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Religious Accommodation under Sherbert v. Verner: The Common Sense of the Matter

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should be indulged which it is legally possible to invoke."[64] Witness also the language of the court in *State ex rel. Phelan v. Walsh.*[65] "It is *more charitable* to suppose that the moderators have made a mistake than that the voters have done some act by which they have incurred the penalty of temporary disenfranchisement. We think the presumption in favor of the voter must prevail."[66]

V.

CONCLUSION

The real question presented by Uniform Rule 15 is not whether it expresses a rule preferable to the Thayer-Wigmore doctrine, but whether the judicial control which it permits is a desirable thing. If not, then the inflexible Thayer-Wigmore approach should be followed. Where presumptions conflict, a judge will not then be able to choose the one which in his opinion protects the greater interest but will be compelled to relinquish the entire decision to the jury. If some degree of judicial control is desirable then a system of classification of presumptions, like the one proposed by Professor Morgan, is the answer. In this way, presumptions may still be "balanced" but only within certain boundaries and according to a definable standard. If a more liberal judicial control is to be permitted, and it is submitted that it should be, then the Uniform Rule 15 approach is the answer. Courts should be able to bring to bear on the determination of a case their knowledge of the law, their experience and most importantly their ability, not shared by the jury, to view an individual case in its legal context and to exert some guiding force toward reaching a fair and reasonable result.

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RELIGIOUS ACCOMMODATION UNDER *SHERBERT V. VERNER:* THE COMMON SENSE OF THE MATTER

I.

INTRODUCTION

The religion clauses of the first amendment[1] impose a dual limitation on government in order that the right to worship may remain inviolate. The separate concepts of non-establishment and free exercise intertwine, when properly construed, to promote and preserve this liberty. Though

64. Wiggins v. Gillette, 93 Ga. 20, 19 S.E. 86 (1893). (Emphasis added.)
65. 62 Conn. 260, 25 Atl. 1 (1892).
66. *Id.* at 291, 25 Atl. at 4. (Emphasis added.)

1. U.S. CONST. amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

the "wall of separation" metaphor provides simplicity of expression, it appears inadequate to express the precise action necessary to assure the utmost freedom. Mr. Justice Douglas recognized this inadequacy:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency, one on the other. That is *the common sense of the matter.*[2] (Emphasis added.)

Bearing these considerations in mind, this comment proceeds to examine the demands of the free exercise clause and the impact of the correlative limitation of the establishment clause. Specifically, attention will be directed toward situations wherein active intervention is required to promote free exercise and the reconciliation of such intervention with the prohibitions of the establishment clause.[3]

Sherbert v. Verner[4] confronted the Court with a situation ideally adapted for a consideration of the interrelationship of the clauses. The accommodation principles enunciated therein appear to clarify the import of the religious mandates. The extent and application of these principles remain a problem, which it is the purpose of this comment to explore.

II.

THE ACCOMMODATION THEORY EXAMINED

A. *An Analysis of Sherbert*

In *Sherbert,* appellant was denied unemployment compensation since she was not deemed "available for work," as required by the South Carolina statute,[5] by reason of her refusal to accept employment which required Saturday work. The South Carolina Supreme Court upheld the denial of compensation[6] in spite of appellant's contention that her refusal to accept employment was justified because it was motivated by her conscientious religious beliefs as a member of the Seventh Day Adventist faith. The United States Supreme Court, reversing on appeal, *held* that the denial of benefits abridged the free practice of her religion in violation of her Constitutional rights. In the absence of a compelling state interest to the contrary, the Court stated, the exemption must be granted to *accommodate* appellant's religious beliefs.

