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RECENT CASES

Constitutional Law—State and Local Tax—Nondiscriminatory Ad Valorem Property Tax on Imports Stored in Warehouse Pending Sale Is Not Prohibited by Import-Export Clause

I. Facts and Holding

Petitioner, a tire importer and distributor,[1] brought an action to enjoin a county tax commissioner[2] from collecting a nondiscriminatory[3] ad valorem property tax[4] assessed against petitioner's warehouse inventory of imported tires and tubes.[5] Petitioner asserted that the imposition of the tax violated the import-export clause of the United States Constitution, which prohibits a state from laying "any Imposts or Duties on Imports or Exports . . . ."[6] Respondents contended that a nondiscriminatory ad valorem property tax was not a tax on imports within the meaning of the import-export clause. Additionally, respondents contended that the tires, having been mingled, sorted, and arranged for sale with other tires imported in bulk, had lost their status as imports and had become subject to state taxation. The trial court,[7] holding for petitioner,

1. Petitioner, Michelin Tire Corporation, operated in the United States as an importer and wholesale distributor of automobile and truck tires and tubes manufactured in France and Nova Scotia by Michelin Tires, Ltd. Petitioner distributed its tires to franchised dealers from distribution warehouses in various parts of the country. The instant warehouse, located in Gwinnett County, Georgia, served 6 southeastern states.

2. Respondents were the Tax Commissioner and Tax Assessors of Gwinnett County, Georgia.

3. The tax was assessed against domestic and imported goods without regard to place of origin.

4. An ad valorem tax is computed on the basis of a percentage of the value of the property subject to taxation. *See* Black's Law Dictionary 58 (rev. 4th ed. 1968). In 1972-73 county government units acquired over 30% of their total revenue and over 80% of their tax revenue from property taxes. *See* U.S. Bureau of the Census, County Government Finance in 1972-73, at 7 (1975).

5. Petitioner's inventory at the warehouse consisted primarily of tires and tubes imported from other countries, although on the tax dates in question some domestic tubes were stored at the warehouse. The imported tires were packed in bulk into trailers and vans at the foreign factory without otherwise being packaged or bundled. When the tires were unloaded from the trailers and vans at the domestic warehouse they were sorted by size and style so that the individual shipments were no longer identifiable units and were stored in the warehouse awaiting sale and delivery to franchised dealers.

6. U.S. Const. art. I, § 10, cl. 2 provides:

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

7. Trial was held in the Superior Court of Gwinnett County.

permanently enjoined respondent from collecting the tax. The Georgia Supreme Court, agreeing with respondents' contention that the tires had lost their status as imports and therefore were subject to state taxation, reversed.[8] On writ of certiorari, the Supreme Court of the United States, *held*, affirmed. A nondiscriminatory ad valorem property tax imposed by a state on imported goods stored in a warehouse pending sale is not prohibited by the import-export clause of the United States Constitution. *Michelin Tire Corp. v. Wages*, 96 S. Ct. 535 (1976).

II. Legal Background

The framers of the Constitution enacted the import-export clause with the apparent intent that it remedy shortcomings of the Articles of Confederation and achieve specified national goals. Since the Articles of Confederation allowed individual states to regulate commerce as they saw fit, the seaboard states, through whose ports goods in foreign commerce had to pass, were able to impose duties on imports destined for inland states. One reason for the import-export clause was to preserve harmony among the states by remedying this distribution of power that had allowed the coastal states to tax the citizens of other states, the ultimate consumers, by the simple expedient of levying imposts and duties on goods passing through their ports.[9] The framers also intended that the clause vest in the national government the exclusive power to regulate foreign commerce,[10] as exclusive regulation by the national government was believed necessary to enable the United States to speak with one voice in foreign relations.[11] Finally, the framers assumed that duties on imports would be the primary source of revenue for the national government, and they did not want those revenues diverted to the states.[12] To effectuate these three goals the framers gave Congress the power "To regulate Commerce with foreign Nations"[13] and "To lay and collect Taxes, Duties, Imposts, and Excises,"[14] and denied

8. Wages v. Michelin Tire Corp., 233 Ga. 712, 214 S.E.2d 349 (1975). In addition, the Georgia Supreme Court affirmed a superior court holding that certain tubes in corrugated shipping cartons were immune from ad valorem taxation. That holding, however, was not before the Court in the instant case.

9. *See* Madison, *Preface to Debates in the Convention of 1787*, in 3 The Records of the Federal Convention 539, 542 (M. Farrand ed. 1911).

10. *See* The Federalist Nos. 11 & 12 (A. Hamilton).

11. *See* Letter of James Madison to Professor Davis, in 3 M. Farrand, *supra* note 9, at 518-19; The Federalist No. 11 (A. Hamilton).

12. *See* The Federalist No. 12 (A. Hamilton).

13. U.S. Const. art. I, § 8, cl. 3.

14. U.S. Const. art. I, § 8, cl. 1.

states the power, absent congressional consent, to "lay any Imposts[15] or Duties[16] on Imports[17] or Exports."[18]

The first Supreme Court case interpreting the import-export clause was *Brown v. Maryland*,[19] an opinion written by Chief Justice Marshall. In *Brown*, a license tax levied by the state on importers as a prerequisite to their sale of imported goods within the state was held to be equivalent to a tax on the imported goods themselves and thus unconstitutional. In response to fears expressed by counsel for the State of Maryland[20] that reading the clause too broadly would limit unreasonably the power of the states to raise needed revenue, Marshall recognized that "there must be a point of time when the prohibition ceases, and the power of the State to tax commences."[21] Marshall identified the breaking of the original package as one point in time at which an item loses its distinctive character as an import and becomes subject to state taxing power.[22] In addition, he sug-

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15. In 1787 "imposts" were "customs duties" collected upon imports and exports at the time and place of importation and exportation. 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 296 (1953).

16. "Duties," a more comprehensive term than "imposts," included "customs," or external duties, and "excises," or inland duties. With the exception of capitation taxes, land taxes, and general property taxes, inland duties comprehended all internal "taxes." *Id.*

17. There is strong evidence that the framers intended "imports" to include goods from other states as well as from abroad. *See id.* at 297-304. The Supreme Court, however, has interpreted the import-export clause to apply only to articles imported from foreign countries into the United States. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868).

18. U.S. CONST. art. I, § 10, cl. 2.

19. 25 U.S. (12 Wheat.) 419 (1827).

20. Roger Taney, later Chief Justice Taney, argued for the State of Maryland that the prohibition on state taxation should cease when the goods entered the country. As Chief Justice, Taney had occasion in the License Cases, 46 U.S. (5 How.) 504, 573 (1847) (Taney, C.J., concurring), to comment on Marshall's analysis in *Brown v. Maryland*:

> But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them.

Id. at 575.

21. 25 U.S. (12 Wheat.) at 441.

22. In a frequently quoted passage, Marshall stated:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

Id. at 441-42.

gested the sale[23] or use[24] of the article by the importer as other acts that would cause the articles to lose their immunity from state taxation. Although the *Brown* holding was limited to the validity of a statute requiring importers to pay a license tax prior to selling imported goods, Marshall's discussion of the scope of the import-export clause has been the point of departure for judicial analysis of state taxation of imports.

In subsequent Supreme Court decisions the Court's analysis has focused on whether the imported goods retained their status as imports at the time the tax was imposed. The "original package doctrine"[25] was applied in *Low v. Austin*[26] to prohibit a state ad valorem property tax from being assessed against wine stored in the original cases in which it was imported. The Court stated that imported goods do not lose their character as imports until they have been removed from their original cases; while they retain their character as imports, a tax upon them *in any shape* is within the constitutional prohibition.[27] Taking a less restrictive view of the clause, the Court in *May v. New Orleans*[28] applied the original package doctrine to uphold a state property tax on imported goods that had been taken out of their shipping unit preparatory to displaying them for sale. The Court held that the box or case in which the foreign manufacturer placed separate parcels or bundles for shipping was to be regarded as the original package. When this shipping unit was opened and the individual parcels were exposed for sale, they lost their distinctive character as imports. The Court also noted that a contrary holding would provide a tax immunity for manufacturers of foreign goods imported into this country that is denied to manufacturers of domestic goods, "an interpretation [that] ought not to be adopted if it can be avoided without doing violence to the words of the Constitution."[29] The Court concluded that the imported goods, having lost their distinctive character as imports, could be taxed *as property*.[30]

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23. *Id.* at 443. In Waring v. Mayor, 75 U.S. (8 Wall.) 110 (1872), a municipal tax on all sales of merchandise in the city was held to be valid against imported goods in the hands of a trader who had purchased them from the importer, even though tbe goods were still in their original packages. The Court said that tbe goods had lost their exempt status as imports because they had been mixed with the general property of the state upon their sale by the importer.

24. 25 U.S. (12 Wheat.) at 443.

25. *See* text accompanying note 22 *supra*.

26. 80 U.S. (13 Wall.) 29 (1872).

27. *Id.* at 34. The original package doctrine was also applied to prohibit a state from taxing imported goods in Anglo-Chilean Corp. v. Alabama, 288 U.S. 218 (1933).

28. 178 U.S. 496 (1900).

29. *Id.* at 504.

30. *See also* Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928), in wbich the Court, upholding a license tax on dealing in fish, held that fish that had been processed, handled,

The Court also has applied the original package doctrine when the imported goods were intended for use in the importer's manufacturing process rather than for sale.[31] In *Hooven & Allison Co. v. Evatt*,[32] the Court held that hemp stored in the importer's warehouse in the original shipping packages was immune from an ad valorem property tax. The Court stated that as long as the original package was unbroken, the hemp would continue to be an import while awaiting use in the importer's manufacturing process. The Court retreated from the original package doctrine, however, in *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. City of Algoma*,[33] two companion cases. In upholding the state property taxes, the Court indicated that the fact that the imported goods awaiting use in manufacturing were stored in their original form or package was not controlling. Since the iron ore and lumber in question were essential to and had been irrevocably committed to supply current manufacturing requirements, the Court held that they had been put to the use for which they had been imported and thus had lost their distinctive character as imports. Regardless of whether an article is imported for sale[34] or imported for use in manufacturing, however, the issue that the Court consistently has attempted to resolve is whether the importer has so dealt with the imported article that it has become incorporated with the general mass of property in the country, resulting in the loss of its distinctive character as an import.

