polygamy was a "basic tenet in the theology of Mormonism," but was not "essential to the practice of the religion," while in *Woody* "peyote . . . [was] the *sine qua non* of defendants' faith." *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76. Second, "the degree of danger to state interests in *Reynolds* far exceeded that in [*Woody*]." *Id.* One commentator has argued that polygamy, "a divine Mormon duty, observable upon pain of damnation," was as essential to Mormonism as peyote was to peyotism and that *Reynolds* and *Woody* can be distinguished only by the relative importance of the state's interests. Comment, *Statute Prohibiting Use of Peyote Unconstitutional as Applied to Religious Users*, 17 STAN. L. REV. 494, 500 n.42 (1965).

Compare Woody, supra, with State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967). In *Bullard*, defendant, arrested for possession of marijuana and peyote, argued that he was a member of the Neo-American Church which used both substances for religious purposes. *Id.* Expressing doubt about the defendant's good faith, the court stated that "[e]ven if he were sincere, the first amendment could not protect him." *Id.* at 603, 148 S.E.2d at 568. This judicial declaration appears to be an afterthought. The major distinction between *Woody* and *Bullard* may be the two courts' consideration of the good faith of the defendants' religious beliefs. Note, *Freedom of Religion + LSD = Psychedelic Dilemma*, 41 TEMP. L.Q. 52, 56-57 (1967). *See generally* Marcus, *supra* note 13, at 1246-51; Comment, *Constitutional Law—Freedom of Religion—Unconstitutionality of State Narcotics Statute as Proscribing the Sacramental Use of Peyote by Indians*—People v. Woody, 6 ARIZ. L. REV. 305 (1965); Comment, *Constitutional Law—Free Exercise of Religion—Illegal Use of Toxic Drugs*—People v. Woody, 14 CATH. U.L. REV. 120 (1965); Comment, *Statute Prohibiting Use of Peyote Unconstitutional as Applied to Religious Uses, supra.*

28. *See* cases cited note 18 *supra* and notes 30-32 *infra.*

29. Courts often cite the parade of horribles first set forth in *Reynolds*:

> 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 pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

98 U.S. at 166. *See, e.g.*, Hill v. State, 38 Ala. App. 404, 409, 88 So. 2d 880, 884, *cert. denied*, 264 Ala. 617, 88 So. 2d 887 (1956); State v. Bullard, 267 N.C. 599, 603, 148 S.E.2d 565, 569 (1966), *cert. denied*, 386 U.S. 917 (1967); Harden v. State, 188 Tenn. 17, 23, 216 S.W.2d 708, 710 (1948).

The state interests actually upheld, however, often threaten far less serious social consequences than the *Reynolds* Court hypothesized. Braunfeld v. Brown, 366 U.S. 599 (1961), illustrates the essentially trivial state interests that sometimes survive judicial scrutiny. In *Braunfeld*, the Supreme Court upheld a state "blue" law against a challenge by Orthodox Jews who contended that its enforcement would seriously jeopardize their

In cases preceding *Sherbert* and its balancing test, state courts upheld statutes prohibiting snakehandling on the basis of "grave and immediate danger" to the public or some equivalent standard.[30] The latest Tennessee supreme court decision involving snakehandling, *Harden v. State*,[31] applied this standard, held the state snakehandling statute constitutional and prohibited religious snakehandling.[32] In addition to statutory remedies, a state can regulate religious action through the common law power to abate public nuisances.[33]

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business operations unless, contrary to their religious tenets, they remained open for business on Saturday. Although the Court did not apply a balancing test in this pre-*Sherbert* case, it did limit the state's regulatory authority to religious actions which are "in violation of social duties or subversive of good order . . . ." *Id.* at 603. The "important" social goal the state sought to protect was "a day of rest, repose, recreation and tranquility" that, in order to minimize the "atmosphere of commercial noise and activity," must necessarily be the *same* day for all. *Id.* at 607-08; *see id.* at 614-15 (Brennan, J., dissenting). *See also* Prince v. Massachusetts, 321 U.S. 158, 165-70 (1944) ("sacred" right of parents to direct child's religious training overborne by public interest in child's welfare, even in "these peripheral instances in which the parents supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct"); Hill v. State, *supra* (strong hint that legislative declaration that snakehandling is dangerous is per se ground to prohibit it); State v. Bullard, *supra* (free exercise clause does not authorize believer to commit any act that threatens public safety, morals, peace and order).