There evolves from this decision a two-fold test which must be met in order to sustain any law which imposes a burden on the free exercise of

2. Zorach v. Clauson, 343 U.S. 306, 312 (1952).
3. Commentators have posed diverse theories for the proper reading of the religion clauses. *Compare* Katz, *Freedom of Religion and State Neutrality,* 20 U. CHI. L. REV. 426 (1953) *with* Kurland, *Of Church and State and The Supreme Court,* 29 U. CHI. L. REV. 1 (1961). See also Fernandez, *The Free Exercise Of Religion,* 36 So. CAL. L. REV. 546 (1963).
4. 374 U.S. 398 (1963).
5. So. CAR. CODE tit. 68, §§ 68–113, 68–114 (1962).
6. 240 S.C. 286, 125 S.E.2d 737 (1962).

religion. Such burden must be removed unless (1) there is a compelling state interest to the contrary[7] and (2) the state interest will, *in fact,* be seriously impaired by granting the exemption. The Court ruled out speculation and conjecture as to possible harms resulting from such exemption as a valid claim of state interest.[8]

B. *The Personal Interest*

The Court in *Sherbert* first noted that we are dealing with actions which clearly may be subject to some incidental legislative controls although abstract beliefs must remain free.[9] This dichotomy has long been recognized and it now appears well established that in certain instances a burden on religious practices may be permissible. The nature of the burden and the circumstances requiring it must be examined in order to determine its justification.

Since, as with many constitutional problems, the question is one of degree,[10] it becomes essential to characterize the burden on free exercise as either direct or indirect. The distinction appears simple, in the abstract, when we describe as direct any legislation which proscribes the practice itself[11] and as indirect, any legislation which neither forbids nor directly penalizes the practice, but in effect renders it more difficult.[12] In application to a particular situation, however, the distinction becomes less clear and the courts find themselves struggling for the proper classification. This problem presented itself fully in the *Sherbert* case. Mr. Justice Brennan, speaking for the majority, characterized the burden as direct. Granting that unemployment compensation has achieved the status of a right, he concluded that since appellant could not *both* comply with the statutory eligibility requirements *and* fulfill her religious obligations, the burden was a direct barrier to the free exercise of her religion.[13] Mr. Justice Stewart, concurring in the result, reasoned that, since she suffered only economic detriment and was subject to no penal sanction for her actions, the burden was indirect.[14] Consequently, he concluded that the decision

7. Such interest may appear in a wide variety of contexts, such as control of marital relationships (bigamy), child labor, or generally, anything within the state's power to control.

8. 374 U.S. at 407, the Court stated:

> The appellees suggest no more than a *possibility* that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. (Emphasis added.)

9. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such." 374 U.S. at 402. The action-belief dichotomy was first proposed in Reynolds v. United States, 98 U.S. 145, 164 (1878), and has been oft reiterated. *E.g.* Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *Cf.* Torcaso v. Watkins, 367 U.S. 488 (1961).

10. *Cf.* Zorach v. Clauson, 343 U.S. 306, 312 (1951).

11. *Cf.* Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878).

12. See, *e.g.*, Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961).

13. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

14. *Id.* at 417–18.

was inconsistent with the prior Sunday closing law decision of *Braunfeld v. Brown.*[15]

In conjunction with the nature of the burden, consideration must also be given to the nature of the practice upon which a burden has been placed. Abridgement of activities collateral to basic religious ceremonies is clearly more easily justified than abridgement of the ceremonies themselves.[16]

C. *The State Interest*

In considering the state interest in sustaining the legislation, it is beyond doubt that the fourteenth amendment has rendered the first amendment applicable *in toto* to the states.[17] Consequently, all legislation which imposes a burden on the free exercise of religion must conform to the demands of first amendment freedoms. As the Court stated in *West Virginia State Bd. of Educ. v. Barnette*[18]:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all the restrictions which a legislature may have a 'rational basis' for adopting. *But* freedoms of speech and of press, of assembly, and of *worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect. (Emphasis added.)

It has been suggested, not only that the presumption of constitutionality which is generally accorded legislation disappears when the legislation conflicts with one of the first amendment freedoms, but also that such legislation must be considered to be prima facie invalid.[19] In any event, the state's interest must go beyond a rational basis for the legislation and demonstrate a need for such legislation in order to prevent abuse to a compelling public interest and ". . . it would plainly be incumbent upon the appellees (the state) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[20] The *Sherbert* decision makes it clear that mere speculation will not suffice to support the legislation.

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15. 366 U.S. 599 (1961).