III. The Instant Opinion

Recognizing that *Low v. Austin*[35] had held specifically that the import-export clause prohibits states from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose

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and sold were no longer in their original form and had lost their distinctive character as imports.

31. For a description of the Court's different treatment of goods imported for sale and goods imported for use in manufacturing see Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?*, 19 LA. L. REV. 747, 765-67 (1959); Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes*, 7 SW. U.L. REV. 247, 265-67 (1975).

32. 324 U.S. 652 (1945). For a discussion of this case see Powell, *State Taxation of Imports—When Does an Import Cease to be an Import?*, 58 HARV. L. REV. 858 (1945).

33. 358 U.S. 534 (1959). For a discussion of these cases see Hart, *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 176-79 (1959).

34. The original package doctrine was reaffirmed as determinative of whether an article imported and held for sale retains its character as an import in Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964).

35. 80 U.S. (13 Wall.) 29 (1871).

their character as imports,[36] the instant Court undertook to test the soundness of that proposition. The Court began by identifying the goals[37] that the framers sought to accomplish by including the import-export clause in the Constitution and concluded that a nondiscriminatory property tax was not the type of assessment that the framers regarded as objectionable. Since a nondiscriminatory tax does not allow a strategically located state to benefit at the expense of its neighbors, the Court concluded that the allowance of the tax would neither interfere with the free flow of imported goods nor cause disharmony among the states. Further, because a nondiscriminatory tax cannot be used to create special protective tariffs or applied selectively to encourage or discourage importation in a manner inconsistent with federal policy, the Court indicated that such a tax could have no impact whatsoever on the federal government's exclusive regulation of foreign commerce. Finally, since a nondiscriminatory tax is not a tax on the commercial privilege of bringing goods into the country, the Court stated that such an assessment would not deprive the federal government of its right to all revenues from imposts and duties on imports. The Court next looked at the wording of the clause itself, and after noting that the prohibition is only against states' laying "Imposts or Duties" as contrasted to congressional power to collect "Taxes, Duties, Imposts, and Excises,"[38] decided that the terminology was sufficiently ambiguous to allow the presumption that a tax that does not create the evils that the clause was intended to correct is not within the prohibition that the framers intended. The Court then reviewed and overruled the decision in *Low*, finding that the opinion was analytically deficient[39] and based on misreadings of the opinions of Chief Justice Marshall in *Brown v. Maryland*[40] and Chief Justice Taney in the *License*

36. *See* text accompanying note 27 *supra.*

37. *See* text accompanying notes 9-18 *supra.*

38. U.S. CONST. art. I, § 8, cl. 1 provides: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts, and Excises . . . ." Comparing this clause with the import-export clause, the Court read the prohibition of the latter as being narrower in scope and "not prohibiting every exaction or 'tax' which falls in some measure on imported goods," citing 1 W. CROSSKEY, *supra* note 15.

39. The Court stated that the opinion in *Low* extended the prohibition of the import-export clause to nondiscriminatory ad valorem taxes on the assumption that *Brown v. Maryland* had marked the line "where the power of Congress over the goods imported ends, and that of the State begins, with as much precision as the subject admits." 80 U.S. (13 Wall.) at 32. The opinion did not undertake independent analysis of the rationale underlying the clause in applying it to a nondiscriminatory property tax.

40. 25 U.S. (12 Wheat.) 419 (1827). The instant Court pointed out that Marshall's description of the prohibited tax in *Brown* implied that a state tax that treated imported goods no differently from domestic goods would not he prohibited, a proposition rejected by the *Low* Court. According to Marshall, the objectionable characteristic was that

Cases.[41] Thus, without addressing the issue whether the tires in question had lost their character as imports,[42] the Court held that a nondiscriminatory ad valorem property tax assessed by a state against imported goods that are no longer in import transit is not prohibited by the import-export clause of the Constitution.

IV. Comment

The instant case marks a clear shift in judicial analysis of the validity of taxes challenged under the import-export clause. No longer will the Court focus solely on the goods involved in an attempt to determine whether they had lost their distinctive character as imports at the time the tax was imposed. Rather, the Court has indicated that it will examine the challenged tax and determine its validity on the basis of whether the tax discriminates against goods because of their foreign origin. If the tax is imposed on goods on that basis, it is a prohibited impost or duty on imports; however, if foreign goods that are no longer in transit are treated no differently from domestic goods, the tax is not prohibited by the import-export clause. In choosing to focus on whether the tax is discriminatory rather than on whether the taxed goods are imports, the instant Court, unlike prior Courts,[43] has recognized that the clause prohibits only certain types of taxes and not *all* taxes on imports and exports,[44] and it persuasively documented its conclusion that a nondiscriminatory property tax was consistent with the constitutional pol-

> [T]he tax intercepts the import, *as an import*, in its way to become incorporated with the general mass of property, and denies it the privilege of hecoming so incorporated until it shall have contributed to the revenue of the State.

Id. at 443 (emphasis supplied by Court).

41. 46 U.S. (5 How.) 504, 573 (1847) (Taney, C.J., concurring). The instant Court expressed the belief, contrary to the reasoning in *Low*, that Chief Justice Taney's opinion supported the proposition that nondiscriminatory ad valorem property taxes are not prohibited by the clause, citing the following passage as authority:

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; *and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner*. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the state.

Id. at 576 (emphasis supplied by Court).

42. Mr. Justice White, concurring, would have upheld the tax on the ground that the goods involved had lost their character as imports.

43. *See* text accompanying note 27 *supra*. *See also* Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 76 (1946), a case involving a tax on exports, in which the Court stated: "[The import-export clause] prohibits every State from laying 'any' tax on imports or exports without the consent of Congress."

44. *See* notes 15, 16, & 38 *supra* and accompanying text.

icy of immunity of imports *as imports* since such a tax does not in any way burden goods because of their foreign origin.[45] From a policy standpoint, upholding a nondiscriminatory property tax achieves a more equitable balancing of interests than a blanket prohibition of all taxes on imported items that have not yet become "mixed up with the mass of property in the country." By allowing a state to levy a uniform tax on property within its borders, the instant decision will require importers to share the costs of state services, such as police and fire protection, from which they benefit. Domestic goods stored in a warehouse in their shipping crates no longer will be subject to state taxes while identical goods of foreign origin enjoy an exemption from the same taxes; on the contrary, the instant decision will end the discrimination against domestic goods that resulted under prior law and, simultaneously, will assure the absence of discrimination against foreign goods. In addition, whether a tax discriminates is an easier standard to apply and will achieve a more certain result than would continuing the approach of trying to determine whether an imported article has ceased to be an import at some particular point in time. Rather than attempting the difficult factual determination of whether an import was still in its original package or had been put to the use for which it had been imported at the time the tax was imposed, the Court simply will have to examine whether the tax discriminates on the basis of origin of the goods taxed.

The instant Court appears to have limited its holding to some degree by emphasizing that the tires in question had reached their distribution warehouse and were no longer in transit.[46] The opinion thus implies that a period of time still might exist during which an imported article is protected against even a nondiscriminatory property tax. This interpretation would require a two-step analysis in import-export clause cases—after deciding whether the tax is discriminatory, the Court then would determine whether the article still was in transit to its wholesale distribution outlet. Including the second step would be unnecessary if the goods were moving in interstate commerce, for as the Court notes, taxation of goods which are merely in transit through a state is prohibited under traditional commerce clause analysis,[47] and this prohibition applies to domestic and foreign goods alike. It may be argued, however, that the import-export clause prohibits taxation of foreign goods that have already

45. *See* note 38 *supra* and accompanying text.
46. *See* 96 S. Ct. 535, 543, 548 (1976).
47. *Id.* at 543 n.11.

entered the country and are awaiting entry into the stream of interstate commerce, or that are in strictly intrastate commerce, since they have not yet reached their ultimate destination. Even though the dealer in domestic goods that are awaiting entry into interstate commerce or domestic goods in intrastate commerce receives no more benefits from state services than the dealer in foreign goods in identical circumstances, the domestic goods would be subject to a state tax from which the foreign goods would be exempt. By including the second step, the Court in these cases would be returning to a standard that would allow discrimination against domestic goods without achieving any of the policy objectives underlying the import-export clause. Thus the only factor that should be considered in determining the validity of a tax on an imported article is whether the tax discriminates on the basis of the foreign origin of the article. This standard is consistent with the intent of the framers in prohibiting the states from laying imposts or duties on imports or exports and, as the instant Court suggested, can be applied without violating the words of the Constitution.

WALTER S. WEEMS

Constitutional Law—Free Exercise of Religion—Religious Snake Handling Abated as a Common Law Public Nuisance by Tennessee Supreme Court

I. FACTS AND HOLDING

The State of Tennessee sought to enjoin defendant-pastor and deacon of a charismatic religious sect[1] from handling poisonous

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1. Liston Pack, pastor of the rural and relatively isolated Holiness Church of God in Jesus Name, and Alfred Ball, a deacon of that church, belong to a movement founded in 1909 at Sale Creek in Grasshopper Valley, Tennessee by George Went Hensley and commonly thought to be an offshoot of Methodism. J. COLLINS, TENNESSEE SNAKE HANDLERS 1 (1947); W. LABARRE, THEY SHALL TAKE UP SERPENTS 29 (1962). Such practices, considered by believers to be a command from Jesus, were central to the articles of faith of defendants' theology.

