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STATE EX REL. SWANN V. PACK: SELF- ENDANGERMENT AND THE FIRST AMENDMENT

INTRODUCTION

For many years there has been some controversy over whether an individual has the right to endanger himself if his conduct threatens no direct harm to others. This issue has come up in a number of contexts including committing suicide,¹ wearing a helmet while riding a motorcycle,² engaging in endurance contests,³ and refusing a medically indicated blood transfusion.⁴ Recently it was raised again when the Holiness Church of God in Jesus Name in the mountains of Tennessee went to court over the right of its members to drink poison. On September 8, 1975, the Supreme Court of Tennessee handed down its decision in that case in *State ex rel. Swann v. Pack*⁵ enjoining the members of the sect from handling snakes or drinking poison because such activities constitute a common law public nuisance.⁶

I. DIVERGENT PHILOSOPHIES OF SOCIAL ORGANIZATION

The debate over the validity of self-endangerment legislation is most easily understood through a brief comparison of two theories of social organization. Since these represent polar extremes, they can serve to establish a frame of reference.

At one extreme is the social model emphasizing individual

¹ See, e.g., *State v. Willis*, 121 S.E.2d 854 (N.C. 1961); *Stiles v. Clifton Springs Sanitarium Co.*, 74 F. Supp. 907 (W.D.N.Y. 1947).

² E.g., MASS. GEN. LAWS ANN. ch. 90, § 7 (1968), and cases cited in note 38 *infra*.

³ TENN. CODE ANN. § 39-2207 (1939).

⁴ See, e.g., cases cited in notes 73-81 *infra*.

⁵ 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 96 S. Ct. 1429 (1976).

⁶ A public nuisance is defined as "a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law." 58 AM. JUR. 2d *Nuisances* § 7 (1971). This is the definition cited by the court. 527 S.W.2d at 113. In addition, the court cites *Yarbrough v. Louisville & Nashville Ry. Co.*, 11 Tenn. App. 456 (1930) which defines a common law nuisance as follows:

[a] nuisance in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable or comfortable use of property.

527 S.W.2d at 113.

liberties. This theory, based on natural law,⁷ is that society is an aggregate of individuals who have certain natural and inherent rights to life, liberty, and property which the social compact⁸ was established to protect; the social compact is merely superimposed on these rights, which are the ultimate authority. Government's role is "strictly fiduciary in character . . . designed to make more secure and more readily available rights which antedate it and which would survive it."⁹ In this model, government plays an essentially negative role since freedom is defined as the absence of governmental restraints on one's natural rights.¹⁰ Only when a person's acts are directly harmful to others does society have the right to intervene. In this model, there is one inviolable area of liberty: that of self-concern.¹¹

At the opposite extreme is a paternalistic social model. Here the theory is that there are no inherent individual rights and that all personal rights derive from a social compact which is the original source of the rights to life, liberty, and property. In this model, the state of nature is characterized as dangerous and competitive, a state where only the most aggressive survive. Thus in the natural state, man is not free; he can become free only to the extent that the state through its laws makes him so by protecting him from the state of nature. Liberty is not abridged by the state but is established and created by it.

⁷ Natural law includes the idea that in a state of nature, such nature as yet being pure and undefaced by man's baser passions, there exist principles to the guidance of human conduct. Included with these principles of conduct are various natural rights: rights which are self evident, inherent in man and which exist independently of enacted law. See Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 and 42 HARV. L. REV. 365 (1928).

⁸ The social compact for purposes of this comment can be defined as the agreement or contract individuals enter into when they form a society. When the social compact becomes highly sophisticated and takes on a character independent of the people, it is known as "the state" or "government." *Id.*

⁹ *Id.* at 389.

¹⁰ See generally MURPHY, *POLITICAL THEORY: A CONCEPTUAL ANALYSIS* 204-15 (1968). Murphy explains that when government's function is to encourage people to better themselves and society through laws, this can be described as government taking a "positive" role. In contrast, where government is conceptualized to be an arbiter in protecting people from each other only when necessary, it can be said that government takes a "negative" role.

¹¹ For the classic statements of this theory of society, see JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* (1966 ed. 1690) and JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* (Am. ed. 1951).

Government plays a positive role in that it insures that people are protected and secure. Thus in this model, the social compact, the welfare of the people considered en masse, is the first priority and individual freedom is secondary.¹²

Encompassed in this paternalistic model of society is the idea that since the welfare of the people as a whole is the ultimate interest to be protected, the state can regulate to this end with few restraints.¹³ The paternalistic power of the government as guardian of the general welfare is recognized in our society as the police power of a state. The police power is usually described as the broad, inherent power of the legislature to prescribe regulations which promote the education, health, safety, peace, morals and general welfare of the community.¹⁴ Since the welfare of the people as a whole is the original and ultimate interest,¹⁵ the police power extends even to prohibiting people from engaging in activities that directly endanger only themselves.¹⁶

In contrast, the libertarian position proposes that because men have certain natural rights which the government serves only to protect, the power of a state to regulate is always lim-

¹² For the classic statements of this view of society, see THOMAS HOBBES, *THE ELEMENTS OF LAW, NATURAL AND POLITIC* (2d ed. 1969) (1st ed. published 1889) and J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1873).

¹³ Corwin, *supra* note 7, explains at 390 that when the first ten amendments to the United States Constitution were written, these restraints on governmental power were written into the compact.

¹⁴ *Mugler v. Kansas*, 123 U.S. 623 (1887); *Barbier v. Connolly*, 113 U.S. 27 (1885). See also 16 C.J.S. *Constitutional Law* § 174 (1956).

¹⁵ This idea is expressed in the legal maxim, "salus populi est suprema lex," "the welfare of the people is the supreme law." 78 C.J.S. *Salus* (1952).

¹⁶ H.L.A. Hart, a modern philosopher endorsing this paternalistic model, explains the rationale of protecting people from themselves in this way:

[P]aternalism - the protection of people against themselves - is a perfectly coherent policy. Indeed, it seems very strange in mid-twentieth century to insist upon this, for the wane of laissez-faire since Mill's day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil.

. . . .

It is too often assumed that if a law is not designed to protect one man from another its only rationale can be that it is designed to punish moral wickedness But it is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with suffering . . . rather than with the immorality

H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 31-32, 34 (1963).

ited by its function of protecting individual rights whether or not the right is protected by the Constitution specifically.¹⁷ Thus a state regulating for the public good can restrict man's individual rights only to prevent harm to others.¹⁸ To protect a person from himself or to regulate him for his own good is not a sufficient warrant for the state to restrict personal liberty.¹⁹

II. MANIFESTATION OF THE PHILOSOPHICAL CONFLICT IN TWO AREAS OF SELF-ENDANGERMENT LAW

The debate between the libertarian and paternalistic

¹⁷ Justice Chase expressed this idea succinctly in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-388 (1798):

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.

