PLURAL MARRIAGE AND RELIGIOUS FREEDOM: THE IMPACT OF REYNOLDS v. UNITED STATES

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The religious freedom clause of the first amendment is not one of "the most precisely drawn portions of the Constitution."[1] Judges have wrestled with its imprecision for nearly a century in efforts to define the extent of individual religious freedom. The language of the free exercise provision, which has been described as "at best opaque,"[2] was first discussed by the United States Supreme Court in 1879 in *Reynolds v. United States*,[3] the Mormon plural marriage case. The concepts flowing from *Reynolds*, which still have a viable but reduced role in refining the meaning of the free exercise guarantee, were to cast the molds for subsequent interpretations of religious freedom.

To what extent has the impact of *Reynolds* been diminished? During the past 100 years the religious issues have been different from those of the polygamy cases, but the constitutional issues have been similar. No longer are courts as concerned with defining the scope of religion or determining whether governmental activity inhibits belief or action. Instead, courts consider whether religious acts can be inhibited because of some compelling state interest, and the compelling quality of society's interest is considered in light of alternative means of protecting the public. That approach, though, owes much to the basic decision in *Reynolds* that the free exercise clause is not an absolute guarantee, and to its example in weighing societal interests in deciding whether to uphold an individual's claim that his freedom to practice religion has been infringed. In view of this significant constitutional development, it is appropriate to return to the *Reynolds* decision and

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1. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
2. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
3. 98 U.S. 145 (1879).

evaluate the issues it has generated and its impact upon the exercise of religious liberty.

THE *Reynolds* DECISION

George Reynolds, an English immigrant to the United States, took Mary Ann Tuddenham as his wife soon after he settled in Utah Territory in 1865. By the time he married a second spouse, Amelia Jane Schofield, 9 years later,[4] he had acquired some prominence as the private secretary of Brigham Young, the second president of the Church of Jesus Christ of Latter-day Saints, or as it is unofficially known, the Mormon Church. This second marriage led to his indictment for violation of the Morrill Act, a statute directed at the Mormon practice of polygamous marriage[5] and signed into law by President Lincoln in 1862. The Act provided that:

> [E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States . . . shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding five years.[6]

The first Reynolds trial turned on the testimony of Amelia Jane. The prosecution used her to prove that the ceremony which constituted the violation of the Morrill Act had taken place. On the witness stand she was put in the position either of admitting that she and Reynolds had been married or of declaring that she was not married to him and consequently was living in sin. She testified that her husband, a man who already had a wife, had indeed married her. The jury found him guilty of bigamy and the judge sentenced him to a year in prison and fined him $300.[7]

In his appeal to the territorial supreme court, Reynolds asserted that his second marriage was motivated by his desire to comply with the mandate of his church that worthy men, who were authorized by church leaders to do so, should take plural wives. He argued that punishment for compliance with that religious requirement deprived him of his first amendment right to the free exercise of his religion. This objection was brushed aside by the court as "based upon neither

4. F. ESSHOM, PIONEERS AND PROMINENT MEN OF UTAH 1126 (1966) (originally published in 1913).

5. The statute made unlawful both forms of polygamy—polyandry or plurality of husbands and polygyny or plurality of wives. Mormon plural marriage involved only polygyny, but has generally been referred to by the broader term of polygamy.

6. Act of July 1, 1862, § 1, 12 Stat. 501.

7. Lindford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 332 (1964).

reason, justice nor law. . . ."[8] The conviction was reversed, however, because the wrong number of grand jurors had handed down the indictment.[9]

At the second trial the government was unable to serve process on Amelia Jane Reynolds. The trial judge, concluding that the defendant was responsible for her absence, allowed the prosecution to use Amelia Jane's testimony from the first trial. The transcript was read to the jury and the verdict again was guilty. This time Reynolds was sentenced to 2 years imprisonment at hard labor, and his fine was set at the statutory maximum of $500. On appeal the Utah territorial supreme court affirmed the conviction without any reference to religious liberty.[10]

On January 6, 1879, approximately 2 years after the decision by the Utah supreme court, the United States Supreme Court affirmed Reynolds' conviction. Various procedural objections, such as the correct number of grand jurors and the use of the transcript of Amelia Jane's testimony from the first trial, were swept away.[11] The Court then considered the argument that the first amendment protected Reynolds from prosecution for bigamy. It was raised in the context of the refusal of the trial judge to charge that the defendant should be found innocent if he believed at the time of the second marriage that entering into polygamy was a religious duty. The judge had instructed the jury that if Reynolds had deliberately married a second time, neither the lack of evil intent nor the want of understanding that he was committing a crime would excuse him. The Supreme Court decided that the charge was not in error.[12]

Writing for the Court, Chief Justice Morrison Waite noted that in the jury instruction "the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[13] He looked at the background of the first amendment and concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in vio-