16. *Compare* Cox v. New Hampshire, 312 U.S. 569 (1941) (License required for "parade" on public streets) *with* People v. Woody, 40 Cal. Rptr. 69 (1964) (Sacramental use of peyote forbidden by narcotics ban.)

17. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215 (1963); Engel v. Vitale, 370 U.S. 421, 423 (1962); Torcaso v. Watkins, 367 U.S. 488, 492 (1961); Zorach v. Clauson, 343 U.S. 306, 309 (1952); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 210–11 (1948); Everson v. Board of Educ., 330 U.S. 1, 5 (1947); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

18. 319 U.S. 624, 639 (1943); *Accord* Dennis v. United States, 341 U.S. 494, 526–27 (1951); Thomas v. Collins, 323 U.S. 516, 529–30 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schenck v. United States, 249 U.S. 47 (1919). The immediacy factor has been generally disregarded in applying the test. *Cf.* Emerson, *Toward A General Theory Of The First Amendment*, 72 YALE L.J. 877, 908–14 (1963).

19. Prince v. Massachusetts, 321 U.S. 158, 173 (1944) (dissent).

20. Sherbert v. Verner, 347 U.S. 398, 407 (1963).

D. *The Establishment Problem in Sherbert*

The *Sherbert* decision provides a channel for some interesting observations concerning the establishment of religion limitation. In the well-known words of Mr. Justice Black:

> The 'establishment of religion' clause . . . means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[21]

Mr. Justice Stewart, concurring in the result, thought this "insensitive and sterile construction of the Establishment Clause"[22] must be revised in order to support the decision of the Court in *Sherbert*. The majority of the Court saw the exemption, not as an affirmative act in aid of religion, but rather as the removal of a barrier to appellant's practice, *which barrier had been affirmatively implaced.* It is questionable whether prior establishment decisions are so "insensitive and sterile" as Mr. Justice Stewart suggests.[23] In any event, the *Sherbert* decision makes it clear that government is obliged to maintain a benevolent neutrality, taking affirmative steps, where necessary, *to remove a barrier* to the free exercise of religion. The distinction is purely one of approach to the problem. The decision accords with the thesis proposed by Professor Katz to the effect that, the ". . . limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty, not vice versa."[24]

It appears worthy of note that the affirmative steps commanded by the *Sherbert* decision will clearly not infringe upon the rights of those with contrary beliefs. Such considerations seem to be of primary importance in determining the propriety of the exemption.[25]

III.

SUBSEQUENT APPLICATIONS OF *Sherbert*

A. *Peyotism Vindicated*

In *People v. Woody,*[26] the Supreme Court of California reversed defendants' convictions for the illegal possession of peyote, a hallucinogen.[27]

21. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).
22. Sherbert v. Verner, 374 U.S. 398, 414 (1963).
23. See Note, *Free Exercise And Establishment Clauses — Conflict Or Coordination*, 48 MINN. L. REV. 929 (1964).
24. Katz, *Freedom Of Religion And State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953).
25. Mr. Justice White joined Mr. Justice Harlan in dissent from *Sherbert.* They proposed that the exemption could be granted by the individual states, if they so desired, but was not compelled by the Constitution. By strict logic, their analysis is vulnerable under the establishment clause, since the state would be conferring a benefit upon Sabbitarians, not removing a barrier to their established rights under the free exercise clause. However, it is submitted, that such action is compatible with the first amendment because it amounts, in fact, to each state legislature evaluating their own state's interest in the same manner the Court did for states generally.
26. 40 Cal. Rptr. 69 (1964).
27. Although peyote is a hallucinogen, the court concluded that it was within the term "narcotics," the possession of which is forbidden by the California narcotics law. CAL. HEALTH & SAFETY CODE, § 11500.

Since the use of peyote is the very essence, a *sine qua non,* of the religious ceremony of the Native American Church, the court *held* that application of the statutory prohibition of narcotics to this practice was a violation of the practitioners' rights of "free exercise of religion."

The *Woody* decision is an expansion of *Sherbert* in that the exemption granted was from compliance with a criminal statute. Such expansion appears valid since the *Sherbert* decision intimated, by dicta, that a penal sanction would clearly be a more severe burden on free practice than mere economic detriment. The personal burden assumes further weight from the nature of the practice burdened. The use of peyote was an integral part of their religious ceremony, similar to bread and wine among the Christian churches.