¹⁸ "Their [the legislature's] power, in the utmost bounds of it, is limited to the public good of the society." JOHN LOCKE, *supra* note 11, § 135. See also Corwin, *supra* note 7, at 392, explaining that Locke's insistence on *public* good as the only legitimate goal of governmental action is in line with his main trend of thought as it represents a limitation on legislative freedom of action in favor of individual rights.

¹⁹ John Stuart Mill writes that;

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

JOHN STUART MILL, *On Liberty*, *supra* note 11, at 95-96. See also Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1969-70).

views continues today. The controversy regarding the extent to which a state may restrict personal liberty when an individual's conduct endangers only himself and when no constitutional guarantee is involved has arisen in a modern context in the split of authority on at least two issues: suicide and motorcycle helmets.²⁰

A. *Suicide*

At common law suicide was clearly a crime.²¹ The self-destructive act, to qualify as suicide, had to be intentional,²² voluntary,²³ and deliberate.²⁴ But even then, suicide was "something more than self-sought or self-inflicted death. It was a species of crime or wickedness, something wrong, a kind of self-murder."²⁵ Because of this, suicide resulted in forfeiture of all property and ignominious burial, a harsh treatment which still prevailed in the 19th century.²⁶

²⁰ Although consensual crimes such as possession of narcotics, gambling, prostitution, and homosexuality fall within the rubric of self-endangerment legislation, they are not dealt with here for a number of reasons. First, the criminal laws against them are regularly upheld without much question. Second, moral issues are so intertwined it is difficult to examine these laws purely for the social philosophy involved. Third, these laws are particularly subject to *ad terrorem* arguments, *i.e.*, if everyone did it society would collapse. Finally, these laws are the subjects of treatises in themselves and are beyond the scope of this comment.

Also not within the scope of this comment are the various consumer protection measures. These regulations—the requirement that cars come equipped with seatbelts for example—are distinguishable from self-endangerment legislation on the ground that they do not restrict the *individual's* freedom for his benefit but restrict instead the freedom of the manufacturer or distributor of the product.

²¹ Annot., 92 A.L.R. 1180 (1934).

²² *Stiles v. Clifton Springs Sanitarium Co.*, 74 F. Supp. 907 (W.D.N.Y. 1947) (citing Penal Law, Consol. Laws ch. 40, § 2300).

²³ *Muzenick v. Grand Carniolian Slovenian Catholic Union of United States*, 119 P.2d 504 (Kan. 1941).

²⁴ *Parker v. Aetna Life Insurance Co.*, 232 S.W. 708 (Mo. 1921).

²⁵ 83 C.J.S. *Suicide* § 1 (1953). See also O'Sullivan, *The Ethics of Suicide*, 2 CATH. LAW. 147 (1956).

²⁶ [T]he law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and as the suicide is guilty of a double offense, one spiritual in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects, the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self.

4 BLACKSTONE, COMMENTARIES 189 (21st ed. 1856).

While the common law was clear on the criminality of suicide, modern law is confused.²⁷ Two states have upheld convictions for attempted suicide where there was no statute defining suicide as a crime, based on its status as a crime at common law.²⁸ Other jurisdictions, however, have held that absent such a statute, suicide is not a crime.²⁹ One state equivocates by defining suicide not as an indictable crime but as "unlawful."³⁰

Commentators³¹ and courts³² have analogized the issues of suicide law to those of self-endangerment law, yet the analogy is defective for a number of reasons. First, moral and religious values are intertwined in suicide law and are not easily isolated to reveal the social philosophy involved. Second, suicide is not an issue which is frequently raised directly. Third, and most important, suicide is distinguishable from the great mass of other self-harming conduct such as taking narcotics or participating in endurance contests³³ because suicide involves death as the specific goal, whereas the goal of other self-harming conduct is not death but usually pleasure or profit. Thus a better issue with which to examine the actual arguments regarding the extent to which a state has power to forbid a person to endanger himself are the cases interpreting the state statutes requiring motorcyclists and passengers to wear helmets while operating their cycles.

²⁷ See generally Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855 (Sept. 1968).

²⁸ *State v. LaFayette*, 188 A. 918 (C.P.N.J. Camden County 1937); *State v. Willis*, 121 S.E.2d 854 (N.C. 1961).

²⁹ *Iowa v. Campbell*, 251 N.W. 717 (Iowa 1933). Additionally, there is conflict over the status of attempted suicide. At least three states have held that since suicide is not a crime, attempted suicide logically cannot be a crime. *May v. Pennell*, 64 A. 885 (Me. 1906); *State v. Dennis*, 105 Mass. 162 (1870) [cited in Schulman, *supra* note 27, at 858]; *Grace v. Texas*, 69 S.W. 529 (Tex. Crim. App. 1902). Three states have resolved the problem by enacting statutes providing specifically that attempted suicide is a crime. N.J. STAT. ANN. § 2A:170-25.6 (1957); OKLA. STAT. ANN. tit. 21 § 812 (1951); WASH. REV. CODE § 9.80.020 (1909).

³⁰ *Wallace v. State*, 116 N.E.2d 100 (Ind. 1953).

³¹ See, e.g., Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954).

³² See, e.g., *State v. Eitel*, 227 So.2d 489 (Fla. 1969); *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. App. 1968); *State ex rel Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975).

³³ TENN. CODE ANN. § 39-2207 (1939). This statute makes it a misdemeanor to participate in any type of physical endurance contest.

B. *Motorcyclists and Helmets*

New York adopted the first motorcycle helmet statute in 1966.³⁴ Many states followed New York's example³⁵ and by July 1967 the helmet requirement was classified as a federal "minimum standard" by the Secretary of Transportation to which all state highway safety programs were to conform.³⁶ Despite the federal endorsement, these statutes have been attacked as unconstitutional exercises of the police power³⁷ at least 24 times.³⁸ While the majority of jurisdictions has upheld these helmet statutes, at least three courts have voided them as unconstitutional.³⁹

³⁴ N.Y. VEH. & TRAF. LAW § 381(6) (McKinney 1969). The statute reads, "It shall be unlawful . . . for any person to operate or ride upon a motorcycle unless he wears a protective helmet of a type approved by the commissioner"

³⁵ E.g., MICH. COMP. LAWS ANN. § 257.658(d) (1967); MASS. GEN. LAWS ANN. ch. 90, § 7 (Supp. 1968).

³⁶ SECRETARY OF TRANSPORTATION, NATIONAL UNIFORM STANDARDS FOR STATE HIGHWAY SAFETY PROGRAMS, H.R. Doc. No. 138, 90th Cong., 1st Sess. 304 (1967).

³⁷ The police power is the broad, inherent power of the legislature to regulate for the education, health, safety, peace and general welfare of the community. See cases cited note 14 *supra*. It is clear that requiring cyclists to wear helmets is a reasonable means to the end of promoting personal safety. The means the state legislatures chose is not under challenge, the end is. The issue is whether the legislature has a legitimate concern in curtailing personal injury when that injury threatens no direct harm to others. Is this a valid goal of the police power? While the paternalists would answer that promoting personal safety is a valid goal for legislators, the libertarians would argue that unless the conduct involved poses a direct threat to others, it is not a legitimate concern for the state.