8. United States v. Reynolds, 1 Utah 226, 227 (1875) (dictum).
9. Congress had earlier sought to remedy the difficulties in the territorial judiciary by enacting the Poland Act in 1874. Act of June 23, 1874, 18 Stat. 253. In spite of that effort there was confusion as to whether the federal law preempted local law concerning the number of grand jurors required for an indictment.
10. United States v. Reynolds, 1 Utah 319 (1876).
11. Reynolds v. United States, 98 U.S. 145, 153-61 (1879). On rehearing, the original judgment of affirmance was vacated, the judgment of the court below was reversed, and the case was remanded to correct an error in the sentence. The decision on the substantive merits, however, was not affected. *Id.* at 168-69.
12. *Id.* at 161-67.
13. *Id.* at 162.

lation of social duties or subversive of good order."[14] Waite classified polygamy as an evil act over which Congress had legislative power. Then the Chief Justice asked whether religious belief would excuse practices contrary to law. His response was that "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[15]

There were no cases Justice Waite could use as precedent for these conclusions, and the barebones wording of the first amendment was not particularly helpful. Neither the word "religion"[16] nor the phrase "free exercise" are defined in the Constitution. In order to determine the religious freedom which had been guaranteed, the Chief Justice went to "the history of the times in the midst of which the provision was adopted."[17] He reviewed the events leading up to the adoption of the Virginia Statute of Religious Freedom just before the federal constitutional convention met. The preamble of that Act noted the danger of government intrusion "into the field of opinion" and declared that "[i]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[18] In this statement, according to Waite, "is found the true distinction between what properly belongs to the Church and what to the State."[19] The opinion then notes that Thomas Jefferson, who was out of the country when the Constitution was framed, was disappointed that it contained no express declaration of religious freedom, but anticipated the problem would be cured by amendment. Ratification by one state was effected only upon an understanding that the document would be altered to include, among other things, a declaration of religious freedom. The first session of Congress "met the views of the advocates of religious freedom" and included the religious liberty clause in the first amendment.[20] The Chief Justice then noted that Jefferson, in his Danbury Letter of 1802, remarked that "the legislative powers of the government reach actions only, and not opinion. . . ."[21] Waite concluded that this statement by Jefferson, "[c]oming as [it] does from an acknowledged leader of the advocates of

14. *Id.* at 164.
15. *Id.* at 167.
16. *Id.* at 162.
17. *Id. See also* Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307 (1973).
18. *Id.* at 163.
19. *Id.*
20. *Id.* at 164.
21. *Id.; see* S. PADOVER, THE COMPLETE JEFFERSON 947 (1943).

the measure . . . may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[22]

The immediate impact of the *Reynolds* decision was, of course, upon George Reynolds. After the "at hard labor" aspect of his sentence was remitted,[23] he was resentenced and sent to prison where he served 19 months, receiving 5 months off for good behavior. Upon his release he was regarded by the Mormons as a "living martyr," and devoted the rest of his life to work on behalf of the church.[24] Ironically, in 1885 he was married a third time to Mary Goold.[25]

The *Reynolds* decision had no immediate impact upon the Mormon marital system. The major reason was that testimony proving the performance of marriages between men and their plural wives could not be readily obtained either from the wives or from persons present at the ceremony.[26] Therefore, in 1882 Congress enacted the Edmunds Act which made it a misdemeanor in a territory of the United States for a male to cohabit with more than one woman.[27] During the decade of the 1880's some 1,300 men were imprisoned for unlawful cohabitation.[28] Further pressure was brought on the church by the Edmunds-

22. Reynolds v. United States, 98 U.S. 145, 164 (1879).

23. *Id.* at 168-69.

24. He became one of the "general authorities" of the church. J. SMITH, ESSENTIALS IN CHURCH HISTORY 685 (12th ed. 1947). He devoted his energies to missionary work and to extensive writing concerning the Book of Mormon, a volume accepted by Mormons as scripture. G. REYNOLDS, A COMPLETE CONCORDANCE OF THE BOOK OF MORMON (1900); G. REYNOLDS, A DICTIONARY OF THE BOOK OF MORMON (1891); G. REYNOLDS, THE STORY OF THE BOOK OF MORMON (1883).

25. F. ESSHOM, *supra* note 4, at 1126. Reynolds' conviction of bigamy for entering into a second marriage, coupled with his subsequent third trip to the altar, fits his case neatly into the following limerick:

There was a young fellow of Lyme
Who lived with three wives at a time.
When asked, 'Why the *third*?'
He said, 'One's absurd,
And bigamy, sir, is a crime.'

LOTS OF LIMERICKS 90 (L. Untermeyer ed. 1961).

26. See Miles v. United States, 103 U.S. 304 (1881), in which the Supreme Court reversed the polygamy conviction of a Mormon because of use of the testimony of his second wife to establish his marriage to his first wife. Under the law of Utah Territory, until the first marriage could be established, the second wife was prima facie the lawful wife and could not testify against her husband.

27. Act of March 22, 1882, § 3, 22 Stat. 31.

28. 6 B. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 211 (1930). Enforcement of the Edmunds Act in Utah is discussed in H. BANCROFT, HISTORY OF UTAH 1540-1886, at 677-90 (1889); 6 B. ROBERTS, *supra*, at 111-21.