Concurrently, however, the state's interest in enforcing a penal sanction must be recognized as far more compelling than its interest in maintaining uniformity in unemployment legislation. The State suggested: (1) that the exemption would produce deleterious effects among the Indian community in consequence of their continued use of peyote; and (2) that a great burden would be placed upon the administration of the narcotics law by reason of the spurious claims of religious practice that could be anticipated. The first contention was quickly refuted by factual considerations. The evidence clearly indicated that no permanent deleterious effects resulted from its use nor is there any more propensity to narcotics addiction among users than among non-users in the Indian community.[28] Refutation of the second contention came in the form of a direct application of the *Sherbert* reasoning that mere speculation of future spurious claims cannot fulfill the state's burden of showing a necessity for denying the exemption.

Thus the case turned on the second factor of the *Sherbert* test. Although narcotics control is certainly a compelling state interest, the drug here involved, being limited primarily to ceremonial use,[29] would not, *in fact,* substantially impede the state's interest.[30] Though there may be a question whether the Court intended *Sherbert* to be expanded to encompass penal sanctions, the application of the "cause in fact" test appears entirely appropriate and, in light of this, the case seems to have been properly decided.

B. *Refusal to Serve on Jury Upheld*

The Supreme Court of Minnesota, in the case of *In re Jenison,*[31] affirmed the contempt conviction of a woman who refused to serve as a

28. People v. Woody, 40 Cal. Rptr. 69, 74 (1964). The court also pointed out that ". . . Indian children never, and Indian teenagers rarely, use peyote." Thus, the state's fear of the "indoctrination of small children" was unfounded.

29. *Id.* at 73. The court noted that peyote is also worn about the neck, much as a Catholic wears a medal, and that prayers are directed to it as an object of worship.

30. *Id.* at 75. To emphasize the lack of any real effect upon state interests, the court pointed out that such an exemption had been granted in other states (New Mexico and Montana) with no undesirable consequences.

31. 265 Minn. 96, 120 N.W.2d 515 (1963). Appellant's refusal to serve was based on a literal interpretation of the biblical passage, "Judge not, so you will not be judged." Matthew 7:1.

petit juror because of her conscientious religious convictions against judging others. The court reasoned that the solemn obligation of jury service and the extreme interest of the state in assuring its citizens the right to trial by a jury of their peers justified such compulsory participation, irrespective of religious objections. The United States Supreme Court vacated the judgment and remanded the case for consideration[32] in light of their decision in *Sherbert v. Verner*.[33] Upon reconsideration, the Minnesota court reversed the conviction, holding that the state's interest was not so compelling as to warrant denial of appellant's first amendment right of free exercise.[34]

The question in *Jenison* presented itself, not in terms of what barriers a legislature may place as incidental obstructions to religious practice, but rather as to whether actions contrary to religious beliefs may be compelled by legislation. It is submitted that the contempt conviction would have been a violation of appellant's constitutional rights even in the absence of the *Sherbert* decision as precedent.[35] Nevertheless, the Minnesota court, in applying the *Sherbert* test, depicted the importance of the latter portion, the "harm in fact" consideration. The court paid due deference to the jury system and its exalted position in our legal structure. However, the inevitable conclusion emerged that the mere possibility of feigned scruples could not suffice to constitute an interest so compelling as to justify the contempt conviction. That such artificial beliefs could become general enough to seriously impair the jury system appears almost ludicrous. Nevertheless, the court's decree granted the exemption with the express reservation that it persist ". . . until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system . . ."[36]

The decision presents an interesting elucidation of the test formulated in the *Sherbert* case. Its application here was clearly appropriate, but there may be an important question as to whether the state must show *actual abuse* of the privilege to warrant a denial of the exemption, as appears a necessary inference from this decision. Such a burden could be far too stringent in other areas.

IV.