³⁸ *Bogue v. Faircloth*, 316 F.Supp. 486 (S.D. Fla. 1970); *Love v. Bell*, 465 P.2d 118 (Colo. 1970); *State v. Eitel*, 227 So.2d 489 (Fla. 1969); *State v. Lee*, 465 P.2d 573 (Hawaii 1970); *People v. Fries*, 250 N.E.2d 149 (Ill. 1969); *Everhardt v. City of New Orleans*, 217 So.2d 400 (La. 1969); *Commonwealth v. Howie*, 238 N.E.2d 373 (Mass. 1968); *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968); *State v. Cushman*, 451 S.W.2d 17 (Mo. 1970); *State v. Krammes*, 252 A.2d 223 (N.J. Super. Ct. 1969); *State v. Mele*, 247 A.2d 176 (N.J. Super. Ct. 1968); *People v. Newhouse*, 287 N.Y.S.2d 713 (Ithaca City Ct. 1968); *People v. Carmichael*, 288 N.Y.S.2d 931 (Genesee County Ct. 1968), *rev'g*, 279 N.Y.S.2d 272 (Sp. Sess. 1967); *People v. Bielmeyer*, 282 N.Y.S.2d 797 (Buffalo City Ct. 1967); *State v. Anderson*, 166 S.E.2d 49 (N. C. 1969); *State v. Odegaard*, 165 N.W.2d 677 (N.D. 1969); *State v. Craig*, 249 N.E.2d 75 (Ohio Ct. App. 1969); *State v. Betts*, 252 N.E.2d 866 (Franklin Mun. Ct. Ohio 1969); *State v. Fetterly*, 456 P.2d 996 (Ore. 1969); *Arutanoff v. Metropolitan Gov't of Nashville and Davidson County*, 448 S.W.2d 408 (Tenn. 1969); *Ex parte Smith*, 441 S.W.2d 544 (Tex. Crim. App. 1969); *State v. Solomon*, 260 A.2d 377 (Vt. 1969); *State v. Laitinen*, 459 P.2d 789 (Wash. 1969); *Bisenius v. Karns*, 165 N.W.2d 377 (Wis. 1969).

³⁹ *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968), which the same court declined to follow in *People of the City of Adrian v. Poucher*,

Most of the courts which uphold these statutes do so on two grounds. The first is based on the threat of direct injury to others. This is the so-called "missile hazard theory," derived from the argument that a cyclist hit on the head by a flying object would likely lose control of his cycle and prove dangerous to others.⁴⁰ While this argument is speculative and empirically tenuous,⁴¹ it is not challengeable as an illegitimate goal of the police power even under the libertarian point of view, as it invokes the potential of direct danger to others.

Courts upholding the statutes without invoking the potential of direct danger to others under the missile hazard theory usually fall back on the threat of indirect injury to others, the rationale of secondary harm.⁴² The most frequently mentioned secondary harm is the welfare cost analysis;⁴³ since a cyclist

240 N.W.2d 298 (Mich. Ct. App. 1976); *State v. Betts*, 252 N.E.2d 866 (Franklin Mun. Ct., Ohio 1969); *State v. Fries*, 250 N.E.2d (Ill. 1969). See Note: *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO STATE L.J. 355 (1969). See also Annot., 32 A.L.R.3d 1270 (1970).

⁴⁰ See, e.g., *Bogue v. Faircloth*, 316 F. Supp. 486, 489 (S.D. Fla. 1970); *Arutnoff v. Metropolitan Gov't of Nashville and Davidson County*, 448 S.W.2d 408, 411 (Tenn. 1969); *State ex rel. Colvin v. Lombardi*, 241 A.2d 625, 629 (R.I. 1968); *State v. Fetterly*, 456 P.2d 996, 997 (Ore. 1969).

⁴¹ One difficulty with the above rationale [the missile hazard theory] is that it lacks cogency. The cyclists simply do not believe it; they consider it patently unrealistic [citing Reply Brief for Plaintiffs and Appellants at 4, *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich.App. 1968)]. They point out that it represents nothing more than judicial notice of a subject about which most judges have little knowledge or experience.

Motorcycle, *supra* note 39, at 367.

⁴² The theory of secondary harm is that other people suffer as a result of the actor's injury. For example, when the breadwinner is incapacitated, the family loses its means of support and the family suffers. Furthermore, if the family is then forced to go on the welfare rolls, society suffers. Thus while the conduct may appear to harm only the actor himself, there are actually identifiable injuries to others which flow from the actor's conduct. The indirect injuries to others are the secondary harms.

It is interesting to note that the majority of efforts to prohibit conduct which, on first glance, appears to harm only the actor himself are rationalized as a means of preventing secondary harms, rather than as efforts to protect people from their own folly . . . [W]here the person to be protected from himself is not under age, "ill," or a member of another group with a similar claim to sympathy . . . society acts for its own benefit rather than his. It must, therefore, still be able to point to a secondary harm to justify the law.

Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065 at 1068, and note 9 at 1068.

⁴³ *State v. Odegaard*, 165 N.W.2d 677, 679 (N.D. 1969); *State ex rel. Colvin v. Lombardi*, 241 A.2d 625, 627 (R.I. 1968).

drives in a society committed to prevent people from dying of their injuries, the state may have to assume the expense of treating the cyclist if he is injured but not killed outright. Thus society believes it can demand that the cyclist do his share to protect himself. Additionally, the cyclist's injury or death may force society to assume the cost of his neglected financial support obligations to others. The reduction of damages rationale is another frequently cited secondary harm.⁴⁴ It theorizes that if a cyclist is injured because of another driver's negligence and brings a civil action to recover damages, compensatory damages will be lower when a helmet is worn since the injury of a cyclist wearing a helmet will most likely be less severe than that of a cyclist not wearing a helmet. Thus this position views the problem from the standpoint of a negligent defendant in a tort suit. The helmet requirement serves to protect these defendants from paying unnecessarily high damage awards to the cyclist with an unprotected head. These arguments all identify people other than the actor who will suffer from his injury. State taxpayers contributing to the welfare rolls, the cyclist's dependents, and the defendants in a tort action are all seen as potential victims of a cyclist's refusal to wear a helmet.

However, several decisions have upheld helmet statutes on the basis that a state can protect an individual from himself without the justification of any direct or even any secondary harm to others.⁴⁵ These decisions are based broadly on the argument that the whole is no more than the sum of the parts; that is, as society is only composed of individuals banding together, each of these individuals is a subject of concern to society in its efforts to thrive. Thus the state as steward of the whole has a legitimate interest in the viability of the individual citizen.⁴⁶ The courts upholding the helmet statutes, and partic-

⁴⁴ *Love v. Bell*, 465 P.2d 118 (Colo. 1970).