Plural marriage in Arizona Territory gave rise to prosecutions of some Mormons there. See United States v. Tenney, 2 Ariz. 29, 8 P. 295 (1885), *aff'd on rehearing*, 2 Ariz. 127, 11 P. 472 (1886). The journals of two prominent Mormon pioneers of Arizona refer to the difficulties of men in the territory who had more than one wife. ARIZONA PIONEER MORMON: DAVID KING UDALL, HIS STORY AND HIS FAMILY 97-146 (L. Udall & L. Udall ed. 1959); THE LIFE AND TIMES OF JOSEPH FISH, MORMON PIONEER 251-67 (J. Krenkel ed. 1970).

In Idaho Territory Marshal Fred T. Dubois set up an especially effective organization for the apprehension of offenders of the Edmunds Act. He and James Hawley, the United States attorney for the territory, worked so well together in prose-

Tucker Act which disincorporated the church and declared that a substantial portion of its property was forfeited to the United States.[29] By 1890 federal pressure had become so great that the president of the church issued the so-called "Manifesto" which formalized the Mormon acquiesence in the *Reynolds* ruling.[30] Today the Church of Jesus Christ of Latter-day Saints makes it clear that teaching or practicing plural marriage is a transgression of church law.[31] Members who do so are excommunicated; other persons who do so are not accepted into membership.[32]

CONSTITUTIONAL ISSUES GENERATED BY *Reynolds*

While the problem of polygamy in the nineteenth century in Utah has thus subsided, the constitutional issues raised by the polygamists remain in three primary respects. The courts have traditionally considered whether the interests in question were matters of "religion" or not, and they have continued to classify religious interests, but, following the lead of *Reynolds*, they have more recently tended to deemphasize the issue. Though courts are still using the *Reynolds* test to classify interests which are asserted by litigants to be of a religious nature as either beliefs or practices, the distinction has become less important.

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cution of these cases that Dubois once asserted that "we have a jury that would convict Jesus Christ!" M. BEAL, A HISTORY OF SOUTHEASTERN IDAHO 311 (1942). Both men later represented Idaho in the United States Senate.

To evade apprehension, some polygamists dispersed their families into Mexico and Canada. See N. HATCH, COLONIA JUAREZ: AN INTIMATE ACCOUNT OF A MORMON VILLAGE 1 (1954); L. NELSON, THE MORMON VILLAGE: A PATTERN AND TECHNIQUE OF LAND SETTLEMENT 219-20 (1952); T. ROMNEY, THE MORMON COLONIES IN MEXICO 49-50 (1938).

29. Act of March 3, 1887, 24 Stat. 635.

For analysis of the litigation relating to the Edmunds-Tucker Act and to other anti-polygamy legislation, see Davis, *The Polygamous Prelude*, 6 AM. J. LEGAL HIST. 1 (1962); Lindford, *supra* note 7. *See also* G. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD (1971); D. Hatfield, Congress, Polygamy, and the Mormons, Aug. 14, 1954 (unpublished thesis on file in Ohio University Library); R. Poll, The Twin Relic: A Study of Mormon Polygamy and the Campaign by the Government of the United States for its Abolition, 1852-1890, May 1939 (unpublished thesis on file in Texas Christian University Library).

30. DOCTRINE AND COVENANTS 256-57 (1921 ed.). This volume, regarded by members of the Mormon church as scripture, contains revelations given to Joseph Smith, the first Mormon prophet and president, and his successors in the presidency of the church.

The 1890 Manifesto was accepted as binding by the majority of church members, and its position was buttressed by the assertion that its issuance was founded upon divine inspiration. There was, however, some question as to its effect outside the United States. In 1904 a second official statement from the then president of the church made it clear that the church officially had abandoned polygamy throughout the world. See J. SMITH, *supra* note 24, at 608-09, 630-31.

31. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL HANDBOOK OF INSTRUCTIONS 122 (1968).

32. Some splinter groups still practice polygamy. The practices of these so-called "Fundamentalists" are discussed in W. STEGNER, MORMON COUNTRY 209-26 (1942); W. TURNER, THE MORMON ESTABLISHMENT 195-217 (1966). Their legal problems are related in Davis, *supra* note 29, at 24-27.

Judges have also, as did Justice Waite in *Reynolds*, weighed the interests of society and those of the individual in order to strike a balance capable of both protecting the individual in his free exercise of religion and protecting the needs of society, notwithstanding any adverse consequences upon religious freedom.

Classification of Religious Interests

While it is only freedom of "religion" that the free exercise clause undertakes to protect, the problem of classification stems from the lack of any criteria in the language of the free exercise clause as to what constitutes "religion." Accordingly, courts have found it necessary to look to other sources, including the individual's conception of religion, judge-made definitions and implications from legislative enactments. When George Reynolds argued that his second marriage was motivated by a religious principle which at that time was a part of the dogma of his faith, he in effect asked the judiciary to accept a definition of "religion" broad enough to include taking a plural wife. The *Reynolds* opinion did not quibble with that self-supplied yardstick suggested to measure the defendant's interest. It was assumed that polygamy was religion; the defendant's classification was used. This did not, of course, prevent the Court from affirming his conviction. Polygamy was a religious practice which could be banned by the Congress. This approach of assuming the matter at issue is a tenet of religion, subject to legislative control on the ground that it is a religious practice which can constitutionally be restricted, has been generally retained by judges.[33] It keeps them out of the thicket of defining someone else's religion.