Wisconsin v. Yoder, 406 U.S. 205 (1972), which found the state interest in compulsory education of children under the age of 16 insufficient to infringe the Amish religious practices, is the first case to overturn a statute serving more than a minimal state interest. The *Yoder* decision was the basis for the Tennessee Court of Appeals decision in *Pack*. 527 S.W.2d at 111. Regrettably, the Tennessee Supreme Court completely misunderstood the case. *See* notes 51-55 *infra* and accompanying text.

30. Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, *cert. denied*, 264 Ala. 677, 88 So. 2d 887 (1956); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947). *See* note 60 *infra* and accompanying text.

31. 188 Tenn. 17, 216 S.W.2d 708 (1948).

32. *Id.* at 25, 216 S.W.2d at 711. The court held that religious snakehandling was dangerous to the life and health of people "when and whenever the practice was undertaken." *Id.* at 24, 216 S.W.2d at 711. *See* note 60 *infra*.

33. The State Attorney General has the power to prohibit an action by declaring it a common law public nuisance. State *ex rel.* Bd. of Health v. Sommers Rendering Co., 66 N.J. Super. 334, 169 A.2d 165 (1961). A common law public nuisance is:

> [E]verything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable or comportable use of property.

Yarbrough v. Louisville & N. Ry., 11 Tenn. App. 456, 458 (1930). A present or immediate threat of harm is a prerequisite to finding and abating a common law nuisance. Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975), *modified*, 529 F.2d 181 (1976). Even if criminal sanctions apply, a public nuisance can be abated through

In *State* ex rel. *Swann v. Pack*,[34] the Tennessee supreme court balanced the state's interest in the safety of the audience and the snake-handlers against the defendants' right to the free exercise of their religion.[35] The court agreed that defendants were entitled to first amendment protection,[36] but found their rights subordinate to a "compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interests."[37] The court distinguished *Yoder* on the ground that waiving the compulsory education requirement for Amish children would not "impair the health of the children, nor result in their inability to be self-supporting or to discharge the duties and responsibilities of citizenship, nor in any way materially detract from the welfare of society."[38] By contrast, the court considered it self-evident that snakehandling posed a serious threat to health and safety.[39] Reports of previous death, absence of safeguards, the "entranced" state of the handlers, and children "roaming about unattended" heavily influenced the court's decision.[40]

The *Pack* court gave only cursory attention to less restrictive alternatives such as excluding children or nonmembers from services in which snakes were handled. Excluding children, the court reasoned, would conflict with a parent's right to direct the religious education of his offspring, while excluding nonmembers would interfere with the "evangelical mission" of the church.[41]

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a civil action. Wilson v. Parent, 228 Ore. 354, 365 P.2d 72 (1961). For a case regulating religious action constituting a public nuisance, see Morrison v. Rawlinson, 193 S.C. 25, 7 S.E.2d 635 (1940) ("loud and raucous" church services lasting into early morning held a public nuisance and prohibited after ten p.m.).

34. 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 924 (1976).

35. *Id.* *But see* note 48 *infra* and accompanying text. The court noted that the handlers were "so enraptured and entranced that they are in a virtual state of hysteria," implying that they were attempting suicide. 527 S.W.2d at 113. *But see* notes 47 & 48 *infra* and accompanying text. The court was concerned for the safety of the audience which was present with "virtually no safeguards." 527 S.W.2d at 113.

36. 527 S.W.2d at 107.

37. *Id.* at 113.

38. *Id.* at 111.

39. *Id.* at 113.

40. *Id.* The court stated that its research confirmed a general pattern of dangerous conditions, "human misery and loss of life," so that it would be "derelict" in its duty if it did not find defendant's guilty of a public nuisance. *Id.*

41. *Id.* at 114. The court's reasoning on this point is confusing. *See* notes 56-59 *infra* and accompanying text. It is not known whether the defendants would accept regulation of snakehandling for public safety rather than an outright prohibition since they were not given the choice.