⁴⁵ *State v. Eitel*, 227 So.2d 489 (Fla. 1969); *State v. Mele*, 247 A.2d 176 (N.J. Super. Ct. 1968); *State v. Odegard*, 165 N.W.2d 677 (N.D. 1969). While the latter two decisions both discuss the potential of direct or indirect harm to others, this is merely lip service, and both opinions state that even if these threats were absent, the legislature would still have the power to require cyclists to wear helmets. In contrast to this circuitous approach, the Florida Supreme Court grabbed the bull by the horns and stated, "[W]e ought to admit frankly that the purpose of the helmet is to preserve the life and health of the cyclist" *State v. Eitel*, 227 So.2d 489, 490 (Fla. 1969).

⁴⁶ See *Holden v. Hardy*, 169 U.S. 366, 397 (1898):

ularly those courts doing so without appeal either to direct or to secondary harm rationales, are heirs to the paternalistic model; as the whole society is the crucial value, restriction of personal freedom to promote the whole is acceptable. This is the philosophy under attack by libertarians.

Several influential jurisdictions have voided the helmet statutes as unconstitutional exercises of the police power, adopting the libertarian position that if the conduct involved threatens no direct harm to others, it cannot be legitimately proscribed by the legislature. The Michigan Court of Appeals was the first court to do so⁴⁷ although its position later changed.⁴⁸ The Michigan statute⁴⁹ was challenged on various provisions of the Michigan constitution⁵⁰ and on "the due process, equal protection and right of privacy provisions of the ninth and fourteenth amendments of the Constitution of the United States."⁵¹ The court found that the statute did have "a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare."⁵² Thus the court refused to decide by "stretching our imagination"⁵³ to find such a relationship, and as individual

The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.

⁴⁷ *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968). This case is noted in 18 *DRAKE L. REV.* 124 (1968); 54 *IOWA L. REV.* 382 (1968); 45 *N.D.L. REV.* 295 (1968-69); 13 *St. Louis U.L.J.* 339 (1968-69); 37 *U.M.K.C.L. REV.* 385 (1969); 71 *W. VA. L. REV.* 191 (1968-69); and 1969 *Wis. L. REV.* 320.

⁴⁸ The same Michigan Court of Appeals later re-examined the identical issue, the constitutionality of requiring cyclists to wear helmets, and declined to follow their ruling in *American Motorcycle Ass'n v. Davids*. In *People of the City of Adrian v. Poucher*, 240 N.W.2d 298 (Mich. App. 1976), the court found a municipal ordinance requiring cyclists to wear crash helmets constitutional as a valid exercise of the police power. The court stated, "We are convinced that the reasoning of this Court in *American Motorcycle Association* . . . was incorrect and decline to follow it." 240 N.W.2d at 300.

⁴⁹ *MICH. COMP. LAWS ANN.* § 257.658(d)(1967).

⁵⁰ *MICH. CONST.* art. 1, §§ 17, 23.

⁵¹ 158 N.W.2d at 73.

⁵² *Id.* at 76.

⁵³ *Id.* In one of the more realistic approaches to the problem, the court in a footnote (n. 11) quoted Judge Kaufman explaining that:

Here it just affects the individual, and while the individual is a member of the general public, his activity in doing what has been determined by the

safety alone did not appear a sufficient reason to restrict personal liberty, the statute was struck down.⁵⁴ In voiding the helmet statute, the court did not base its decision on any constitutional provision. Thus it appears that the Michigan court was the first court to recognize a right not enumerated in the Constitution to endanger oneself. This is the first evidence of this right in the context of motorcycle helmets.

The second court to invalidate a helmet statute was the Supreme Court of Illinois⁵⁵ in a case in which the statute required both a helmet and goggles or a transparent shield.⁵⁶ While claiming to express no opinion on the windshield-goggles provision, the court implied that this requirement was acceptable since its purpose was to prevent a cyclist from being blinded by flying objects, losing control, and hurting others. The court considered the helmet requirement directly and found that:

The manifest function of the headgear requirement in issue is to safeguard the person wearing it—whether it is the operator or a passenger—from head injuries. Such a laudable purpose, however, cannot justify the regulation of what is essentially a matter of personal safety.⁵⁷

The statute was voided as a violation of the Illinois constitution and the due process clause of the United States Constitution.⁵⁸

legislature to be a crime cannot in any way affect the general public unless one would stretch his imagination.

⁵⁴ *Id.* Interestingly enough, when the court declined to follow this reasoning in *People of the City of Adrian v. Poucher*, 240 N.W.2d 298 (Mich. Ct. App. 1976), they did a complete about-face in their philosophical orientation. While the court in the original case was full of the language of libertarianism, in *People of the City of Adrian* they state:

We are not persuaded that the "right to be let alone," at least in this case, or the fact that the legislation tends to protect particular individuals from their own folly warrants the conclusion that the measure is not a valid exercise of the police power. Nor can we say that a measure which seeks to protect a large number of individuals does not advance the health, safety or general welfare of the public in general.

240 N.W.2d at 300.

⁵⁵ *People v. Fries*, 250 N.E.2d 149 (Ill. 1969).

⁵⁶ ILL. REV. STAT. 1967, ch. 95½, par. 189c (a) provides, "The operator of a motorcycle and every passenger thereon must wear protective headgear" ILL. REV. STAT. 1967, ch. 95½, par. 189c (b) provides, "In addition, the operator of a motorcycle and every passenger thereon shall be protected by glasses, goggles or a transparent shield."

⁵⁷ 250 N.E.2d at 151.

⁵⁸ ILL. CONST. art II, § 2 (1870); U.S. CONST. amend. XIV. That the court used both

Approximately 3 months after the Illinois decision, an Ohio municipal court also voided a helmet statute.⁵⁹ The court took a classic libertarian approach and held that without a clear and specific public need, *i.e.* unless others are directly endangered, police power cannot restrict an individual's freedom. The court found that, "[i]ncluded in man's 'liberty' is the freedom to be as foolish, foolhardy or reckless as he may wish, so long as others are not endangered thereby. The State of Ohio has no legitimate concern with whether or not an individual cracks his skull while motorcycling; that is his personal risk."⁶⁰

While there have been other decisions invalidating helmet statutes,⁶¹ the three discussed above confront the controversy most directly.⁶² These courts adhere to the libertarian tenet that the police power of a state is always limited in restricting personal freedom to situations where the conduct being proscribed endangers others even when that freedom is not protected by a specific constitutional guarantee.

While the helmet statutes have been challenged on a number of constitutional bases,⁶³ two of the three decisions exam-

this state constitution clause and the due process clause of the federal constitution evidences their groping for a sufficient basis on which to invalidate the statute. They apparently did not feel as confident as the Michigan court in merely voiding the statute without citing a constitutional basis.

⁵⁹ *State v. Betts*, 252 N.E.2d 866 (Franklin Mun. Ct. Ohio 1969).