The beliefs and religious practices of the Holiness Church are based on New Testament scripture:

> And these signs shall follow them that believe; In my name shall they cast out devils; they shall speak with new tongues;
>
> 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.

Mark 16:17-18 (King James). The words of Mark 16:17-18 are considered a command from Jesus and their meaning interpreted literally. Defendants' faith includes a belief that the

snakes or drinking strychnine as part of their church services. The State contended that the handling of poisonous snakes violated Tennessee's Snake Handlers Act[2] but declined criminal prosecution based on the statute, insisting instead that an injunction should be granted since snakes were being handled on a continuing basis in the presence of children and others attending the church services. Defendants argued that an injunction would interfere impermissibly with the free exercise of their religion as guaranteed by the first amendment of the United States Constitution,[3] as well as by the substantially broader protection of the Tennessee constitution.[4] The trial court, primarily basing its action on a finding of a violation of the Snake Handlers Act, granted a permanent injunction prohibiting the handling of poisonous snakes by defendants in any church service within the county.[5] The court of appeals, identifying the protection of persons exposed to defendants' activities as the State's only legitimate interest in an action to abate a public nuisance,[6]

"Holy Spirit" "annoints" certain of their number and "moves" them to handle serpents, and that tbrough this activity the Holy Spirit uses them to confirm the words of Jesus to nonbelievers. State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 44 U.S.L.W. 3501 (U.S. Mar. 9, 1976).

2. *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 and punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred and fifty dollars ($150), or by confinement in jail not exceeding six (6) months, or by both such fine and imprisonment, in the discretion of the court.

TENN. CODE ANN. § 39-2208 (1975).

3. "Congress shall make no law respecting an establishment of religion, or prohibiting tbe free exercise tbereof. . . ." U.S. CONST. amend. I.

4. *Freedom of worship* - That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man of right be compelled to attend, erect or support any place of worship, or to maintain any 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 shall ever be given, by law, to any religious establishment or mode of worship.

TENN. CONST. art. 1, § 3.

5. The trial court previously had granted a temporary injunction probibiting defendants from handling poisonous snakes in any church service in the county. The trial judge had added, in his own handwriting, that "any person who wishes to swallow strycbnine or other poison may do so if he does not make it available to any other person." At a subsequent church service held in contravention of tbe injunction, one of the snake handling members of the congregation was bitten and hospitalized. The court found defendants guilty of violating the injunction and both were fined and sentenced to suspended jail terms. A final hearing on the original petition and entire record was held in September of 1973 when the court made its injunction permanent. State ex rel. Swann v. Pack, No. 54 Cocke County Law, at 4-5 (Tenn. App., Oct. 25, 1974).

6. The intermediate appellate court noted that the trial court's final decree did not use

found the injunction overbroad. Thus the intermediate appellate court modified the injunction to a "consenting adult" standard, enjoining defendants from handling poisonous snakes in such manner as would endanger the life or health of persons who did not consent to exposure to such danger.[7] On petition for certiorari to the Tennessee Supreme Court, *held*, reversed and remanded.[8] When, as part of a religious service, poisonous snakes are handled or poison consumed, thereby creating a "clear and present danger" to the interests of society, the State may enjoin completely such activities as a public nuisance. *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 44 U.S.L.W. 3501 (U.S. Mar. 9, 1976).

II. Legal Background

During the 1940's several southeastern states enacted legislation aimed at forbidding religious snake handling.[9] Such prohibitions were upheld conclusively by the courts. Illustrative is *Harden v. State*,[10] in which the conviction of members of a religious sect who handled rattlesnakes as part of their religious service was sustained by the Tennessee Supreme Court as a violation of the State's Snake Handlers Act. Asserting that the purpose of the Snake Handlers Act was to "protect the life and health of all people from the exposure to the stated danger,"[11] the *Harden* court found that the precautionary measures taken by the Holiness Church were inadequate. Further, the court, in holding that the Tennessee Snake Handlers Act

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the term "public nuisance," but concluded that it was clear from an examination of the record that the trial court and all parties understood that the injunction was based on a finding that defendants' activities constituted a public nuisance. *Id.* at 5. Noting that a public nuisance must affect an interest common to the public, the Court of Appeals further observed that the entire community need not be affected so long as the activity or circumstance interfered with those who came in contact with it in the exercise of a public right. *Id.* at 8-9. The court then stated: ". . . visitors to the church . . . may be said to be exercising a public right in attending worship services, inasmuch as the services have been opened to the public." *Id.* at 9. *But see* notes 75-77 *infra* and accompanying text.

7. State ex rel. Swann v. Pack, No. 54 Cocke County Law, at 21 (Tenn. App., Oct. 25, 1974).

8. The suit was remanded for the trial judge to enter an injunction permanently enjoining and restraining all parties respondent from handling, displaying, or exhibiting dangerous and poisonous snakes or from consuming strychnine or any other poisonous substance in Tennessee. 527 S.W.2d at 114.

9. *See, e.g.*, Ala. Code tit. 14, §§ 419(2) & (3) (1953); Ky. Rev. Stat. § 437.060 (1975); N.C. Gen. Stat. §§ 14-416 to - 422 (1969); Tenn. Code Ann. § 39-2208 (1975); Va. Code Ann. § 18.2-313 (1975). West Virginia specifically declined to legislate against religious snake handling. *See* R. Holliday, Tests of Faith 1 (1966).

10. 188 Tenn. 17, 216 S.W.2d 708 (1948); *accord*, Hill v. State, 38 Ala. App. 404, 88 So. 2d 880 (1956); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947).

11. 188 Tenn. at 21, 216 S.W.2d at 710.

was not violative of an individual's constitutional right of freedom of worship, emphasized that snake handlers "may *believe* without fear of any punishment that it is right to handle poisonous snakes while conducting religious services,"[12] but may not practice such activities that present a "grave and immediate danger" to the life and health of others. Likewise, in *Lawson v. Commonwealth*,[13] a statute prohibiting handling of all snakes, whether poisonous or not, was upheld by the Kentucky Court of Appeals even though the statute was directed solely at religious services. The *Lawson* court characterized the statute as being of the class of laws "enacted for the purpose of restraining and punishing acts which have a tendency to disturb the public peace or to corrupt the public morals . . . ."[14] In *State v. Massey*[15] defendants were convicted of endangering public health, safety, and welfare by handling poisonous reptiles in a manner that threatened the public health in violation of a municipal ordinance.[16] The North Carolina court was able to reduce the case to a very simple question: "Which is superior, the public safety or the defendants' religious practice?"[17] The court sustained the conviction, finding the answer equally simple.

Unlike earlier snake handling cases, the instant court based its holding not on a violation of a statute prohibiting snake handling but on a determination of common law public nuisance. Thus the instant case presents not only the basic issue of free exercise of religion[18] but also raises questions pertinent to public nuisance. Crucial to an understanding of the Tennessee Supreme Court's analysis is an understanding of (a) the development of the "compelling state

12. *Id.* at 25, 216 S.W.2d at 711.

13. 291 Ky. 437, 164 S.W.2d 972 (1942).

14. *Id.* at 446, 164 S.W.2d at 976, referring to cases cited in 16 C.J.S. *Constitutional Law* § 206 nn.56-60.5, at 1033-34 (1956). Cases cited as illustrative of this grouping are clearly distinguishable from the *Lawson* situation in which the "dangerous" or "offensive" act constitutes the religious act itself, affecting only those who are voluntarily present at the religious service.

15. 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 336 U.S. 942 (1942).

16. The *Massey* court described the ordinance as forbidding the handling of poisonous reptiles, endangering the public health, safety, and welfare in such manner as to constitute a public nuisance. *Id.*

17. 229 N.C. at 735, 51 S.E.2d at 180.

18. For discussions of cases construing the free exercise of religion clause of the first amendment *see, e.g.*, PFEFFER, CHURCH, STATE AND FREEDOM 495-605 (1953); RICE, FREEDOM OF ASSOCIATION 42-72 (1962); 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); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958), Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217. For a table of cases involving the free exercise of religion see Fernandez, *supra*, at 591-95.

interest test" as expressed by the United States Supreme Court in the context of free exercise of religion, (b) the interests in privacy and self-determination underlying the claim of freedom of religion, and (c) the principles of common law public nuisance.

A. *Free Exercise of Religion*

During a period of intense hostility to Mormonism, the Supreme Court considered its first "pure" free exercise of religion case in *Reynolds v. United States*,[19] considering whether a federal statute proscribing polygamy could be constitutionally applied to a Mormon. Announcing that although laws "cannot interfere with mere religious belief and opinions, they may with practices,"[20] a unanimous Court upheld the statute's prohibition of a positive, religiously significant activity. Noting that the word "religion" was nowhere defined in the Constitution, the *Reynolds* Court essentially supplied a meaning to the word that extended the protection of the first amendment only to religious belief, leaving Congress "free to reach actions which were in violation of social duties or subversive of good order."[21] This belief-action dichotomy eventually found expression in a principle that has been called the "secular regulation rule"; *i.e.*, the first amendment does not provide a right to a religious exemption from a regulation dealing with nonreligious matters.[22] Since the emphasis of the first amendment's religion clauses historically evolved as a protection against religious persecution rather than as positive guarantees of religious liberty, application of this rule was not thought to be substantial interference with religious freedom.[23] Hegemony of the belief-action distinction is evident in that in only one case before 1940 did the defense of free exercise of religion overcome a direct prohibition of a positive religious activity.[24] In every other case, federal or state, in which the free exercise clause was invoked, the court resolved the issue against the religiously motivated claimant.