Judges have not always been so reticent. In response to what may be a fear that individuals might label some socially undesirable practice as "religion" and then claim first amendment protection, judges have from time to time constructed their own definitions of religion to exclude the practitioner's conduct from protection. *Davis v. Beason*[34] is such a case. During the anti-polygamy crusade, Idaho Territory had enacted a test oath provision that stripped the right to vote from all Mormons, whether or not they were involved in plural marital relationships.[35] Samuel Davis, a non-polygamous Mormon, was convicted of violating the law through improperly voting. In a habeas corpus proceeding, the United States Supreme Court rejected

33. *See, e.g.*, Smilow v. United States, 465 F.2d 802 (2d Cir. 1972); McMasters v. State, 21 Okla. Crim. 318, 207 P. 566, 568-69 (1922).
34. 133 U.S. 333 (1890).
35. Idaho Terr. Rev. Stat. (1887), § 508.

his first amendment claim that withholding the elective franchise because of his membership in the church prohibited him from freely exercising his religion. Writing for the Court, Justice Field noted:

> The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.[36]

By excluding the form of worship from his definition of religion, Field eliminated from the scope of protection not only polygamy but potentially other activities based on religious tenets.

In the case involving disincorporation of the Mormon church by the Edmunds-Tucker Act,[37] *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*,[38] Justice Bradley also refused to recognize polygamy as a form of religious worship. He argued that because polygamy is so abhorrent, it cannot be considered as a tenet of religion. Accordingly, the organization which considers its practice to be a religious duty is not really a church, and, therefore, the government can disincorporate it without violation of the free exercise clause.[39] His definition of what does not constitute religion is the key in this chain of logic. If something is regarded by the judiciary as abhorrent, it is not religion. Bradley spoke too of "the enlightened sentiment of mankind."[40] The difficulty with this idea is that enlightenment is in the eye of the beholder, and he may view strange or unpopular forms of worship as not falling within the province of religion.

When a legislative body passes a law which criminalizes conduct, even though the conduct is religiously based, that body in effect is rejecting the participant's definition of religion and substituting its own. Some judicial opinions appear to adopt such implied legislative definitions by brushing aside free exercise claims with the mere statement that something made criminal by the laws of the land cannot be religious. In *Knowles v. United States*[41] a defendant who was being prosecuted for sending obscene matter through the mails urged that the government was trampling the guarantees of freedom of religion and press. The court rejected the contention: "The guarantees cannot be made a shield for violation of criminal laws which are not designed to restrict religious worship or a free press, but to protect society against

36. Davis v. Beason, 133 U.S. 333, 342 (1890).
37. Act of March 3, 1887, 24 Stat. 635.
38. 136 U.S. 1 (1890).
39. *Id.* at 48-50.
40. *Id.* at 50.
41. 170 F. 409 (8th Cir. 1909).

practices that are clearly immoral and corrupting."[42] This approach, which has been used in other cases,[43] begs the question, however, "for the precise problem is what conduct can be made a crime. It is the ancient formula of persecution—never prejudice, but 'they violated laws.' "[44]

There has been a movement away from judicial and legislative classification of religious interests. In *United States v. Ballard* the Court commented that even beliefs which are "rank heresy to followers of the orthodox faiths" are protected by the constitution.[45] The fact that a religious rite is curious, unusual, unenlightened or abhorrent no longer will prevent the courts from accepting the claimant's characterization of it as religion.[46] Neither will legislative description of conduct as criminal serve as adequate reason for denying it the status of religion.[47]

Acceptance of a person's own classification of an interest as "religion" underlies the decision in *United States v. Seeger*.[48] There a claim for draft exemption on the ground of religious scruples, a statutory basis for exemption, was upheld even though the claimant's views were highly personal, non-theistic and existed independent of the dogma of any institutionalized religious organizations. *Seeger* should not be read to mean that judges will accept any claim asserted as religion, however, because limitations were placed upon the notion of individualistic conceptions of religion in the recent case of *Wisconsin v. Yoder*.[49] According to the majority opinion,

> to have the protection of the Religion Clauses, the claims must be rooted in a religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may represent a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if [persons] asserted their claims because of their subjective evaluation and rejection of the contempo-

42. *Id.* at 411-12.
43. *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 20 (1946); Davis v. Beason, 133 U.S. 333, 342-43 (1890); Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, 884, *cert. denied*, 264 Ala. 697, 88 So. 2d 887 (1956); State v. White, 64 N.H. 48, 5 A. 828, 829-30 (1886).
44. Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 72 (1946).
45. 322 U.S. 78, 86 (1944).
46. *See* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 258-64.
47. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).
48. 380 U.S. 163 (1965).
49. 406 U.S. 205 (1972).