⁶⁰ *Id.* at 872.

⁶¹ *People v. Smallwood*, 277 N.Y.S.2d 429 (Ct. Spec. Sess. 1967).

⁶² The reluctance of courts to confront the question of the extent of the state's police power without the support of any direct or secondary harms to others is interestingly revealed in a federal court decision upholding a state statute. In *State v. Eitel*, 227 So.2d 489 (Fla. 1969), the Florida Supreme Court had construed a two part statute like Illinois', requiring both goggles and a helmet, as constitutional. The Florida court found the goggles requirement constitutional as it would prevent the cyclist from being blinded, losing control, and injuring others; and the court found the helmet requirement constitutional as being within the law's basic purpose to protect the individual rider's life and health. When the case was subsequently taken to federal district court, *Bogue v. Faircloth*, 316 F. Supp. 486 (S.D.Fla. 1970), the federal court upheld the state court's decision but disagreed on the rationale. They found that the purpose of the helmet requirement was *not* to protect the individual but to prevent harm to other motorists. Having thus justified the statute on the presumably sounder basis of direct harm to others, the federal court stated that, "The Florida Court's remarks regarding the helmet requirements were unnecessary and unfortunate." *Id.* at 489.

⁶³ See, *e.g.*, *Love v. Bell*, 465 P.2d 118 (Colo. 1970), where the statute was challenged as an unconstitutional burden on interstate commerce, an unconstitutional burden on freedom of movement and the right to travel, and special legislation which

ined above voided them because they violated state constitutions⁶⁴ and the fourteenth amendment to the United States Constitution. While the courts were not more specific, presumably they were voiding the statutes as deprivations of liberty without due process of law. Thus a very vague and general provision of the fourteenth amendment, the due process clause, was used to limit the state's police power. In contrast, the paternalistic position is that there are no restrictions on the legitimate goals of the police power except those that are specifically enumerated in the Constitution. Those holding to the paternalistic philosophy believe that a statute cannot be challenged on the due process clause without a specific constitutional guarantee to justify the challenge.⁶⁵ In light of the paternalistic-libertarian dispute, it is informative to examine the courts' interpretations of the extent to which it is permissible for the police power to prohibit an individual from endangering his life when a specific constitutional guarantee is involved.

III. SELF-ENDANGERMENT LAW AND THE FIRST AMENDMENT

A. *The Blood Transfusion Cases*

The members of the religious group known as Jehovah's Witnesses generally refuse blood transfusions even when they are essential to life. Their belief, based on two Biblical passages,⁶⁶ is that transfusions violate Jehovah's law.⁶⁷ A problem

was unconstitutional because it discriminated against a certain class of individuals; *Arutanoff v. Metropolitan Gov't of Nashville and Davidson County*, 448 S.W.2d 408 (Tenn. 1969), where the helmet statute was challenged as being generally beyond the police power, a violation of the due process clause of the fourteenth amendment, a violation of the equal protection clause of the fourteenth amendment and a violation of the right to privacy found in the ninth and fourteenth amendments.

⁶⁴ ILL. CONST. art. II, § 2 (1870); OHIO CONST. art. I, § 1.

⁶⁵ Linde, *Without Due Process*, 49 ORE L. REV. 125 (1970). Linde's thesis is that, No state law can be attacked as lacking support in "police power." There is no constitutional source of "police power" or any other category of state power. State legislative power is plenary subject to constitutional limitations. An attack on the validity of a state law phrased as a claim that it exceeds "police power" should be dismissed unless and until it is restated in terms of a specific constitutional limitation said to have been violated.

Id. at 184.

⁶⁶ *Leviticus* 3:17 (King James): "It shall be a perpetual statute for your generations throughout all your dwelling, that ye eat neither fat nor blood." *Acts* 15:29 (King

arises when doctors decide a transfusion is essential, yet the patient or his relatives refuse permission for that transfusion. The question then becomes whether the courts can compel an individual to receive a transfusion for his own good when this treatment violates a central tenet of his religious belief. Before analyzing the courts' decisions, some background is helpful to establish perspective.

It is generally acknowledged that where first amendment rights are at issue, any restriction of personal liberty must be scrutinized carefully for absolute necessity.⁶⁸ The Supreme Court has established general guidelines as to when religious freedom can be abridged. In an early decision,⁶⁹ the Court established the belief/action dichotomy that while freedom to believe is absolute, actions, even though religiously motivated, can be restricted to protect the general welfare. Various tests have been established since then to determine when the threat to the general welfare is severe enough to necessitate restriction of religious freedom. In *Thomas v. Collins*,⁷⁰ the Court held that attempted restrictions must be justified by clear public interest when the general welfare is threatened not doubtfully or remotely but by clear and present danger. In *Sherbert v. Verner*,⁷¹ the Court said any restriction must be justified by a compelling state interest exhibiting more than a mere rational relationship to some colorable state interest; only the gravest abuses endangering paramount interests give occasion to limit

James): "That ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves, ye shall do well. Fare ye well."

⁶⁸ See generally Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212 (1964).

⁶⁹ See *Thomas v. Collins*, 323 U.S. 516 (1944), which refers to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment [citations omitted]. That priority gives these liberties a sanctity and sanction not permitting dubious intrusions." *Id.* at 530. *Accord*, *U.S. v. Dellapia*, 433 F.2d 1252 (2d Cir. 1970): "Because we are dealing with the first amendment, our sensitivity to incursions upon privacy must be a quantum greater than it would be were we reviewing laws prohibiting the possession of marihuana, *People v. Aguiar*, 257 Cal.App.2d 597, 65 Cal.Rptr. 171 (Ct.App. 1968), *cert. denied*, 393 U.S. 970, 89 S.Ct. 411, 21 L.Ed.2d 383 (1968), or requiring motorcyclists to don helmets, *American Motorcycle Ass'n v. Davids*, 11 Mich.App. 351, 158 N.W.2d 72 (1968)." *Id.* at 1257.

⁷⁰ *Reynolds v. U.S.*, 98 U.S. 145 (1878).

⁷¹ 323 U.S. 516 (1944).

⁷² 374 U.S. 398 (1962).

these rights. In the most recent decision on this point, *Wisconsin v. Yoder*,⁷² the Court established a balancing test in which state interests must be searchingly examined to see if they are of sufficient magnitude to overbalance legitimate claims to the free exercise of religion.

While these tests are not clear in themselves, they do evidence the Supreme Court's great concern and solicitude for the right to freedom of religion. The treatment accorded this delicate area in the blood transfusion cases reflects this concern. At first glance there seems to be a split of authority, mirroring that in the helmet cases, as to whether Jehovah's Witnesses may be compelled to take blood transfusions.⁷³ However, when examined closely the cases holding that there is judicial power to compel transfusions have always involved one of two types of extenuating circumstances. The first is that the patient is a parent of minor children⁷⁴ or is a pregnant woman.⁷⁵ Here the courts have recognized that the welfare of children, particularly in the case of the pregnant patient, is endangered by the parent's refusal of a transfusion. In this situation, courts will step in and order a transfusion over the patient's wishes out of concern for the minor or unborn dependents.⁷⁶ The second cir-

⁷² 406 U.S. 205 (1971).