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19. 98 U.S. 145 (1878). The case was decided during a period of intense hostility to Mormonism. P. KURLAND, RELIGION AND THE LAW 21 (1963), citing 2 BRYCE, THE AMERICAN COMMONWEALTH 699 (3d ed. 1903). *See generally* Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287 (1973).

20. 98 U.S. at 166; *accord*, Cleveland v. United States, 329 U.S. 14 (1946) (religious beliefs of Mormons not valid defense in prosecutions under the Mann Act). *But see* Freeman, *supra* note 18, at 824-26.

21. 98 U.S. at 164.

22. D. MANWARING, RENDER UNTO CAESAR 51 (1962).

23. Galanter, *supra* note 18, at 235.

24. State v. DeLaney, 1 N.J. Misc. 619, 122 A. 890 (Sup. Ct. 1923) (religious defense upheld against statute barring commercial fortune-telling).

The religious solicitation cases of the 1940's[25] began to illustrate the inadequacy inherent in a rigid belief-action distinction. Although most of these cases could have rested solely on the freedom of speech guarantee, they nevertheless established that religious freedom was a substantive freedom protective of more than invidious discrimination. In *Cantwell v. Connecticut*,[26] the first Supreme Court decision squarely holding that freedom of religion was protected against state infringement by the fourteenth amendment, the Court determined that religious freedom "embraces *two* concepts, — freedom to believe and freedom to act."[27] The freedom to believe was deemed absolute, but freedom to act, even if dictated by religious conviction, was characterized as subject to regulation for the protection of society. Such regulation, the Court suggested, would be valid so long as it did not "unduly infringe" upon religious beliefs. Adopting a reasonable basis test as the standard of constitutional protection, the Court sought a limitation of the conduct element, borrowing the Holmes "clear and present danger" test[28] originally applied in the context of seditious libel. Although the Supreme Court subsequently has used this test in a religious freedom context only rarely,[29] the test's ease of application, seemingly obviating the need for close analysis of the relevant interests, may have accounted for its ready adoption by many state courts. Ultimately the Court's majority abandoned the danger standard[30] and has since refrained

25. Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940).

26. 310 U.S. 296 (1940) (Jehovah's Witnesses, who had sold religious books door-to-door, were convicted under a statute prohibiting solicitation of money without a permit for religious purposes from someone not of their sect and also under the common law for inciting a breach of the peace. The Court concluded that conditioning solicitation for religious purposes upon a license obtained from a state official, who alone determines what is a religious cause, impermissibly burdened the free exercise of religion).

27. 310 U.S. at 303.

28. Affirming a conviction under the Espionage Act of 1917, Mr. Justice Holmes wrote: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). Then he added: "It is a question of proximity and degree." *Id.* The *Cantwell* Court phrased the test: "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. For a collection of secondary source citations on the "clear and present danger test" see Fernandez, *supra* note 18, at 588 n.249.

29. *See* Antieau, *The Role of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811, 828-29 (1950); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 314, 327 (1952).

30. Dennis v. United States, 341 U.S. 494 (1951), substituted for the Holmes test a substantially different question: ". . . whether the gravity of the 'evil,' discounted by its

from seeking a talismanic phrase with which to dissipate first amendment problems. Instead, elaborating upon earlier experiments with a "balancing approach,"[31] the Court began to weigh the competing private and public interests.[32]

Further organic change in the Court's interpretation of the free exercise clause came not as a result of challenge to a direct prohibition of conscientious scruples but as an objection to an *indirect* burden. In *Braunfeld v. Brown*[33] the Court acknowledged that even though a burden on freedom of religion was only indirect, it still might be constitutionally invalid unless the state could not accomplish its legitimate secular purpose by alternative means.[34] Finding no such alternative available, however, and applying the accepted reasonableness standard, the *Braunfeld* Court found that the state's interest outweighed the objectors' claim of a penalty on the free exercise of religion. In dissent, Justice Brennan argued for a new constitutional standard of adjudication, stating that only a "compelling state interest" could overcome "this clog upon the exercise of religion."[35] Two years later Justice Brennan wrote for the majority in *Sherbert v. Verner*,[36] stating that a burden on free exercise of religion might be justified "[o]nly [by] the gravest abuses,

improbability, justifies sucb invasion of free speech as is necessary to avoid the danger." *Id.* at 510. Early advocates of the "clear and present danger" test, Justices Douglas and Black came to object that the danger standard did not give enough protection to individual rights. *See* Brandenburg v. Ohio, 395 U.S. 444, 450 (1969).

31. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding statute regulating the employment of children that operated to prevent daughter of Jehovah's Witness from distributing literature in the streets according to the dictates of the child's religious belief). Conceding that the state could not prohibit the same adult activity, the Court affirmed tbe state's greater authority over children's activities in light of tbe "barmful possibilities" inberent in this particular activity.

32. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959); Watkins v. United States, 354 U.S. 178, 198 (1957). For a more recent expression of the balancing process, see Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). See also Justice Black's attack on the balancing approach. Barenblatt v. United States, 360 U.S. 109, 140-45 (1959) (Black, J., dissenting). For commentary on the balancing process see Clark, *supra* note 18, at 329-44 and Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

33. 366 U.S. 599 (1961) (Orthodox Jewish merchants challenged statute banning commercial activity on Sunday that made no exception for those worshipping on another day).

34. *Id.* at 607. This standard drastically modified the secular regulation rule; now the impact of the regulation on the religious practice must be evaluated. Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* Galanter, *supra* note 18, at 280-84; Note, *The Less Restrictive Alternative in Constitutional Adjudication*, 27 VAND. L. REV. 971 (1974); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

35. 366 U.S. at 613.

36. 374 U.S. 398 (1963) (upholding the right to receive unemployment compensation even though the applicant refused employment requiring Saturday work because it was contrary to her religious beliefs).

endangering paramount interests . . . ."[37] Constructing a triple-tiered analytical framework, the *Sherbert* Court asked: (1) whether a burden had been placed on the religious practice; (2) whether a compelling state interest justified the infringement; and (3) whether an alternative existed that would not infringe first amendment rights.[38]

The decision in *Wisconsin v. Yoder*[39] is tantamount to a completion of the Court's "bootstrap operation" according meaningful constitutional protection to the free exercise of religion. Finding that the Amish religious faith and mode of life were "inseparable and interdependent,"[40] the *Yoder* Court allowed the Amish a free exercise exemption from the state's compulsory education law. The Court relied on *Sherbert* for the principle that a regulation neutral on its face may offend the constitutional requirement of governmental neutrality if, in its application, it unduly burdens the free exercise of religion. Abandoning rigid adherence to a belief-action dichotomy, the Court utilized a more sophisticated "balancing test," indicating that much more than the abstract weighing of "state interests" and "individual freedoms" now would be required. To achieve this balancing, the Court stated that a careful assessment of the extent of the harm threatened by enforcement or nonenforcement of the disputed statute must be accomplished. On one hand, the state's underlying public interests must be determined and the

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37. 374 U.S. at 406, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945); *cf.* NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock, 261 U.S. 516, 524 (1960).

38. The *Sherbert* Court virtually eliminated the direct-indirect distinction by restricting its threshold inquiry simply to the existence *vel non* of a burden. Further, finding the merely "colorable" state interest in preventing fraudulent claims for unemployment compensation insubstantial, the Court never reached its third question.

For an excellent illustration of the *Sherbert* analytical approach, see People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), in which the California Supreme Court applied the *Sherbert* "compelling state interest" test to a direct prohibition of the use of peyote by the Navajo members of the Native American Church. Defendants were convicted for the unauthorized possession of peyote, the "*sine qua non* of defendants' faith . . . tbe sole means by whicb defendants are able to experience their religion." *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76. *Reynolds* was distinguished on two points: (1) the relative importance of the state's interests; and (2) tbe relative essentiality of tbe religious practice. *But see* 98 U.S. at 161. The *Woody* court found that the state had evinced no compelling reason for prohibition and rejected the contention that the state had no alternative means of accomplishing its secular goals. Subsequent decisions, however, frequently noting that drugs are not central to defendants' faith, have refused to grant an exemption from state regulations prohibiting possession of controlled drugs. *See, e.g.*, Gaskin v. State, 490 S.W. 2d 521 (Tenn. 1973).

39. 406 U.S. 205 (1972).

40. At least within the *Yoder* context, "belief and action cannot be neatly confined in logic-tight compartments. . . ." *Id.* at 220. Justice Douglas, dissenting in part from the majority's opinion, speculated that the Court's decision promised that in time *Reynolds* would be overruled. *Id.* at 247.

harm to those interests examined with "particularity." On the other hand, the importance of the activity for which the religious exemption is claimed and the degree of interference with religious tenets caused by the statutory prohibition must be evaluated.

Thus the Court gradually has developed a meaningful safeguard for the free exercise of religion. The *Reynolds* Court extended constitutional protection only to religious belief. *Cantwell* held that the first amendment embraced both freedom to believe and freedom to act, but qualified the constitutional protection of the latter as subject to reasonable legislative regulation. The *Yoder* Court recognized that religious belief and action could be inherently interrelated and insisted that the state must detail explicitly the compelling interest of the state required to restrict the individual's free exercise of religion.

B. *The Right of Privacy*

Underlying the interests implicit in the free exercise clause is a recognition of the fundamentally private nature of religious belief. Although the Supreme Court historically has recognized a privacy interest inherent in certain explicit constitutional guarantees,[41] only recently has the Court begun to define an independent constitutional right of personal privacy. As developed by the Court, the right of privacy has evolved to protect an individual's ability to make fundamental decisions about the conduct of his or her personal life. First recognized in *Griswold v. Connecticut*,[42] the independent right of privacy was held to protect a married couple's decision to use contraceptives. Since *Griswold*, the protection of the right of privacy has been expanded gradually to include the same decision as to contraceptive use by unmarried couples,[43] possession of obscene material in the home,[44] and to a woman's decision to terminate her pregnancy.[45] The Court emphasized in *Roe v. Wade* that the right of personal privacy was not an unqualified right and must be consid-

41. *See* Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment protection from illegal searches and seizures by application of exclusionary rule to the states); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of private association); Prince v. Massachusetts, 321 U.S. 158 (1944) (freedom from interference in family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (private right to control child rearing and education); Boyd v. United States, 116 U.S. 616 (1886) (fourth and fifth amendment protection of home and privacies of life).