> rary secular values accepted by the majority, much as Thoreau rejected the social values of his time . . . their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.[50]

Thus, *Seeger* may represent no more than an approach not unlike that in *Reynolds* in which the Court did not take issue with the defendant's assertion that polygamy was a matter of religion.

Belief-Action Dichotomy

The second type of classification of interests found in religious liberty cases is the belief-action dichotomy which Waite borrowed from the prior century and employed in *Reynolds*.[51] Under this approach, when interests are regarded as matters of religion, religious freedom will be protected in *all* cases in which it is classified as belief, but only in *some* cases in which it is classified as action. This formula rejects literally interpretating the free exercise clause to read that once religion is involved *no* law can prohibit its exercise. Such a literal approach doubtless would have led to more cases being decided on the issue whether religion was involved. The *Reynolds* rationale transforms the crucial issue to the classification of an interest as either a religious belief or an act based on religion.

It is not surprising, therefore, that in case after case the protection of beliefs by the first amendment has been more often re-affirmed.[52] In the words of Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[53] People can believe what they will.

This protection of pure belief or opinion is the basis for the Supreme Court of Idaho's decision in *Toncray v. Budge*.[54] The Idaho constitution was drafted during the height of the anti-polygamy campaign. The provision on the right to hold public office bans participants in "celestial" marriages as well as those involved in plural mar-

50. *Id.* at 215-16.
51. For discussion of the historical sources used by the Court in *Reynolds*, see text accompanying notes 17-22 *supra*.
52. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961); United States v. Ballard, 322 U.S. 78, 86 (1944); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); State v. De Laney, 1 N.J. Misc. 619, 122 A. 890, 891 (Sup. Ct. 1923); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565, 569 (1966).
53. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
54. 14 Idaho 621, 95 P. 26 (1908).

riage.[55] Budge, a monogamist, was allowed to seek a judgeship, even though his marriage had been performed in a Mormon temple and therefore was considered a "celestial" marriage according to Mormon usage. The Idaho court ruled that the constitutional prohibition was aimed at polygamy; it "was directed against acts, practices, and teachings with reference to this life, and not against beliefs and opinions as regard to the hereafter."[56] The Mormon belief that marriages like Budge's would continue into the life after death makes it possible for a man to marry successive wives on earth and to believe that he will have more than one spouse in the hereafter. The law cannot reach that opinion.

The difficulty with the distinction between religious opinion and religiously motivated action appears in its application to cases like *Reynolds* in which the claimant asserts the right to act on his beliefs. Litigation in the first amendment area, except in rare cases like *Budge*, involves acts which have either been performed or are contemplated, because legislators are usually concerned with conduct rather than concepts. Labelling something an act, however, does not resolve the constitutional issue, if it is assumed that even some religious acts cannot be prohibited. Thus, in *Reynolds,* Waite found it necessary to proceed to weigh the interests of society and then base the decision on the result of that weighing, rather than on the conclusion that Reynolds acted when he married a second time.

Wisconsin v. Yoder[57] represents a recent willingness by the Supreme Court to minimize the rather formalistic process of classifying interests as acts or beliefs and to emphasize the more significant concern of weighing interests. In *Yoder* members of the Old Order Amish religion were convicted of refusing to send their children to public high school as required by the state's compulsory school attendance law, although they had argued that their conduct was based on their religious beliefs. In considering the belief-action distinction, the Court noted that:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct . . . beyond the power of the State to control . . . . This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this

55. IDAHO CONST. art. VI, § 3.
56. Toncray v. Budge, 14 Idaho 621, 655, 95 P. 26, 38 (1908); *see* C. ZOLLMAN, AMERICAN CHURCH LAW 42 (1933).
57. 406 U.S. 205 (1972).

> context belief and action cannot be neatly confined in logic-tight compartments.[58]

No longer is there the sharp dichotomy that Waite expounded in the *Reynolds* case. *Yoder* recognizes its erosion: the protection of the first amendment extends not only to religious opinion, but also to some religious acts.

Justice Douglas in *Yoder* suggested even more than did the majority. In his separate opinion, he wrote that the action of the Court "even promises that in time *Reynolds* will be overruled."[59] *Yoder* does not make that promise explicit, however. Even Chief Justice Waite would have allowed most actions based on religion to be shielded by the constitution. What *Yoder* does is to blur the sharpness of the opinion-action distinction and to redefine the weighing process by which religious interests will be measured to determine if the first amendment affords them protection.

WEIGHING OF RELIGIOUS INTERESTS

Once the decision not to protect all religious conduct was made in *Reynolds*, it became necessary to develop a formula by which those actions potentially subject to governmental restriction could be distinguished from those beyond governmental intrusion. According to Justice Waite, "Congress . . . was left free to reach actions which were in violation of social duties or subversive of good order."[60] What has evolved in more recent cases has been a weighing process in which the importance to the individual of the practice involved is weighed against the interest of society; in order for restrictions on religiously based actions to be constitutionally valid there must be "a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause."[61] The judiciary is now guided by the balance of these interests, not solely by contemporary societal mores as the *Reynolds* Court had suggested.