⁷³ See generally Annot., 9 A.L.R.3d 1391 (1966).

⁷⁴ See, e.g., Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), rehearing denied, 331 F.2d 1010 (D.C. Cir.), cert. denied, 237 U.S. 978 (1964), a case frequently cited for the proposition that transfusions may be compelled, where the judge relies heavily on the fact that the patient was a mother: "The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments." *Id.* at 1008. Accord, *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965), where a man was compelled to accept a transfusion partly on the basis of his obligations to a wife and four children. But see *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944):

The right to practice religion freely does not include liberty to expose the community or the child to communicable disease. . . . *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 [emphasis added].

⁷⁵ *Raleigh Ritkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J.), cert. denied, 377 U.S. 985 (1964).

⁷⁶ In *Powell v. Columbian Presbyterian Medical Center*, 267 N.Y.S.2d 450 (Sup. Ct. 1965), the court ordered a transfusion administered to a mother of six based at least partially on the court's sense of existentialism and moral guilt. The court explained, How legalistic minded our society has become, and what an ultra-legalistic

cumstance in which courts have intervened to compel transfusions is that the patient is *non compos mentis*⁷⁷ or comatose.⁷⁸ This is justified by the argument that an emergency exists, and when the patient cannot make a rational decision, the safest policy is to proceed with the transfusion.

In contrast, in cases without extenuating circumstances, *i.e.* where the patient is a competent adult without minor children, courts deciding the issue on the merits⁷⁹ have upheld the right to refuse transfusions. Such a decision was reached by the Supreme Court of New York when they denied the application of a hospital for an order authorizing a blood transfusion to a Jehovah's Witness who had refused the transfusion.⁸⁰ The court noted that the patient had made a competent and calculated decision, and even though suicide was a violation of the penal law, he had a right to refuse the transfusion. Without relying on the freedom of religion issue, the court decided the case on

maze we have created to the extent that society and the individual have become enmeshed and paralyzed by its unrealistic entanglements!

I was reminded of "The Fall" by Camus, and I knew that no release—no legal absolution—would absolve me or the Court from responsibility if I, speaking for the Court, answered "No" to the question "Am I my brother's keeper?" This woman wanted to live. I could not let her die!

Id. at 452.

⁷⁷ See Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), where the patient was "*in extremis* and hardly *compos mentis* at the time in question; she was as little able competently to decide for herself as any child would be." *Id.* at 1008; accord, United States v. George, 239 F.Supp. 752 (D.Conn. 1965), where the patient was diagnosed to be psychologically unstable at the time.

⁷⁸ Collins v. Davis, 254 N.Y.S.2d 666 (Sup. Ct. 1964).

⁷⁹ These cases reaching the merits are few because the issue does not frequently come up, and when it does, courts are reluctant to confront the issue on the merits. They have developed a kind of doublebind treatment of the procedure involved which successfully avoids the merits of the case. If the patient is in need of a transfusion, which is usually an urgent need due to the nature of transfusions, courts will authorize it on the theory that it's an emergency dictating a decision in favor of life because there's no opportunity to give the problem the mature consideration it deserves. See Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964); United States v. George, 239 F.Supp. 752 (D. Conn. 1965); Powell v. Columbian Presbyterian Medical Center, 267 N.Y.S.2d 450 (Sup. Ct. 1965). Subsequently, once the transfusion has been administered, the question is magically moot. See Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, rehearing denied, 331 F.2d 1010 (D.C. Cir. 1964). Thus there are few opportunities to litigate the question fully.

⁸⁰ Erickson v. Dilgard, 252 N.Y.S.2d 705 (Sup.Ct. 1962). This case is noted in 33 FORDHAM L. REV. 513 (1965).

the basis that "it is the individual who is the subject of a medical decision who has the final say and . . . this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires."⁸¹

A second court which decided the issue on the merits was the Supreme Court of Illinois.⁸² There, the patient was competent and both of her children were adults. The court held that transfusions could not be ordered by courts over the objections of the individual because the first amendment "protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals."⁸³

Thus it would seem that while there is a split of authority regarding society's right to force an individual to protect himself in the absence of a specific constitutional guarantee as is the case with the helmet decisions, when a constitutional right is involved, an adult is allowed the freedom to endanger his own life if he is mentally competent and is without dependents.

B. *The Development of State ex rel. Swann v. Pack*

The controversy in *State ex rel. Swann v. Pack*⁸⁴ grew out of the distinctive religious practices of a fundamentalist sect in the Tennessee mountains called The Holiness Church of God in Jesus Name. As part of their religious ceremonies, members of this sect drink strychnine and handle poisonous snakes. The

⁸¹ *Erickson v. Dilgard*, 252 N.Y.S.2d at 706 (Sup.Ct. 1962). Although the court did not actually mention the freedom of religion issue, it was a consideration in their decision to allow the individual to do as he chose.

⁸² *In re Brooks Estate*, 205 N.E.2d 435 (Ill. 1965). Although the transfusion in this case had already been administered, the court dismissed the argument that the question was moot and found that the issue presented fell within the well recognized exception of cases presenting problems, which although technically moot were of substantial public interest and so required authoritative determination on appeal. *Id.* at 437-38.

⁸³ *Id.* at 441. See generally Note, 44 TEXAS L. REV. 190 (1965) (concluding that it is unclear if the decision would have been different had the court used the "compelling state interest" test instead of the "clear and present danger" test).

⁸⁴ 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 96 S. Ct. 1429 (1976).

purpose of these practices is not to test a member's faith but "to confirm the Word of God."⁸⁵

The case history of *Swann* is intricate. On April 14, 1973 the District Attorney General of the Second Judicial Circuit of Tennessee filed a petition seeking to enjoin Pastor Pack and certain Elders of The Holiness Church from "handling, displaying or exhibiting poisonous snakes or taking or using strychnine or other poisonous medicines."⁸⁶ A week later the Circuit Court in Newport, Tennessee granted an injunction based on the Tennessee statute making snake handling a misdemeanor.⁸⁷ Although the statute forbidding snake handling was the authority for the injunction, the trial judge also enjoined the use of poison in church services. At the bottom of the injunction, the trial judge added in his own handwriting, "However, any person who wishes to swallow strychnine or other poison may do so if he does not make it available to any other persons."⁸⁸

Apparently, the Holiness Church ignored the injunction because the District Attorney General subsequently filed a second petition alleging increased activity at the church. He concluded that Cocke County, Tennessee was "in imminent danger and likely to 'become the snake handling capital of the world.'"⁸⁹ In response to this, Pack and the Elders were held in contempt, fined and sentenced. The sentences were suspended, but when the defendants defaulted on payment of the fines, they were directed to appear at a hearing and show cause why they should not be imprisoned.