Although reaching the trial court's result, the court rested its decision on the common law of nuisance rather than the Tennessee criminal statute.[42] Since this was a suit to abate a public nuisance rather than a criminal prosecution, the court determined that the criminal statute was not controlling but merely expressed in part the Tennessee public policy on snakehandling.[43]

Pack is another case sustaining state health and safety regulations without serious consideration of the public interests or impartial balancing of those interests against defendants' right to free exercise of their religion. The court misunderstood Tennessee public policy and misread constitutional requirements. The Tennessee statute only prohibited snakehandling when performed in a dangerous manner.[44] Both *Harden* and *Pack* assumed, without reliable evidence, that religious snakehandling was dangerous per se.[45] The latter opinion considered handling a poisonous snake tantamount to a suicide attempt.[46] The record contained no evidence supporting such a proposition: on the record the court could only have concluded that snakehandling presents no serious health threat.[47] A "surprisingly" small

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42. 527 S.W.2d at 112. *See* note 2 *supra.*

43. 527 S.W.2d at 112. In Home Beneficial Ass'n v. White, 180 Tenn. 585, 177 S.W.2d 545 (1944), the Tennessee supreme court stated:

> [I]t seems clear that the public policy of the State is to be found in its Constitution, its laws, its judicial decisions and the applicable rules of common law. "Public policy" is practically synonymous with "public good". . . .

180 Tenn. at 588, 177 S.W.2d at 546.

The *Pack* court acknowledged that the Tennessee statute on snakehandling was a statement of public policy, but dismissed it because

> [t]his is not a criminal prosecution. Its consequences are more far-reaching and it is to be decided on a substantially different basis.
>
> This is a suit to abate a nuisance.

527 S.W.2d at 112.

44. *See* notes 4 & 32 *supra* and accompanying text.

45. *See* note 35 *supra* and accompanying text. The *Harden* court was explicit:

> The language of [the statute] is by necessary implication a legislative declaration that such handling of a poisonous snake is dangerous to life and health. . . . That statute does by necessary inference declare that such handling of poisonous snakes is dangerous to the life and health of people. Accordingly, it forbids that practice.

216 S.W.2d at 709-10.

46. 527 S.W.2d at 113. In discussing the state's right to prevent a person from committing suicide, the court found that Tennessee "has the right to guard against the unnecessary creation of widows and orphans," and stated that "most assuredly the handling of dangerous snakes by untrained persons . . . [i]s not calculated to increase one's life span." *Id.*

47. *See* note 3 *supra.*

number of fatalities have resulted from snakehandling in religious ceremonies,[48] while the audience faces a lesser threat. The court's strict prohibition was thus contrary to the state policy expressed in the criminal statute.[49]

The court also misunderstood the constitutional requirements imposed by *Sherbert* and *Yoder*. The former requires a compelling state

48. LA BARRE 13-14. One authority on rattlesnakes has stated that only about three of every one hundred people bitten by rattlesnakes will die. 2 L. KLAUBER, RATTLESNAKES 846 (2d ed. 1972). Many snakehandlers have been bitten numerous times and survived: Tom Harden, leader of the Dolley Pond congregation, has been bitten at least four times; Paul Lee Dodson has been bitten seventeen times; and, the founder of the cult, George Went Hensley, claimed to have "been bitten four hundred times 'til I'm speckled all over like a guinea hen.'" LA BARRE 45-46. Dr. Berthold Schwarz, a psychologist, states that some snakehandlers (known as "saints") have claimed to have been bitten over fifty times. Schwarz, *Ordeal by Serpents, Fire and Strychnine*, 34 PSYCHIATRIC Q. 405, 411 (1970). He acknowledged reports of persons in their 70's and 80's who survived snakebites. *Id.* Four "saints" knew of "only" 18 members of the Holiness Church who had died from snake bites in 31 years. *Id.*

Many handlers have never been bitten. Dr. Schwarz says that he has witnessed more than 200 instances of snakehandling without observing a snakebite. *Id.* One "saint" claimed to have handled snakes over 2,000 times without ever having been bitten. Dr. Schwarz noted that there are no known cases of snakebitten children during these religious ceremonies. *Id.* Both La Barre and Schwarz report no cases of snakebites involving nonhandlers, and no such report appears in any snakehandling case. *See* note 60 *infra.*