Individual Interest

In considering the individual's interest, courts will look to how strongly the claimant adheres to religious principles, but will not inquire into the validity of his religious beliefs. Courts have also shown a tendency to probe into the acts under consideration to see if they are central to the religious sect.

58. *Id.* at 220.
59. *Id.* at 247 (Douglas, J., concurring in part and dissenting in part).
60. Reynolds v. United States, 98 U.S. 145, 164 (1879).
61. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

An illustration of an inquiry into whether conduct is religiously motivated may be seen in *Dobkin v. District of Columbia*,[62] a case in which a merchant who conducted business on Saturday was not allowed to refuse a court appearance on Saturday on the ground that he was a sabbatarian. The religious view that Dobkin professed was not important enough to him to practice, and it was therefore considered by the court as not important enough to warrant protection. If a person does not practice what he professes, he cannot invoke it to protect his conduct. Actions overcome and belie words. While it is always possible for a backslider to repent, judges tend to be suspicious of repentance that comes as conveniently as did Mr. Dobkin's.

In weighing the importance to the individual of his religious conduct, the courts will not consider the good faith of the claimant in conducting himself contrary to the law. In *Sheldon v. Fannin*,[63] for example, the plaintiffs sought to enjoin enforcement of a rule requiring public school children to stand during singing of the national anthem. The injunction was granted even though they avowed their willingness to rise for the pledge of allegiance to the flag, and the trial judge suggested that "it may strain credulity that their objection to standing as well for the National Anthem is bona fide or sincere."[64] Neither will the courts examine the reasonableness of the belief on which conduct is based. Whether it is ludicrous or unfounded is beside the point. Justice Douglas has expressed as the basis for this position the fact that

> [m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.[65]

The courts do examine the extent to which the action of the government undermines the individual's religion, however. *People v. Woody*[66] was an appeal by a group of Navajo Indians convicted for

62. 194 A.2d 657 (D.C. Ct. App. 1963).
63. 221 F. Supp. 766 (D. Ariz. 1963).
64. *Id.* at 775.
65. United States v. Ballard, 322 U.S. 78, 86-87 (1944). This attitude was recently echoed by the majority in *Yoder* when examining the religious mode of life. "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights of others is not to be condemned because it is different." Wisconsin v. Yoder, 406 U.S. 205, 224 (1972).
66. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

violating California's drug law by participating in peyote ceremonies of the Native American Church. Members of that sect regard peyote as more than a sacramental symbol; it is an object of their worship. The Supreme Court of California reversed the conviction, commenting that to "forbid the use of peyote is to remove the theological heart of Peyotism."[67] In the balancing process, legislation that bans a practice central to the defendant's religious concepts must yield to the constitutional guarantee of religious liberty.

In establishing the centrality concept in *Woody*, it was necessary to distinguish *Reynolds*. The California court noted that peyote was "the *sine qua non* of defendants' faith" and stated that "[p]olygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of that religion . . . ."[68] That characterization does not adequately state either the role played by polygamy or the complications of the centrality idea. Church leaders tended to be polygamists; many indeed were "called" to enter into plural marriage. Refusal of such a call would have been in violation of the central Mormon concept of obedience to church authority; and life in plural marriage was regarded as being especially meritorious. Most male members of the church, however, did not find it necessary to have plural wives any more than most Hindus regard the use of drugs as essential to their religious lives.[69] What is essential for one member of a church may not

67. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. The conviction for possession of peyote by a Crow Indian member of the Native American Church was upheld by the Montana supreme court which did not speak of use of the drug in language like that of *Woody*. State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926). Other defendants have been less successful in arguing that the use of drugs played a significant enough role in their religion so that the first amendment protected them from prosecution. In Leary v. United States, 358 F.2d 851 (5th Cir. 1967), a conviction for marijuana was upheld and the defendant's first amendment contention was rejected. Leary had argued that he was a member of a Hindu sect which used the drug "as an aid to attain consciousness expansion by which an individual can more easily meditate or commune with his God," *id.* at 860. The court responded that there was no evidence that the use of marijuana was a formal requirement of his religion and noted that it was not universally used by Hindus. *Id.* In People v. Mitchell, 244 Cal. App. 2d 176, 182, 52 Cal. Rptr. 884, 888 (1966), the California court of appeals distinguished *Woody* in a case in which the defendant argued that it was his personal philosophy that use of marijuana was beneficial to him. His interest was not great enough. And *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728 (1964), involved the question whether a convicted peyote user could bring himself within the protection of *Woody* by showing the extent to which his religion demanded use of the drug. According to the court, conduct that the religion does not mandate but merely permits, acts which are acceptable under a religious creed but not essential to salvation according to its tenets, and behavior which is peripherial to the thrust of the religious dogma, all fall outside the *Woody* rationale. They are not sufficiently central to the religion.