PRIOR CASES RECONSIDERED

A. *Sunday Closing Laws*

In *Braunfeld v. Brown*,[37] appellants, Orthodox Jewish shopkeepers, who were obliged by their faith to close their places of business on Saturday, assailed Pennsylvania's Sunday closing legislation[38] as contravening

32. *In re* Jenison, 375 U.S. 14 (1963); noted in 77 HARV. L. REV. 550 (1964).
33. 374 U.S. 398 (1963).
34. *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).
35. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
36. *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588, 589 (1963).
37. 366 U.S. 599 (1961).
38. PA. STAT. ANN. tit. 18, § 4699.10 (1960 Cum. Supp.).

their constitutional right of free exercise. Appellant, Braunfeld, asserted that compulsory Sunday closing would render him unable to continue in business, thereby resulting in the loss of his capital investment. Such detriment, however great, was admittedly indirect and the Court sustained the legislation, even as applied to appellants, because of the state's compelling secular interest[39] in maintaining one uniform day of rest. The Court recognized that:

> . . . the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.[40]

This was the first distinction intimated by the Court in the *Sherbert* case.[41] There, the appellant could not comply with the statutory requirements for unemployment compensation while fulfilling her religious obligation to refrain from Saturday labor. Here, however, compliance with both obligations — the religious and the legislative — was possible, at least in the abstract. It is submitted that such a distinction is extremely tenuous and defies practical application. Appellant Braunfeld's contention, which was not rejected by the Court, that he would lose his capital investment emphasizes that it was factually impossible for him, as a merchant,[42] to comply with both requirements. Under such analysis, the burdens on practice in *Sherbert* and *Braunfeld* are plainly comparable in type, and the economic detriment in the *Braunfeld* situation is the more severe in degree.[43]

Consequently, for the *Braunfeld* situation to withstand the *Sherbert* test, the state interest must be the controlling factor. It is clear the state can show a "rational basis" for such legislation, but whether a "necessity" for a uniform day of rest exists — one day when all activity in the business community ceases — remains questionable.[44] With our knowledge of human capacity and optimum productivity, it seems clear that the state has a "compelling interest" in demanding that each citizen rest one day in seven. Such considerations would justify Sunday closing laws, *unless* alternative legislation will achieve the result without abridging first amendment rights.

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39. The Court dispensed with the establishment problem on the basis of McGowan v. Maryland, 366 U.S. 420 (1961) and Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961), decided the same day. The Court had decided in those cases that, although the Sunday legislation evolved from religious principles, its secular purpose was now dominant, and its validity did not depend on its origin.

40. Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

41. 374 U.S. at 404.

42. The Court's suggestion (366 U.S. at 606) that appellant could pursue another occupation in order to avoid the economic detriment appears to beg the issue.

43. See Sherbert v. Verner, 374 U.S. 398, 417–18 (1963). Mr. Justice Stewart (concurring in the result) points out that appellant Braunfeld was in a position to lose his entire capital investment while appellant Sherbert's loss would be a maximum of twenty-two weeks compensation.

44. It is suggested in Braunfeld, 366 U.S. at 602, that the state's interest lies partly in promoting social communication among members of the community, and that this interest would be thwarted by such exemption. Although, admittedly, this serves as a rational basis for the legislation, it appears extremely doubtful that there could be a compelling interest in the legislation for that purpose.

The alternative which presents itself as most feasible is that petitioned for in *Braunfeld* — retaining the general Sunday ban while exempting those whose religious practice demands that they refrain from work on another day. A number of problems inhere in this solution. Primarily, we must consider (a) who will receive the exemption and (b) the additional policing problems resultant from such exemptions. Assuming that the bona fide nature of the individual's belief could be adequately determined before granting the exemption,[45] the extent of the exemption remains problematic. For example, should an exemption be granted to a Sabbitarian store owner whose employees are non-Sabbitarians? Or must all personnel be entitled to the exemption? The legislative problems here involved are far-reaching and their resolution would have a direct bearing on the policing of the program.[46] The *Braunfeld* decision relied heavily on the inherent problems of administration as a compelling state interest for denying the exemption but Brennan, J., concurring and dissenting, recognized that twenty-one states have, of their own initiative, granted such exemptions statutorily.[47] It is submitted that the effective operation of these exemption programs, and their very enactment by state legislatures, casts serious doubt upon the gravity of the asserted state interest.