La Barre proposes the following explanations for the small number of bites and fatalities resulting from snakehandling. First, the handling of the snakes may disrupt their reflexes since they are accustomed to coiling before striking. Second, the snakes are "playing possum" as herpetologists maintain some snakes do when approached by humans. Third, the body heat of the handler has a "drugging effect" on the snakes. Finally, some snakes, including rattlers, suffer from cataplexy, a sudden loss of muscle power in animals. No single explanation for the small number of bites has been proven, and La Barre regards the question of "why more snakehandlers are not bitten as being unsolved and still open." LA BARRE 20.

Snake experts have offered other explanations for the small number of deaths resulting from snakehandling:

> The timber rattlesnake, the species usually handled in the services, is one of the more mild-tempered rattlers; furthermore, when kept in captivity, it is curiously prone to spells of apathy when almost nothing short of severe injury will provoke it to strike. The copperhead, the other species commonly handled, has a more uncertain temper but is relatively docile. Its venom is comparatively weak, and its bite is probably not able to kill an adult under most circumstances.

S. MINTON, JR. & M. MINTON, VENOMOUS REPTILES 186 (1969).

49. Although the criminal statute did not apply in a suit to abate a public nuisance, it partially evidenced the Tennessee legislature's determination on snakehandling, 527 S.W.2d at 112, and should have been heavily weighed in favor of the defendant when the restrictions involve his first amendment rights.

interest to justify prohibition,[50] while the latter rejects the surface analysis employed in *Pack*.[51] *Yoder* held that courts "must *searchingly* examine the interests that the State seeks to protect,"[52] and followed that admonition with a rigorous analysis of the state interest in compulsory education in the particular context of the Amish children.[53] The *Pack* court, despite lip service to *Yoder*,[54] did not attempt a specific examination.[55]

The court's discussion of less restrictive alternatives, required by *Sherbert*,[56] was equally inadequate. The court ignored the possibility of safety measures such as snakeproof cages or sealed-off areas.[57] Its rejection of a ban on children or nonmembers at snakehandling services was completely illogical. Banning a religion's "theological heart" tends to prohibit the religious belief itself,[58] and is obviously more detrimental to the religion and its believers than restrictions on the right

50. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

51. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

52. *Id.*

53. *Id.* at 221-34.

54. 527 S.W.2d at 110-11. The court's lengthy quotation from Reynolds v. United States, 98 U.S. 145 (1878), and Davis v. Beason, 133 U.S. 333 (1890), clearly reveals the failure to understand *Yoder*. Both *Reynolds* and *Davis* applied the old belief-action dichotomy, granting no first amendment protection to any action implementing religious beliefs. *See* notes 14-18 *supra* and accompanying text. In concluding that these cases always permit health or safety regulations of religious conduct, *see* 527 S.W.2d at 111, the court ignored the central rule of *Sherbert* and *Yoder*: such health and safety regulations are proper only if they serve compelling state interests that cannot be protected by less intrusive means.

55. A single conclusory paragraph, 527 S.W.2d at 113, was the sole discussion of the factual basis underlying the "compelling" state interest in prohibiting religious snakehandling.

56. Sherbert v. Verner, 374 U.S. 398, 407 (1963). *See* note 22 *supra* and accompanying text. In Morrison v. Rawlinson, 193 S.C. 25, 7 S.E.2d 635 (1940), a church was used in a "loud and raucous" manner in a residential area until the early morning hours. The court issued an injunction prohibiting church services after ten p.m. rather than closing the church permanently.

57. *See* 527 S.W.2d at 114. Even when snakehandlers have agreed to comply with safety regulations, courts have still chosen to prohibit the practice, reasoning that it is dangerous per se. *See* State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949), *noted in* LA BARRE 42-43. In *Massey*, the defendants stated that the snakehandlers recognized the state's right to regulate their practice for safety purposes, but vigorously objected to a restriction that prohibited the congregation from following its religious practices. The court rejected this appeal in upholding the convictions for criminal violation of a city ordinance prohibiting religious snakehandling. 229 N.C. at 735, 51 S.E.2d at 180. *See* notes 41 *supra* & 60 *infra* and accompanying text.