42. 381 U.S. 479 (1965).

43. Eisenstadt v. Baird, 405 U.S. 438 (1972) (decided on equal protection grounds).

44. Stanley v. Georgia, 394 U.S. 557 (1969).

45. Roe v. Wade, 410 U.S. 113 (1973).

ered in conjunction with legitimate state interests, such as the protection of the life of another individual. Regulations limiting this fundamental right, however, must be justified by a compelling state interest, and the legislation "must be narrowly drawn to express only the legitimate state interests at stake."[46] Even before *Roe*, the Court recognized in *Prince v. Massachusetts*[47] that the right of privacy has certain limitations when rights of another individual are involved. The Court stated that in undertaking religious activities involving the "harmful possibilities . . . of emotional excitement and psychological or physical injury," persons "may be free to become martyrs themselves . . . [b]ut it does not follow they are free, in identical circumstances to make martyrs" of others.[48]

Apposite to the prohibition against religious snake handling of the instant case are the motorcycle helmet cases.[49] Most state courts considering challenges to self-protective legislation requiring motorcyclists to wear helmets avoid the basic issue of whether the state's interest can justify such a requirement. Such courts rely instead on the presumption of constitutionality attending any police power regulation or on the almost transparent fiction that other motorists are affected by the statute's operation.[50] When the courts frankly have questioned governmental interference, the results have been inconclusive. Several cases have upheld the reach of the police power, finding sufficient nexus in the state's interest in having "robust, healthy citizens";[51] others have found that similar legislation violates constitutional guarantees, rejecting the sufficiency of the state's interest in the "viability of its citizens" as a logic leading to "unlimited paternalism."[52]

46. *Id.* at 155.

47. 321 U.S. 158 (1944).

48. *Id.* at 170. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court noted that the freedom asserted by the appellees not to salute the flag did not bring them into collision with rights asserted by any other individual. "It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Id.* at 630.

49. *See generally* Annot., *Validity of Traffic Regulations Requiring Motorcyclists to Wear Protective Headgear*, 32 A.L.R.3d 1270 (1970); Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 (1969); 82 HARV. L. REV. 469 (1968).

Many of these same issues are also raised by judicial orders of blood transfusions to Jehovah's Witnesses. *E.g., In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

50. *See, e.g.*, Everhardt v. City of New Orleans, 217 So. 2d 400 (La. Sup. Ct. 1968); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 707 (City Ct. Buffalo 1967).

51. *See, e.g.*, People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1968); State v. Lee, 51 Hawaii 516, 465 P.2d 573 (1970).

52. *See, e.g.*, American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968); State v. Betts, 21 Ohio Misc. 175, 184, 252 N.E.2d 866, 872 (Mun. Ct. 1969) ("Included

C. *Public Nuisance*

Although the precise standards of the right of privacy have yet to be articulated by the Court, the emergence of this individual right is additional evidence of the evolving distinction between private rights and public rights, a distinction long recognized in Anglo-American law. Like the right of privacy, a public right is virtually impossible to define with precision, but the "catchall" criminal offense, public nuisance,[53] is instructive of the dimensions of the public right. Common law "public nuisance" has included interferences with the public health, public safety, public morals, public peace, public comfort, and public convenience as well as a wide variety of other unclassified public rights of a similar kind.[54] By degrees, this class of offenses has been expanded to include virtually any form of annoyance or inconvenience interfering with common public rights. At early common law a public nuisance was an infringement of the rights of the Crown. The principle was extended gradually to include the invasion of rights belonging to the public as a whole, such as the interference with the operation of a public market or smoke from a lime-pit that inconvenienced an entire town. Injury to the entire community has never been requisite to a determination of public nuisance, however, so long as those who came in contact with the alleged nuisance did so in the exercise of a public right. Criticized as a "legal garbage can,"[55] nuisance theory seems applicable to an infinite variety of situations, the requirement of an infringement of a public right being the sole limiting

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.").

53. The classic definition of a public nuisance is "an act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." H. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (1890). The latest draft of the *Restatement of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (Tent. Draft No. 17, 1971).

54. For citations to each of the enumerated categories, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88, at 584 (4th ed. 1971) [hereinafter cited as PROSSER] as well as the extensive collection of citations in RESTATEMENT (SECOND) OF TORTS § 821B, comment *b* at 22-24 (Tent. Draft No. 16, 1970).

55. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). *See also* Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 482 (1949) (the "rag ends of the law"); Wade, *Environmental Protection, The Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165, 173 & n.33 (1972) ("a good word to beg a question with"). Dean Prosser has said that "[f]ew terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance,' and there is nothing more to be said." PROSSER § 86, at 571.

theme in the determination of common law public nuisance.[56]

Examination of the broad spectrum of cases supporting a finding of public nuisance illustrates that the infringed right is collective in nature, in contrast with an individual's right not to be assaulted, defamed, defrauded, or negligently injured. In *Cantwell* the Court noted that defendant Jehovah's Witness "was upon a public street, where he had a right to be . . . ."[57] Conversely, the Georgia Court of Appeals, considering a claim for personal injuries, held, *inter alia*, that the negligently constructed landing and steps of a church building did not constitute a public nuisance since there was no common public right to use the steps and landing of a church building owned by a particular denomination.[58] Similarly, in a commercial context, it has been held that a soft-drink machine causing injuries to an infant invitee was not a public nuisance since the child had no public right to enter the place of business, even though the public was invited.[59]

Although the English common law with its statutory modifications has been adopted in the great majority of American jurisdictions, most states have supplanted or supplemented the common law crime of public nuisance with broad general statutes. Such statutes commonly are construed, however, as inclusive of anything that would have been a nuisance at common law.[60] Additionally, most states have enacted special statutes declaring certain specified conduct or particular things to be public nuisances. The North Carolina statute prohibiting snake handling,[61] never challenged in the courts, provides that snake handling is both a criminal offense and a public nuisance.

III. THE INSTANT OPINION

Interpreting Tennessee's Snake Handlers Act as not prohibitive of snake handling per se nor directed at protecting the snake handler himself,[62] the state supreme court found that the statute was "not

56. RESTATEMENT (SECOND) OF TORTS, § 821B, comment *g*, at 9 (Tent. Draft No. 17, 1971).

57. 310 U.S. at 308.

58. Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

59. Dahlstrom v. Roosevelt Mills, Inc., 27 Conn. Supp. 355, 238 A.2d 431 (1967).

60. PROSSER § 88, at 586. A common example applies to black currant bushes that barbor parasites destructive to grain or timber. RESTATEMENT (SECOND) OF TORTS, Explanatory Note 2c § 821B, at 16 (Tent. Draft No. 16, 1970).

61. N.C. GEN. STAT. § 14-416 (1969).

62. Tennessee's Snake Handlers Act "condemns the *manner* and not tbe *fact* of snake handling . . . . [I]t permits snake handling if done in a careful and prudent manner . . . . [I]t was not intended to prevent zoologists or herpetologists from handling snakes or reptiles

controlling" in the instant situation, but merely indicative of state public policy. Observing that abatement of a nuisance was the primary issue, the court noted that the consequences of proceeding on a nuisance theory were more far-reaching than a criminal action. Regarding the snake handler himself, the court noted that although suicide was not proscribed statutorily by Tennessee law, suicide was a crime at common law and undoubtedly was still a "grave public wrong." The court thus reasoned that the state had a right to protect a person from himself and to demand that he protect his own life. Apparently adopting the view that an individual's role as part of the body politic outweighs his rights as an individual, the court concluded that because the danger to the health and safety of both the snake handler and observer was obvious under the facts presented,[63] the handling of snakes and the drinking of poison[64] as part of a religious ritual was a common law public nuisance.[65]

The court detailed the historical development, as well as the unusual religious beliefs and practices of the snake handlers, acknowledging that "to forbid snake handling is to remove the theological heart of the Holiness Church,"[66] and holding that, despite its unconventional practices and small membership, the Holiness Church of God in Jesus Name was a constitutionally protected religious group. Tracing the line of free exercise of religion cases, with principal focus on a continuing belief-action distinction, the court

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as a part of their professional pursuits . . . , nor those who are engaged in scientific or medical pursuits requiring the handling of snakes." 527 S.W.2d at 112.

"If the legislature had not [intended the phrase 'any person' to mean any *other* person] it would have placed a period at the end of the word reptile, leaving language which made it unlawful 'to display, exhibit, handle or use any poisonous snake or reptile.' " *Id.* at 112. *But see* Harden v. State, 188 Tenn. 17, 23, 216 S.W.2d 708, 710 (1948) (noting that the precautions afforded *no* degree of protection to those who actually handled the snakes).

63. The instant court described the record as showing "the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of 'annointment,'. . . ." 527 S.W.2d at 113.

The court of appeals summarized the facts with a somewhat different emphasis, finding that siguificant safety precautions were taken prior to snake handling activities, that the snake handling occurred only a few minutes per service, and that testimony indicated that only "designated representatives" had been involved directly. State ex rel. Swann v. Pack, No. 54 Cocke County Law, at 6-7 (Tenn. App., Oct. 25, 1974).