In light of the unreality of the first distinction made in *Sherbert* regarding the nature of the burden and these considerations concerning the state's interest, it is submitted that *Braunfeld* has been seriously threatened and should have been overruled by the Court in *Sherbert*. Should the question again come before the Court, their position may very well be reversed.

B. *Proselytizing Activities*

In light of the *Sherbert* decision, the proselytizing activities of the Jehovah's Witnesses also warrant re-evaluation. In *Prince v. Massachusetts*,[48] the Court affirmed the conviction of a woman for furnishing her nine year old ward with magazines, knowing of her intent to sell them in the street, and for permitting the child to work "contrary to law" in violation of the state's child-labor laws.[49] Both parties were members of the Jehovah's Witnesses and the magazines were religious publications of that organization.[50] The Court sustained the conviction, renouncing appellant's contention that the statute violated her constitutional right of free exercise.

45. *Cf. In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

46. For further discussion of the problems inherent in the exemption remedy, *see generally* Mann and Garfinkel, *The Sunday Closing Laws Decisions — A Critique*, 37 N.D. LAW. 323, 334 (1962).

47. 366 U.S. at 614 n.1.

48. 321 U.S. 158 (1944).

49. ANN. LAWS OF MASS., Ch. 149, §§ 80, 81 (1913).

50. The magazines were "Watchtower" and "Consolation." Specified small sums are generally asked, but the magazines may be had without payment. *See* Largent v. Texas, 318 U.S. 418, 420 (1943).

The *Prince* case confronted the Court with a dual personal interest — that of the child to participate in practices commanded by her religion and that of the guardian to raise the child in accordance with those beliefs.[51] That the obligation to so "spread the gospel" descends upon the children, as well as the adult members of the Witnesses is evidenced by their reliance on the scriptural statement, "[A] little child shall lead them."[52] In light of this obligation, the statute, though undoubtedly enacted for secular purposes, *in effect* constitutes a direct proscription of a basic religious practice.[53] The obligation to proselyte is basic to the Jehovah's Witnesses' practice and must be assessed with this consideration in mind. The suggestion that the activity should be considered secular, somewhat similar to bingo games, lotteries, and such fund-raising activities of other churches[54] seems unfounded because of the integral relationship of this activity to their belief.[55]

The state has a strong interest in promoting the health and safety of its citizens, such interest being compounded when children are involved. At first blush, the proscription of child labor, which takes the form of distribution of literature in the streets to an often disinterested and sometimes hostile public, appears warranted by a compelling interest. Yet the fact that this child was accompanied by a presumably competent guardian casts some doubt on the necessity for the proscription. Consequently, two questions arise: (1) can we assume that the children will always be accompanied? (2) is a competent guardian sufficient protection for the child? The answer to the first question is uncertain, but could be provided for by statute, with little difficulty. The answer to the second is clearly *no*. In *Prince,* the guardian and child were positioned about twenty feet apart at an intersection.[56] Such accompaniment on a crowded city street can hardly be called protection in other than a "tongue-in-cheek" manner.

There seems little doubt that, in certain instances, the state may impose its standards of safety upon a parent or guardian. Here, such imposition abridges the right of free exercise of religion, but, unless the "danger in fact" test be so absurdly applied as to demand a showing of actual harm to, or molestation of, one of these children,[57] the state's interest appears sufficiently compelling to warrant the proscription. Accommodation principles must be kept within reasonable bounds.

51. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parent's right to provide religious with secular education).

52. *See* Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

53. *Cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961):

> If the purpose or *effect* of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid. . . . (Emphasis added.)

54. Prince v. Massachusetts, 321 U.S. at 177–78 (1944). (Separate opinion of Jackson, J.).

55. *See* Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943). "This form of religious activity occupies the same estate under the First Amendment as do worship in the churches and preaching from the pulpits."

56. 321 U.S. at 162.

57. *Cf. In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963). It is submitted that the court's implication that "actual abuse" must be shown was certainly not intended to be so interpreted.