⁸⁵ Alfred Ball, a defendant in this suit, quoted in PELTON AND CARDEN, *SNAKE HANDLERS* (1974) and cited in *State ex rel. Swann v. Pack*, 527 S.W.2d at 106 (Tenn. 1975).

⁸⁶ 527 S.W.2d at 103.

⁸⁷ TENN. CODE ANN. § 39-2208 (1947). This statute provides, 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.

Any person violating the provisions of this section shall be guilty of a misdemeanor

The injunction read that the defendants were enjoined from "handling poisonous snakes or using deadly poisons in any church service being conducted in said church or at any other place in Cocke County, Tennessee. . . . 527 S.W.2d at 103.

⁸⁸ 527 S.W.2d at 104.

⁸⁹ *Id.*

At this hearing the trial judge issued a final decree permanently enjoining the defendants from "handling, displaying or exhibiting dangerous and poisonous snakes at the said Holiness Church of God in Jesus Name, or at any other place in Cocke County, Tennessee."⁹⁰ At this point, use of poison was dropped from the injunction.

In a split decision, the Tennessee Court of Appeals found the injunction to be overbroad and modified it to enjoin the defendants from "handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to exposure to such danger."⁹¹ Thus the Court of Appeals injected a consenting adult standard which would allow snake handling.

The Tennessee Supreme Court reversed and found both lower courts in error in restricting their injunctions to the terms of the snake handling statute. While this was originally a criminal action for violation of a state statute, the court spontaneously changed the emphasis of the case and characterized it instead as a suit by the District Attorney General to abate "a common law nuisance, wholly independent of any state statute."⁹² Thus both the previous injunctions were found to be overly narrow, and the Tennessee Supreme Court ordered that on remand,

the trial judge will enter an injunction perpetually enjoining and restraining all parties respondent from handling, displaying or exhibiting dangerous and poisonous snakes or from consuming strychnine or any other poisonous substances, within the confines of the State of Tennessee [emphasis added].⁹³

Thus any consumption of poison whatsoever was enjoined as a common law public nuisance. The United States Supreme Court denied certiorari for the case on March 8, 1976.⁹⁴

⁹⁰ *Id.* at 105.

⁹¹ *Id.* at 114. This consenting adult standard was apparently derived from the language in the snake handling statute, reprinted note 87 *supra*.

⁹² *Id.* at 113.

⁹³ *Id.* at 114.

⁹⁴ *Pack v. Tennessee ex rel Swann*, 96 S.Ct. 1429 (1976).

C. *The Approach in the Blood Transfusion Cases: A Better Solution for Swann*

The issue in the blood transfusion cases is closely analogous to the issue in *Swann* in several important ways. First, neither refusing a transfusion nor drinking poison even arguably threatens direct harm to others; thus any danger to others must arise from secondary harm. Second, the activity is proscribed not by any legislative action but rather by judicial action; thus the proscription lacks the familiar presumption of constitutionality that attaches to statutes.⁹⁵ Third, the individuals must be presumed to be motivated by sincere religious convictions⁹⁶ based on Biblical passages.⁹⁷ Fourth, and most significant, since the actions are a part of the individual's religious practices, they are protected by the first amendment. While some distinctions between the blood transfusion cases and the present case can be argued,⁹⁸ they are relatively insignificant and far outweighed by the similarities.

Yet the *Swann* case makes no mention of the blood transfusion cases except for one case which has at best doubtful precedential value.⁹⁹ Basically, the court seems to accord the

⁹⁵ U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

⁹⁶ While the sincerity of a particular religious practice is open to challenge, it is not an issue in this case.

⁹⁷ The basis for the Jehovah's Witnesses' action is quoted in note 66 *supra*. The Biblical passage regarding poison relied on by the members of the Holiness Church of God in Jesus Name is *Mark* 16:18 (King James), which states,

They shall take up serpents; and if they *drink any deadly thing*, it shall not hurt them; they shall lay hands on the sick, and they shall recover [emphasis added].

⁹⁸ There are two arguable distinctions. The first is that the blood transfusion cases involve the staff of a hospital and doctors who are committed professionally and by oath to maintaining life. Many of the transfusion cases have considered this involvement as a factor in their decision to order a transfusion over the wishes of the individual. See *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964) and *John F. Kennedy Memorial Hospital v. Heston*, 279 A.2d 670 (N.J. 1971). The second possible distinction is that refusing blood is merely passive behavior whereas drinking strychnine is active behavior.

⁹⁹ The case mentioned was *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964). In this case, the U.S. District Court for the District of Columbia denied the hospital's application for permission to administer a transfusion to a Jehovah's Witness when two attorneys appeared at the judge's chambers, and without any formal complaint, application, or petition having been filed, requested that the judge endorse the order for a transfusion they had in their hands. The judge denied the application, and later the same day, the two attorneys

poison issue brief treatment strictly as an analogy to suicide although the two issues are clearly distinguishable.¹⁰⁰ Assuming *arguendo* that the analogy is valid, poison drinking is still treated with unseemly brevity.

Poison drinking is enjoined not on the basis of a statute but as a common law public nuisance and as such it lacks the

showed up unannounced at the chambers of Circuit Judge J. Skelly Wright. Judge Wright went to the hospital and interviewed the patient's family, and to the extent possible, the patient herself. He concluded that the patient didn't want to die, but she didn't want to take responsibility for accepting the transfusion and thus betraying her religious convictions. So Judge Wright then and there ordered the transfusion, thus relieving the patient's conflict. In his opinion, he stresses the emergency nature of the whole transaction, and states that, "It should be made clear that no attempt is being made here to determine the merits of the underlying controversy." *Id.* at 1007. Later, the Court sitting en banc denied a petition for rehearing en banc. Four separate opinions were filed. In a concurring opinion, Circuit Judge Washington stressed the idea that their denial of a rehearing en banc was *not* to be interpreted as approving the action in the matter sought to be reheard. In another concurring opinion, Circuit Judge Danaher held he would dismiss for lack of a case or controversy. Two dissenting opinions were filed. Circuit Judge Miller objected to the procedure of the action, which he implied was totally improper. He stated,

. . . the purported orders [for the transfusion] should be expunged so there would be nothing in our records which could be cited as a precedent for future similar action by a single appellate judge.

Id. at 1010, 1014. This dissent was joined by Circuit Judges Bastion and Burger. A second dissent was filed by Circuit Judge Burger, joined by Miller and Bastian, in which Burger objected on the basis that the judicial power had been over-extended by the order. He explained,

. . . we should . . . reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters of *essentially private concern* and others of enormous public concern, are beyond the reach of judges [emphasis added].

Id. at 1010, 1017-1018. At best then, the case had doubtful value as a precedent. See also 39 N.Y.U.L. Rev. 706 (1964).