64. Since the danger to the individual himself, as the result of handling poisonous snakes or drinking poison involve virtually the same issues, this discussion has not given separate consideration to the religious practice of drinking poison. Believers, however, generally distinguish between the two, finding snake handling to be biblically required but the drinking of poison merely permitted by the Scriptures. *See* PELTON & CARDEN, SNAKE HANDLERS 107 (1974).

65. 527 S.W.2d at 113.

66. *Id.* at 112.

held that under the first amendment of the United States Constitution a religious practice could be restrained to the point of outright prohibition when the practice involved a "clear and present danger" to the interests of society.[67] Enunciating the dictates of the compelling state interest test,[68] the court characterized its task as one of balancing the competing interests of religious freedom against the state's interest in the preservation of society as a whole, "a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower."[69] But, observing that the free exercise of religion did not include either the right to violate statutory law or the right to commit or maintain a public nuisance, the court concluded that the state's interests were paramount. The court then stated that it could conceive of no less restrictive limitation of religious snake handling that would be acceptable to the church membership as well as permissible from the standpoint of the state's interests. Thus the instant court, holding that such activities constituted a public nuisance, directed the trial judge to enter an injunction permanently enjoining defendants from handling poisonous snakes or drinking poison as part of a religious service.

IV. COMMENT

Although legal "nuisance" has managed thus far to survive a lengthy history of criticism, the instant case dramatizes the danger of continued tolerance of such an expansive legal concept. Judicial resort to common law nuisance theory, easily defeating the claim of a first amendment freedom, must be seen as a mandate either to analyze finally the "impenetrable jungle"[70] surrounding the word "nuisance" or to discard completely the concept as being beyond intelligent application. If "nuisance" is to have any meaning beyond the ad hoc exercise of power, whether judicial or legislative,[71] and

67. *Id.* at 111.

68. "[T]he scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must he clear and present and so grave as to endanger paramount public interest." *Id. But see*, "[T]he action of the state must be *reasonable* and *reasonably dictated* by the needs and demands of society as determined by the nature of the activity as balanced against societal interests." *Id.* (emphasis added).

69. *Id.* at 113.

70. *See* PROSSER § 86, at 571.

71. An interesting comparison with the instant judicial determination of common law public nuisance is to be found in statutes declaring the exhihition of obscene motion pictures public nuisances, subject to injunction. *See generally* Annot., *Exhibition of Obscene Motion Pictures as Nuisance*, 50 A.L.R.3d 969 (1973). The lack of precision inherent in the public nuisance concept and the use of nuisance to protect the public morals raises a serious potential for violation of first amendment rights, akin to censorship.

especially if it is to be elevated as a tool with which to deal with pressing societal problems,[72] the limitations as well as the reach of nuisance theory must be understood clearly. In the instant case, the lack of well defined principles of nuisance law is exacerbated by the absence of a clearly drawn statute specifying that, in the judgment of the legislature, religious snake handling is a public nuisance. Rather, the opinion necessarily divides itself into two parts: (1) the *judicial* determination that religious snake handling is a public nuisance[73] — a "law" that reaches substantially beyond the legislative concern expressed by the Snake Handlers Act; and (2) judicial evaluation of the law the court itself has written — a balancing of the state's interests in the protection of society as a whole against the claim of free exercise of religion. This melding of legislative and judicial functions has ominous implications for the compelling state interest test.

Ultimately, it seems that the instant decision likely will be grouped with those cases that Prosser has described as "mere aberration[s],"[74] cases which apply the term nuisance to anything that causes hurt, annoyance, or inconvenience to matters not connected with any public right.[75] While the ritual snake handling takes place on private property, not on a public highway or in a public park, that fact alone is not dispositive of the question of whether the activity is a public nuisance. So far as the rights of those attending the church services are concerned, the character of the use of the property[76] and its purpose,[77] not the ownership, determine whether

72. The American Law Institute's concern with limiting a public nuisance to a criminal interference is that the concept is too restrictive and inhibits the incipient development of the law in the field of environmental protection. RESTATEMENT (SECOND) OF TORTS, Explanatory Note § 821B, at 3-4 (Tent. Draft No. 17, 1971). *See also* Wade, *Environmental Protection, The Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165, 167 (1972).

73. Note that the "statute" which the instant court, in effect, has written—that religious snake handling may be enjoined as a public nuisance—almost certainly would be struck down as unconstitutional on its face were it written by the state legislature. The primary effect of a statute must be one that neither advances nor inhibits religion. Board of Ed. v. Allen, 392 U.S. 236, 243 (1968).

74. PROSSER § 86, at 573.

75. *See, e.g.*, cases cited *id.* at 571 & nn. 2 & 3.

76. The private character of the use of property is well illustrated by Roberts v. Clements, 252 F. Supp. 835 (E.D. Tenn. 1966), striking down a state law banning nudist colonies. Two of the three-judge district court thought the law was unconstitutionally vague, but these judges also pointed to the common law rule that indecent exposure or lewdness must be public in order to constitute a criminal offense. The third judge stated that the law was an unconstitutional abridgement of the right of association and the related right of privacy; since the nudist colony was isolated from public contact, the state had no interest in prohibiting it. *Id.* at 848-50.

77. Determinations of whether a churchgoer is an invitee or a licensee invariably focus on the individual's purpose in attending church. For a typical discussion, holding that plain-

a public right is involved. Although the worship services are open to the public such invitation does not confer a *right* to enter. Whether those attending church services are invitees or licensees, they attend as private individuals, not as citizens of organized society. Since those attending the church services where snakes are handled have no public right to do so, the danger involved in the handling of snakes cannot properly be called a common law public nuisance.

Having written, in effect, a "statute" declaring religious snake handling a public nuisance (thereby novelly creating a *secular* exemption)[78] the instant court was forced to determine whether the nuisance constitutionally could be abated. Although the more "particularized" balancing approach of *Yoder* clearly indicates that an abstract weighing of competing policies is too simplistic when religious freedom is at issue, the instant court acknowledged the demands of *Yoder* only on the free exercise side of the scale, ignoring assessment of the actual impact of the challenged law upon the state's interest. Without questioning the sincerity of the religious claimants, the court gave detailed attention to the importance of snake handling to those who practice it to "confirm the Word." Religious snake handling was not dismissed as the constitutionally superfluous "action" component of religion; rather, the court noted that "to forbid snake handling is to remove the theological heart of the Holiness Church."[79] In contrast, the state's interests were recited in broad "preservation of life" phrases,[80] more commonly associated with the "reasonableness" standard of judicial scrutiny. The court did not elaborate on the precise governmental concern involved— whether economic, political, or simply paternalistic— nor was any attempt made to assess the potential degree of harm to those chimerical interests had the snake handlers' free exercise claim been allowed. *Yoder* would suggest that if the harm to society lies in a diminished populace, for example, the number of people

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tiff attended church for her own purpose and was therefore a licensee, see McNulty v. Hurley, 97 So. 2d 185 (Fla. 1957) ("One of the concepts of all religious beliefs known to us is that participation in religious activities is for the benefit of the mortals who participate therein.") *Id.* at 188.

78. By prohibiting only religious snake handling the court allows snake handling not religiously motivated. *See* note 62 *supra*. *See also* N.C. GEN. STAT. § 14-421, statutorily allowing the same exemption.

79. 527 S.W.2d at 112.

80. "Tennessee has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower." *Id.* at 113.

killed or injured by snake bites be weighed against the relative harm to the religious interest accomplished by prohibiting the practice. Instead, the state's generalized interest in the preservation of life was treated by the instant court as an absolute right, unsusceptible of any degree of infringement.[81] Furthermore, any serious consideration of less restrictive alternatives was precluded automatically by the court's expansive "preservation of life" principle. The overly broad sweep of the state's asserted interest further obviated the significant distinctions between the snake handler and other consenting adults,[82] and nonconsenting adults and children. By ignoring these distinctions, the court avoided defining, and therefore weighing, the state's interest vis-à-vis each distinguishable group. The court thus could iguore recognition of the fundamental underlying interest of the religious claim,[83] the "right to be let alone."[84]

Fundamental to both aspects of the instant case is the lack of distinction between the life of a person as an individual and his life as a member of society. Although the precise aspect of the emerging right of privacy presented by the issue of religious snake handling—the right to risk one's life[85]—has yet to be addressed squarely by the

81. For the proposition that even extraordinary interests are not absolute rights, see United States v. Robel, 389 U.S. 258 (1967). In *Robel*, the Court struck down a criminal statute prohibiting members of Communist action organizations from working in a defense facility, stating that the war power is not a "talismanic incantation" for total deference to the legislature. *Id.* at 263. *See* note 80 *supra*.

82. In the context of public nuisance, the court in Patterson v. Rosenwald, 222 Mo. App. 973, 6 S.W.2d 664 (1928), acknowledged that keeping a vicious dog might well be a public nuisance, interfering with the public safety. Recovery was denied in this situation, however, the court noting that when a "person injured by a vicious dog voluntarily and unnecessarily placed himself in the way of such dog, it cannot be said that the keeping or harboring of the dog produced the injury." *Id.* at 976, 6 S.W.2d at 666.

83. *Cf.*, "Any society sincerely interested in protecting the right of privacy is hardly likely to he at the same time hostile to the right of free expression. Both interests tend to have the same friends and the same enemies." T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 76 (1966).

84. Justice Brandeis characterized this right as the "most comprehensive" and "most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., concurring).