58. *See* note 27 *supra*.

to proselytize the public or educate children.[59]

State ex rel. *Swann v. Pack* is another snakehandling decision that slighted factual considerations and considered snakehandling to be extremely dangerous based on ill-founded beliefs.[60] The result is a

59. The *Pack* court recognized that "to forbid snake handling [*sic*] is to remove the *theological heart* of the Holiness Church . . . ." 527 S.W.2d at 112 (emphasis added). Although the court realized that the probable result of its decision was the eventual extinction of the sect, nowhere does it sufficiently weigh this interest against any "compelling" state interest. Clark argues that "[i]n cases where [religious snakehandling] is regarded as an absolute necessity by believers it should be privileged." Clark, *supra* note 13, at 364. *See* note 27 *supra* and accompanying text. In People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the California Supreme Court, using the same balancing test that the *Pack* court claimed to apply, weighed this "theological heart" factor heavily and held that the danger to the state would have to be great to prohibit the practice in question. *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76.

60. Despite the statutory language, religious snakehandling has often been held dangerous per se. *See* Hill v. State, 38 Ala. App. 404, 88 So. 2d 880 (1956); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948). Although states have adopted two different types of snakehandling statutes, courts' application of them has produced identical results. Kentucky has adopted the first and more restrictive type of statute:

> No person shall display, handle, or use any kind of snake or reptile in connection with any religious service or gathering.

KY. REV. STAT. ANN. § 437.060 (1969). The statute was held constitutional by the Kentucky Supreme Court in Lawson v. Commonwealth, 291 Ky. 437, 446, 164 S.W.2d 972 (1942).

The other, less restrictive type of statute was adopted by Tennessee, *see* note 4 *supra*, which prohibited snakehandling "in such a manner as to endanger the life or health of any person." TENN. CODE ANN. § 39-2208 (1975). Yet, in Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), the court held that the religious handling of snakes is "dangerous to the life and health of people . . . *when and wherever the practice is being indulged.*" *Id.* at 25, 216 S.W.2d at 711 (emphasis added). In Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, *cert. denied*, 264 Ala. 617, 88 So. 2d 887 (1956), a statute identical to the Tennessee statute in *Harden* was held constitutional with the factual determination whether persons were endangered left to the jury. *Id.* at 410, 88 So. 2d at 885. In State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949), an ordinance outlawed handling poisonous snakes in a "manner as to endanger the public health, safety, and welfare." The court held the religious use of poisonous snakes dangerous to the public health, safety, and welfare. *Id.* at 735, 51 S.E.2d at 179. But, in Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947), the court reversed a conviction for manslaughter in connection with a death resulting from snakehandling for failing to instruct that "it is not a violation of the laws of the Commonwealth of Virginia *per se* to handle a poisonous serpent." *Id.* at 848, 44 S.E.2d at 413.

Thus, all but one of these cases have declared the religious handling of poisonous snakes illegal either by specific statutory prohibition or by judicial interpretation of the state statute. The similar results, despite differing statutes and factual circumstances,

reversion to a strict action-belief dichotomy in snakehandling cases in complete opposition to the Supreme Court's stance on the free exercise of religion, and a fortification of a judicial trend suggesting religious persecution.[61] The resort to outright prohibition in *Pack* is precedent that should not be followed in other first amendment freedom controversies.

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suggest that the prohibition is based on moral repugnance for such activity in connection with religious worship. *See* Fernandez, *The Free Exercise of Religion,* 36 So. CAL. L. REV. 546, 568 (1963).

61. The Jehovah's Witnesses are an example of a religious sect whose situation eventually received judicial remedy. In Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), a challenge by a member of the Jehovah's Witnesses to a compulsory pledge of allegiance requirement was rejected; yet, three years later in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court reversed itself and held a similar requirement unconstitutional. In Jones v. Opelika, 316 U.S. 584 (1942), the Court upheld the validity of a licensing fee for door-to-door salesmen which adversely affected Jehovah's Witnesses who are required by their religion to proselytize by door-to-door sales. Yet, in Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court vacated its opinion in *Jones* and held that the licensing fee was a denial of freedom of religion, speech, and press.