¹⁰⁰ Suicide is an invalid analogy for two reasons. First, suicide requires *intent* to kill oneself, and the individuals drinking strychnine certainly did not intend to destroy themselves. They meant to confirm God's word. Second, the suicide analogy does not take the *motive* for the behavior into account. While someone attempting suicide may have any of a number of motives, the drinking of strychnine in this case was religiously motivated, and as such is protected by the first amendment. *But see dictum* from *Reynolds v. United States*, 98 U.S. 145, 166 (1878):

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

presumption of constitutionality that attaches to statutes.¹⁰¹ The court states that while suicide and attempted suicide are not crimes under Tennessee statutes, they were crimes at common law, and since Tennessee adopted the common law, attempted suicide is a grave public wrong.¹⁰² One question raised by this reasoning is whether, since the Tennessee legislature has not seen fit, as many states have, to classify suicide as any type of crime,¹⁰³ the court is justified in defining suicide as an activity that requires restriction of first amendment freedom by the police power.¹⁰⁴

The court goes on to state that, "Most assuredly . . . the drinking of strychnine [is] not calculated to increase one's lifespan."¹⁰⁵ While this is undeniably a true statement, it diverts attention from the important issue. Although drinking strychnine is not intended to increase one's lifespan (neither is boxing, race car driving, mountain climbing, smoking, drinking, overeating or a myriad of other activities commonly engaged in), drinking strychnine is calculated in this case to fulfill a religious dictate. The critical issue is whether the religious practice of drinking poison can legitimately be enjoined as a common law public nuisance when it threatens no direct harm to others and is, moreover, constitutionally guaranteed by the

¹⁰¹ Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 307-08 (1940):

Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer [footnote omitted]. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature.

¹⁰² 527 S.W.2d at 113.

¹⁰³ But cf. Cawley, *supra* note 31, at 68, who concludes that

. . . in those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necessary medical aid, whether equal to or less than attempted suicide, must be conceded to be lawful.

¹⁰⁴ Here the court has contradicted itself. While they feel confident in invoking the police power on their own in this case, in their decision upholding statutory safety regulations for motorcyclists, the same Tennessee court described the police power as totally a *legislative* function:

It is a function of government solely within the domain of the Legislature to declare when this [police] power shall be brought into operation, for the protection or advancement of the public welfare.

Arutanoff v. Metropolitan Gov't of Nashville and Davidson County, 448 S.W.2d 408, 410 (Tenn. 1969).

¹⁰⁵ 527 S.W.2d at 113.

first amendment. The court never answers this question.

Finally, the court enumerates four alternatives to their comprehensive injunction and gives the reason why none was acceptable.¹⁰⁶ But these alternatives, presumably offered to obviate the "less burdensome alternatives" argument,¹⁰⁷ are directed solely at the prohibition against snake handling. Apparently the court overlooked the most obvious alternative: a distinction in treatment between the handling of snakes and the drinking of poison.

It is likely that the court could have reached a better solution by distinguishing handling snakes from drinking strychnine on the basis of the likelihood of direct harm to others.¹⁰⁸

¹⁰⁶ The court stated:

We gave consideration to limiting the prohibition to handling snakes in the presence of children, but rejected this approach because it conflicts with the parental right and duty to direct the religious training of his children. We considered the adoption of a "consenting adult" standard but, again, this practice is too fraught with danger to permit its pursuit in the frenzied atmosphere of an emotional church service, regardless of age or consent. We considered restricting attendance to members only, but this would destroy the evangelical mission of the church. We considered permitting only the handlers themselves to be present, but this frustrates the purpose of confirming the faith to non-believers and separates the pastor and leaders from the congregation. We could find no rational basis for limiting or restricting the practice, and could conceive of no alternative plan or procedure which would be palatable to the membership or permissible from a standpoint of compelling state interest.

Id. at 114.

¹⁰⁷ See *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁰⁸ It is conceivable that a snake might escape or lash out and thereby pose a direct threat of harm to others, but this threat is absent when an individual drinks poison. The trial judge in the principal case implicitly recognized this distinction, as he enjoined the sect members from handling poisonous snakes or drinking deadly poisons at any church services, but then added in his own handwriting at the bottom of the injunction: "However, any person who wishes to swallow strychnine or other poison may do so if he does not make it available to any other persons." 527 S.W.2d at 104.

Additionally, most of the states where this sect can be found have statutes against snake handling which have been upheld by the courts. See *Hill v. State*, 88 So.2d 880 (Ala. 1956); *Lawson v. Commonwealth*, 164 S.W.2d 972 (Ky. 1942); *State v. Massey*, 51 S.E.2d 179 (N.C. 1949) (city ordinance); *Kirk v. Commonwealth*, 44 S.E.2d 409 (Va. 1947). However, none of these jurisdictions apparently felt the need to enact a statute prohibiting the drinking of strychnine.

This distinction between handling snakes and drinking strychnine was made explicit by the Chief of Police of Durham, North Carolina, during an interstate convention of snakehandlers. As La Barre describes it in his book *THEY SHALL TAKE UP SERPENTS* (1962), Police Chief H. E. King,

The court could then have adopted the approach used by other courts for handling Jehovah's Witnesses who declined blood transfusions. Thus if the individual makes a competent choice to drink strychnine and has no dependents, he would be free to do so.

Besides providing the more just solution, this approach would be more rationally grounded to the facts of this case. The Holiness Church of God in Jesus Name is a small sect, and the stipulations in the record show that it was "located about a half mile from the nearest paved road, and at the end of a dead-end, dirt, private, mountain road and on property owned by the church."¹⁰⁹ To restrict the religious practices of this sect on the ground that they constitute a "public nuisance" is a weak argument at best¹¹⁰ and suggests an inability on the part of the court to differentiate degrees of severity of threat to the public welfare. The California Supreme Court was able to make such a differentiation when they upheld the right of a small band of Indians to consume peyote, even though it was a violation of the penal law, because peyoteism was central to the practice of their religion.¹¹¹ In the concluding paragraph of their opinion, the California court states:

We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression em-

. . . [R]eminded the public of the municipal ordinance against snake-handling. He pointed out, however, that there was no law against people's using blow-torches on themselves or taking strychnine or other poisons in religious demonstrations, so long as they did not injure the health or lives of other persons.

Id. at 35-36.

¹⁰⁹ 527 S.W.2d at 104.

¹¹⁰ The essence of a public nuisance is behavior that affects other citizens adversely. See definition of a public nuisance, *supra* note 6. How an individual's drinking poison could infringe on others' rights to the extent that the behavior would qualify as a common law public nuisance is not explained by the court.

¹¹¹ *People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

bodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes evermore important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.¹¹²

By taking the suggested approach to the situation in *Swann*, the Tennessee Supreme Court also could have preserved the greater value had they chosen not to enjoin the drinking of strychnine by a small fundamentalist sect practicing their religion in the mountains of Tennessee.

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¹¹² *Id.* at 77-78, 394 P.2d at 821-22.