85. The instant decision also raises a serious equal protection question. Religious snake handling has heen singled out as risk-taking behavior requiring prohibitory legislation while other forms of risk-taking behavior have been left unregulated. As a recent article asked, "If Evel Knievel can jump a canyon at risk to his and onlookers' lives, why can't fundamentalists handle snakes in their worship services?" LIBERTY, May-June 1975, at 2. Other examples of risk-taking hehavior left unregulated are immediately obvious, e.g., smoking, hang-gliding, private swimming pools. While legislative bodies may legitimately select from among various evils threatening the public welfare which evils they will leave unregulated and which they will regulate, when a "preferred freedom" such as the free exercise of religion is involved, the state must show a compelling reason why *that particular evil* was selected for attention. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

Supreme Court, there can be little doubt that *Roe v. Wade* added significant weight to the constitutional dimension of the individual's right to control his or her own body. *Roe* clearly restricts the dominance of the state's interests over the rights of the individual to those situations in which one individual's right comes into direct conflict with the rights of another individual. When no other individual's rights are involved, the state's interest in protective legislation is limited to reasonable regnlation of the individual's decision regarding the conduct of his personal life.

While the motorcycle helmet cases illustrate that the state's generalized interest in a robust, healthy citizenry might provide a rational basis for social or economic legislation,[86] both the *Yoder* and *Roe* analyses illustrate that the acceptance of such a broadly asserted interest is not the proper approach in the context of a competing claim of a fundamental right. The compulsory education laws in *Yoder* are certainly one manifestation of the state's legitimate interest in a thriving and productive population, yielding both economic and political benefits to society as a whole. Yet the marginal social utility of the two additional years of schooling was outweighed by the infringement of religious freedom. *Roe* guaranteed that the state may require only conditions that promote an individual's health in a decision involving a fundamental right, not ensure the individual's life or health.[87] With regard to the free exercise claim of the snake handlers, the impact on society *as a whole* is too attenuated to justify prohibition of a church's primary religious activity. Furthermore, the danger sought to be eliminated by the prohibition of religious snake handling is highly exaggerated. A handler rarely is bitten in the great majority of religious services involving snakes, and, even then, a bite rarely is fatal.[88]

It must be concluded that the instant court, by both writing the public nuisance legislation and subsequently testing its own law against the claim of religious freedom, placed a "butcher's thumb"

86. In Holden v. Hardy, 169 U.S. 366 (1898), legislation designed to protect an individual from powerful employees or even "from himself" was held to possess a valid relationship to the general welfare. The Supreme Court stated that "[t]he whole is no greater than the sum of all the parts," *Id.* at 397, and that the individual is consequently an integral part of the entire population. *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); New York Cent. R.R. v. White, 243 U.S. 188 (1917); Chicago B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911).

87. *See also* West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.")

88. 527 S.W.2d at 104 & n. 2.

on the constitutional scales in the shape of its expansive determination of the state's interests, reducing the protection of the compelling state interest test to an empty recital of words. That the dual legislative-judicial function assumed by the instant court is responsible for such result is announced by the court itself in its conclusion that "*[w]e*, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interests."[89] That which normally would be the state's interests are, in fact, the court's interests. In the sensitive area of first amendment freedoms, regulatory measures must be precise and narrowly drawn, infringing upon the freedom asserted no more than is absolutely necessary for the actual protection of other human beings. The amorphous nuisance concept is singularly ill-suited for such demand,[90] even when defined statutorily. The instant court, by reaching out to protect religious snake handlers from themselves, hopelessly compounds the problem by denying consideration by a disinterested judiciary.[91]

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89. 527 S.W.2d at 113 (emphasis added).

90. *Cantwell's* Jehovah's Witnesses were originally convicted both under a solicitation statute and for a common law breach of the peace. *See* note 26 *supra*. The Court noted that the breach of the peace conviction was not pursuant to a narrowly drawn statute expressing legislative judgment that such activity should be regulated but on a "common law concept of tbe most general and undefined nature." 310 U.S. at 308.

Justice Douglas, dissenting in Adderly v. Florida, 385 U.S. 39, 48 (1966), wrote:

> We do violence to the First Amendment when we admit this "petition for redress of grievances" to be turned into a trespass action. . . . Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach of the peace statute, a vagrancy statute will be put to the same end.

Id. at 52, 56.

91. As Justice Brandeis wrote in dissent:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928).

Constitutional Law—Search and Seizure—Attachment of Tracking Device to Automobile Constitutes a Search Subject to Fourth Amendment

I. Facts and Holding

Defendants,[1] charged both with conspiracy[2] and possession with intent to distribute marijuana,[3] filed motions to suppress evidence[4] obtained by state agents who attached an electronic tracking device[5] to the exterior of the defendants' van while the vehicle was parked in a public parking lot. The agents subsequently used the device to track the van to a location where incriminating evidence was found.[6] Defendants argued that the warrantless attachment of the device constituted a search in violation of the fourth amendment.[7] The government contended that since a citizen has no reasonable expectation of privacy in a vehicle parked in a public parking lot or driven on public roads, defendants' right of privacy was not invaded and therefore the installation of the device did not constitute a search under the fourth amendment.[8] The United States District Court for

1. A grand jury returned an indictment against the 9 appellees and 2 other persons.

2. 21 U.S.C. § 846 (1970) (conspiracy to possess marijuana with intent to distribute).

3. 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2 (1970). Only 6 of the defendants were indicted on the possession count.

4. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, defendants moved to suppress the evidence, which consisted of 1200 pounds of marijuana and related paraphernalia found in a shed on defendants' property and another 1200 pounds found in defendants' van.

5. The battery-operated device emits periodic signals that can be picked up on radio frequency. These signals allow the agents to establish the approximate location of the device and the object to which it is attached.

6. Using the tracking device, the agents followed the vehicle to a rural area where a large quantity of marijuana was discovered in a shed.

7. The fourth amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

Defendants sought to attack the alleged search on several grounds: (1) that the attachment of the beacon to the van was an illegal search and that all the evidence obtained was subject to suppression based on the "fruit of the poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471 (1963); (2) that the search of the shed on the defendants' property was an illegal search, not falling within the "plain view" exception to the warrant requirement; *see* Hester v. United States, 265 U.S. 57 (1925); and (3) that the warrant, issued before the seizure but after the search, was defective in failing to list tbe source of the information contained in the affidavit.

8. The government also challenged tbe standing of certain defendants to contest the legality of the searches.

the Northern District of Florida suppressed the evidence, holding that use of the tracking device was an illegal search. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, affirmed.[9] Installation of an electronic tracking device to the exterior of a motor vehicle constitutes a search subject to the warrant requirements of the fourth amendment. *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *rehearing ordered*, 525 F.2d 1364 (5th Cir. 1976).

II. LEGAL BACKGROUND

The fourth amendment protects citizens from unreasonable searches and seizures by government officials and requires a warrant, issued only upon probable cause, before a search or seizure can be undertaken.[10] Early Supreme Court cases considering activity alleged to be a "search" focused on the concept of "constitutionally protected areas"[11] and required a physical penetration into such an area before the challenged activity would be considered a search protected by the fourth amendment. In 1928 the Supreme Court in *Olmstead v. United States*[12] held that, since no physical penetration into the defendant's home had occurred, a wiretap did not constitute an illegal search.[13] This rationale subsequently was followed in *Goldman v. United States*,[14] in which the Supreme Court found that police monitoring of conversations using a listening device pressed against a wall partition did not constitute a search since there was no physical penetration into the defendant's apartment.[15] With the advancing sophistication of electronic surveillance equipment, the inadequacy of this line of cases in protecting private citizens from governmental intrusion increasingly became apparent[16] and re-

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9. Although the instant court affirmed the district court's holding on the issue of the legality of the search, it reversed the holding that all the defendants had standing to challenge the searches. The district court apparently held the erroneous belief that the government had conceded the issue of standing concerning all the defendants.

10. *See* note 7 *supra*.

11. United States v. On Lee, 193 F.2d 306, 314, *aff'd*, 393 U.S. 747 (1962); *see, e.g.*, Stoner v. California, 376 U.S. 483 (1964) (hotel room); Jones v. United States, 362 U.S. 257 (1960) (apartment where defendant was a guest); Amos v. United States, 255 U.S. 313 (1921) (store); Gouled v. United States, 255 U.S. 298 (1921) (office); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (employee's desk in government office).

12. 277 U.S. 438 (1928).

13. *Id.* at 466.

14. 316 U.S. 129 (1942).

15. *Id.* at 135.

16. *See* 55 MINN. L. REV. 1255, 1257 n.21 (1971). For an earlier discussion of possible surveillance tools and the right of privacy see Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966).

sulted in judicial "hair-splitting" over whether monitored conversations were obtained with or without physical penetration.[17]

The trespassory interpretation of the fourth amendment was abandoned expressly in *Katz v. United States*[18] in which the Supreme Court found that the attachment of an electronic listening device to the exterior of a telephone booth was an illegal search. Noting that "the Fourth Amendment protects people not places,"[19] the Court held that the fourth amendment forbids any warrantless intrusion into an activity in which the person involved has a reasonable expectation of privacy.[20] The *Katz* standard is an important factor in deciding what constitutes a search of an automobile. Courts have used this standard, for example, in ruling that opening a car door to examine the vehicle inspection number or checking the vehicle identification number on the rear axle is not a search because there is no reasonable expectation of privacy.[21]

The application of the *Katz* standard to automobile searches may be influenced by a separate line of case in which courts have upheld warrantless automobile searches if both probable cause and exigent circumstances exist.[22] The Supreme Court first announced this exception to the warrant requirements in *Carroll v. United States*[23] and based it on the need for prompt police action because of the mobility of an automobile.[24] Although this doctrine only applies to an admitted "search," it has been cited as suggesting a special relationship between the automobile and the fourth amend-

17. One example of this "hair-splitting" is Silverman v. United States, 365 U.S. 505 (1961), in which the slight penetration of a listening device called a "spike-mike" into a wall satisfied the physical trespass requirement.

18. 389 U.S. 347 (1967).

19. *Id.* at 351.

20. *Id.* at 360-61 (Harlan, J., concurring). The majority held that a search had occurred because the government had "violated the privacy upon which he [the defendant] justifiably relied while using the telephone booth . . . ." *Id.* at 353.