68. People v. Woody, 61 Cal. 2d 716, 725, 394 P.2d 813, 820, 40 Cal. Rptr. 74, 81 (1964).

69. Since plural marriages were not publicly recorded, the extent to which the doctrine of plurality of wives was practiced cannot accurately be ascertained. It appears that the rate of plural marriage fluctuated during the last half of the nineteenth century, tending to increase when federal pressure was applied to the Mormon church and its leaders responded with exhortations to the faithful urging compliance with the doctrine. There is an indication that toward the end of the century approxi-

be to another. This complication in application of the centrality test is perhaps one reason why most judges today, like Waite in *Reynolds*, focus most of their attention on the societal, rather than the individual interest when evaluating the relative merits of the claim of the individual as against the interest of society.

SOCIETAL INTEREST

In considering whether Congress had overstepped its powers in enacting the Morrill Act, it will be recalled that Waite asked whether polygamy was "in violation of social duties or subversive of good order."[70] Two questions may be asked about this test: Was it correctly applied in the *Reynolds* case? Has it withstood the test of time as a yardstick for measuring societal interest in free exercise cases? Mormons asserted that the answer to the first question was no; cases show that the *Reynolds* formula has been subjected to considerable refinement, but that its basic notion is still viable.

Chief Justice Waite indicated that polygamy was viewed by the Court as inconsistent with the democractic American way of life and was consequently a danger to society. Reference was made to a Professor Lieber whose view it was that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[71] There was no data then available, however, to prove that such a generalization held true when applied to Utah polygamy. Subsequent sociological studies indicate that Mormon polygamy neither caused or could cause the degradation of women and children or the subversion of democracy.[72] The Mormon church

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mately 8 percent of the families in the church were plural. T. O'DEA, THE MORMONS 245-46 (1957); Ivins, *Notes on Mormon Polygamy*, 35 UTAH HIST. Q. 309 (1967). Three of the author's great-grandfathers lived in Utah. One of them, Thomas Broadbent, had three wives; another, Joshua Davis, had two. Lewis Barney married his second wife while the Mormon pioneers were enroute to Utah. F. ESSHOM, *supra* note 4, at 770, 839; L. BARNEY, THE LIFE OF LEWIS BARNEY 24 (1971).

70. Reynolds v. United States, 98 U.S. 145, 164 (1879).

71. *Id.* at 166. Chief Justice Waite provided two illustrations of other religiously motivated actions which would not be protected by the first amendment: suttee and human sacrifice. *Id.* These illustrations show that there are outer limits to the acts that will be permitted in the name of religion, but they are not related in any way to plural marriage.

Waite's biographer comments that the Chief Justice had referred to his opinion in *Reynolds* as his "sermon on the religion of polygamy." B. TRIMBLE, CHIEF JUSTICE WAITE, DEFENDER OF THE PUBLIC INTEREST 244n.18 (1938). The biographer further characterized Waite's opinion in the case as "one of the most scathing indictments of what he considered an immoral practice which he ever delivered from the bench." *Id.* at 244.

72. For sociological studies of Utah polygamy, see K. YOUNG, ISN'T ONE WIFE ENOUGH? 361-62 (1954); Ivins, *supra* note 69; J. Hulett, The Sociological and Social Psychological Aspects of the Mormon Polygamous Family (1939) (unpublished dissertation on file in the library of the University of Wisconsin).

did dominate the political, economic and social life of Utah during the time plural marriages were being entered into, but the existence of such a theocracy was unrelated to the matrimonial system of the church. Polygamy provided a means for the government in Washington and the anti-Mormons in Utah to diminish the power of the church and reduce its role in politics.[73]

What of plural marriage today? Would it withstand the "violation of social duties or subversive of good order" test? The economic difficulties in financing multiple families were less pressing in the agrarian frontier society of Utah Territory than they would be in today's world. But the social climate has also changed. Unconventional relationships between men and women are now at least tolerated.[74] We hear of so-called homosexual marriages,[75] new types of marriages are advocated[76] and the institution of marriage,[77] as well as the conduct

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A study of the mental and physical traits of the offspring of the Mormons indicated that the children of polygamous families compared favorably with those of monogamous ones. J. Hickman, A Critical Study of the Monogamic and Polygamic Offspring of the Mormon People (1907) (unpublished thesis on file in Columbia University Library).

For varying subjective contemporaneous assessments of polygamy, see J. BEADLE, POLYGAMY OR THE MYSTERIES AND CRIMES OF MORMONISM (1904); R. BURTON, THE CITY OF THE SAINTS AND ACROSS THE ROCKY MOUNTAINS TO CALIFORNIA 422-28, 476-93 (F. Brodie ed. 1963); F. CANNON & C. KNAPP, BRIGHAM YOUNG AND HIS MORMON EMPIRE 237-47 (1913); J. CODMAN, THE MORMON COUNTRY: A SUMMER WITH THE "LATTER-DAY SAINTS" 160-63 (1874); F. STENHOUSE, "TELL IT ALL": THE STORY OF A LIFE'S EXPERIENCE IN MORMONISM (1874).