21. *See, e.g.*, United States v. Polk, 433 F.2d 644 (5th Cir. 1970); United States v. Johnson, 431 F.2d 441 (5th Cir. 1970) (per curiam), *aff'g* 413 F.2d 1336 (5th Cir. 1969); United States v. Graham, 391 F.2d 439 (6th Cir. 1968); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). The alternate rationale in these cases often has been that if a search had been made, it would not have been an unreasonable one.

Two courts have found such activity constituted a search and was unreasonable. United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965).

22. Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974). For a summary of the development and growth of the automobile exception to the warrant requirements see Miles & Wefing, *The Automobile Search and the Fourth Amendment, A Troubled Relationship*, 4 SETON HALL L. REV. 105 (1972).

23. 267 U.S. 132 (1925).

24. *Id.* at 153; *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970).

ment. For example, Mr. Justice Powell's concurring opinion in *Almeida-Sanchez v. United States*[25] cites *Carroll* as support for his statement that "the search of an automobile is far less intrusive on the rights protected by the fourth amendment than the search of one's person or building."[26]

In *Cardwell v. Lewis*,[27] the Supreme Court for the first time faced the issue of what police activity constitutes a "search" of an automobile. The police activity in question involved scraping paint from the exterior of a vehicle and examining the tire treads after an initial seizure of the car. Drawing from the case law of the automobile exception created in *Carroll*[28] and reasoning that the individual has little expectation of privacy in a motor vehicle operated in public view,[29] the Court held that the activity did not constitute a search under the fourth amendment.[30] The second issue, and the one for which *Cardwell* most often is cited, is whether the prior seizure was a violation of the fourth amendment.[31] Despite the fact that the defendant had been a prime suspect for several months during which time the police could have obtained a warrant, the Court upheld the seizure under the automobile exception.[32] The application of the *Carroll* automobile exception and the language concerning the expectation of privacy in a car left the status of the law on both issues in a state of confusion.[33]

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25. 413 U.S. 266, 275 (1973) (Powell, J., concurring). The Court held that the warrantless search of defendant's car violated the fourth amendment. The automobile exception was not applied since probable cause for the search was lacking.

26. *Id.* at 279; *see* People v. Dumas, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973). The court allowed the search of the defendant's car relying on the automobile exception. The court spoke of a hierarchy of protection given various areas under the fourth amendment and placed automobiles in a secondary degree of protection. *Id.* at 882 n.9, 512 P.2d at 1261 n.9, 109 Cal. Rptr. at 312 n.9. *See also* 1968 U. ILL. L.F. 401, 410.

27. 417 U.S. 583 (1974).

28. *Id.* at 589-90.

29. *Id.* at 590. Justice Blackman cited Justice Powell's remark in *Almeida-Sanchez v. United States*. *See* notes 25 & 26 *supra* and accompanying text. The Court further asserted that a car's function is to provide transportation and not to serve as a residence or repository of personal effects.

30. *Id.* at 591. The alternate rationale was that the search was not unreasonable.

31. In his dissent, Mr. Justice Stewart felt that the no-search argument was "irrelevant" since before this examination there had been a seizure that first must be justified. *Id.* at 597.

32. *Id.* at 593-96.

33. Note, *Confusing the Confusion: Automobile Search and Seizure Takes a New Turn*, 12 HOUSTON L. REV. 460 (1975); 36 OHIO ST. L.J. 190 (1975); 53 N.C.L. REV. 722 (1975). A recent district court opinion used the expectation of privacy standard to hold that installation of an electronic tracking device to a storage drum transported in defendant's car was a fourth amendment search. United States v. Martyniuk, 395 F. Supp. 42 (D. Ore. 1975).

III. The Instant Opinion

The instant court began its inquiry into whether the attachment of the tracking device to the defendants' van was an illegal search by first noting the government's two premises: first, that a citizen has no reasonable expectation of privacy in a vehicle parked in a public parking lot; and secondly, that a citizen cannot reasonably expect privacy in his movements on public roads. Examining the basic purpose of the fourth amendment, the court stated that the amendment was intended to protect the individual from governmental intrusion into his private life.[34] Thus, the court decided that the proper standard for inquiry is whether the government has invaded an individual's "right of personal security, personal liberty, and private property"[35] and has violated "the privacy upon which he justifiably relies."[36] Applying this standard to the instant case, the court concluded that a citizen has a justifiable expectation of privacy in his vehicle, even though he parks in public or drives on the public road. This expectation, the court stated, includes the right to expect that the government will not attach an electronic device to his automobile in order to trace his movements.[37] The court distinguished taking paint scrapings, comparing tire treads, checking vehicle identification numbers, and observing objects in plain view as intrusions of limited scope, purpose, and duration. Furthermore, the court believed adoption of the government's first contention would allow breaking into the trunk or glove compartment of a citizen's car.[38] The court also rejected the government's second premise which was based on the argument that the nature of the information sought by the government determines the existence of a search.[39] The court stated, however, that it was unable to distinguish the violation of privacy that occurs when an electronic device is used to trace a person's movements from that which occurs when a device is used to overhear conversations inside a telephone booth.[40] Therefore, the court held that the attachment of the device was a search subject to the warrant requirements of the fourth amendment.

34. 521 F.2d 859, 864 (5th Cir. 1975).
35. *Id.* at 865, *citing* Boyd v. United States, 116 U.S. 616, 630 (1886).
36. *Id., citing* Katz v. United States, 389 U.S. 347, 353 (1967).
37. *Id.* at 866.
38. *Id.* at 865.
39. *Id.* The government argued that the telephone conversations in *Katz* were an area of greater privacy than the information conveyed by the beeper.
40. *Id.*

IV. Comment

The finding that a search had occurred in the instant case is not inconsistent with the no-search holding in *Cardwell v. Lewis*[41] because the instant activity involves a broader, more extensive invasion of the individual's privacy. The police activity in *Cardwell* was limited to scraping paint and examining tire treads, a task quickly accomplished. The police activity in *Holmes*, however, involved tracking every movement of the defendants for a period of over forty-two hours. While the cases arguably are consistent given their factual differences, the analytical approach employed by the *Holmes* court seems more logical and more consistent in light of *Katz*. The *Cardwell* Court unfortunately intertwined two separate issues and two different lines of cases in concluding that a person enjoys a lesser expectation of privacy in an automobile.[42] The crucial issue is whether a search has occurred under the *Katz* standard, not whether a warrantless search is valid under the line of cases represented by *United States v. Carroll*.[43] The *Carroll* analysis goes beyond the initial determination that a search has occurred, and focuses on whether an exception to the warrant requirement in a particular situation is appropriate; thus, the degree of reasonable expectation of privacy is not the primary issue. The *Cardwell* opinion incorrectly relied in part on the automobile exception to the warrant requirement in deciding that there is a lesser expectation of privacy in a motor vehicle.[44] Importantly, the instant opinion demonstrates the correct conceptual approach to this type of case, separating the two issues involved so that the warrant exception has nothing to do with the initial determination concerning the expectation of privacy. Under the *Holmes* approach, the first inquiry is whether a search has occurred under *Katz*. If this inquiry is answered negatively, it is not necessary to address the second issue of whether the automobile warrant exception applies.[45]

Holmes therefore is significant in finding that there is an expectation of privacy in an automobile. *Cardwell* and the cases involving vehicle identification numbers[46] not only pointed out areas of a car in which there was no expectation of privacy, they also contained

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41. *See* notes 27-33 *supra* and accompanying text.

42. This broad language is not supported by prior case law. *See* 53 N.C.L. Rev. 722, 744 (1975). *See also* 7 Akron L. Rev. 343, 349 (1974).

43. *See* notes 23-24 *supra* and accompanying text.

44. *See* note 42 *supra*.

45. The government did not argue that this search fell within one of the exceptions to the warrant requirements in the instant case.

46. *See* note 26 *supra*.

some dangerously broad language about the "lesser expectation of privacy" in a car.[47] Had the *Holmes* court found that the instant intrusion into an individual's private life was not a search, the effect would have been to reduce the reasonable expectation of privacy in a motor vehicle so extensively that its very existence might be questionable.[48] The court, however, did find a reasonable expectation of privacy and consequently a search. Therefore, in light of *Cardwell*, the vehicle identification number cases, and *Holmes*, the question now becomes what is within the reasonable expectation of privacy in a car. While the Fifth Circuit apparently would allow intrusions limited in scope, purpose, and duration, the *Katz* decision did not mention these factors as controlling. Using these factors as a limiting standard would result in a strictly ad hoc judicial analysis. Since the activity in *Cardwell* involved the exterior of the car and the court in *Holmes* assumed the interior areas were protected,[49] it might be possible to draw a limiting distinction between the exterior and interior portions of the car. Such a standard, however, would pose definitional problems engendering further potential confusion that could outweigh its initial appeal.[50]

Thus for the present, courts are left with the *Katz* reasonable expectation of privacy standard in determining whether a search has occurred. The instant opinion is significant in applying this standard to find that an individual can expect privacy while in his automobile in public. In holding that a person has a right to expect that the government will not attach a tracking device to his automobile, the court gives effect to the frequently quoted admonition of *Katz*, "the Fourth Amendment protects people, not places."[51]

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47. 417 U.S. 583, 589-90 (1974). *See* note 42 *supra*.

48. Common experience and the importance of the automobile in today's society belie the fact that an individual gives up all expectation of privacy when he drives his car in public. For modern America, the automobile has become an expected place of privacy. Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974).

49. 521 F.2d 865 (5th Cir. 1975).

50. Note, *Confusing the Confusion: Automobile Search and Seizure Takes a New Turn*, 12 HOUSTON L. REV. 460, 467-68 (1975).

51. 389 U.S. 347, 351 (1967).