73. The political role of the church had been very formidable. Upon their arrival in the west, the Mormons established a provisional state government with Brigham Young as Governor and other high church officials in leadership roles. When Utah was made a territory, President Young was appointed as Governor and retained the position until 1858 when he was succeeded by a non-Mormon. *See generally* N. ANDERSON, DESERT SAINTS: THE MORMON FRONTIER IN UTAH 83-192 (1942). For a detailed analysis of the economic role played by the church, see L. ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830-1900 (1958).

74. For discussion of current and future problems in connection with the marriage relationship, see J. BERNARD, THE FUTURE OF MARRIAGE (1972); P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE (1959); M. RHEINSTEIN, MARRIAGE BREAKDOWN, DIVORCE AND THE LAW (1971).

For a case dealing with the difficulties of a commune trying to comply with a zoning ordinance which defined "family" in a narrow sense, see Palo Alto Tenants' Union v. Morgan, 321 F. Supp. 908 (N.D. Calif. 1970). The court noted that the "right to form such groups may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not." *Id.* at 911-12.

75. *See, e.g.*, Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971); Corbett v. Corbett (otherwise Ashley) [1970] 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A.); Comment, 56 CORNELL L. REV. 963 (1971).

76. *See, e.g.*, N. O'NEILL & G. O'NEILL, OPEN MARRIAGE: A NEW LIFE STYLE FOR COUPLES (1972); C. ROGERS, BECOMING PARTNERS: MARRIAGE AND ITS ALTERNATIVES (1972). On the subject of communes, see *id.* at 125-60; Cantor, *Communes*, 4 PSYCHOLOGY TODAY 53 (1970); and on "swinging," see G. BARTELL, GROUP SEX (1971).

77. The right to marry has now been recognized as a basic civil right. Loving v. Virginia, 388 U.S. 1, 12 (1967); *cf.* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). It is protected by the fourteenth amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and possibly by the ninth amendment, Griswold v. Connecticut, 381 U.S. 479,

of married persons,[78] is being subjected to fewer legal restraints. The Victorian age of Morrison Waite is far behind us. All of this does not, of course, establish that polygamous relationships like that of the Mormons of a century ago would pass today the test set forth in *Reynolds.*

The test for weighing societal interest, though, has not remained static any more than has society itself. In a development paralleling that of the clear and present danger test in freedom of speech cases, the "violation of social duties or subversion of good order" test has evolved into the "compelling state interest" standard which has been further embellished with the "less drastic means" refinement.

Sherbert v. Verner[79] is an outstanding expression by the Supreme Court of the new approach. In that case the South Carolina unemployment compensation law disallowed compensation for those persons who rejected offers of suitable work. After refusing to accept Saturday work because of her religious beliefs, the claimant was denied compensation payments. The Supreme Court held that the state could not deny her the benefits. Justice Brennan, speaking for the Court, undertook to ascertain whether "some compelling state interest enforced in the eligibility provisions of the South Carolina statute" could justify the interference with the claimant's exercise of religion.[80] There was no proof that the compensation scheme of the state would be beset by fraudulent claims of persons feigning sabbatarian beliefs; nor was there any showing that the compensation fund would be diluted or that scheduling of work by employers would be hindered.

The compelling state interest test, accordingly, places the burden on the government to prove that the religious practice is indeed harmful to society. In the polygamy cases, however, the burden seemed to be on the individuals to show that their interest was strong enough to warrant protection by the first amendment. In addition, the compelling state interest formula places a heavier burden on the state. Brennan said in *Sherbert v. Verner* that "no showing merely of a rational relationship to some colorable state interest would suffice . . . ."[81]

In spite of that added burden, there have been cases after *Sherbert* in which the government has prevailed. One case amply illustrates the

496 (1965) (Goldberg, J., concurring). *See also* Maynard v. Hill, 125 U.S. 190 (1888).

78. The right of marital privacy was recognized in Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972); *cf.* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

79. 374 U.S. 398 (1963).

80. *Id.* at 406.

81. *Id.*

point. Captain Susan Struck, a single Air Force officer, became pregnant while on active duty in Southeast Asia. A board of officers recommended that she be separated from the service pursuant to an Air Force regulation requiring the discharge of any pregnant woman officer. Captain Struck sued to prevent her discharge but the Court of Appeals for the Ninth Circuit affirmed the district court dismissal of her case.[82] One of her arguments was that the regulation was offensive to her freedom of religion because, as a Roman Catholic, she could not have an abortion which would have terminated the discharge proceedings under the regulation. The court dealt with the argument by stating:

> Our conclusion on the Free Exercise of Religion problem raised by Captain Struck is that there is a compelling public interest in not having pregnant female soldiers in the Military establishment, that such a soldier is equally vulnerable, whether she has no religion, or a religion which forbids abortions, and that perfect and universal Free Exercise of Religion must give way to the slight extent necessary to conserve the compelling public interest, there being no practicable way to conserve both interests.[83]

Captain Struck was a nurse. The opinion in no way demonstrated that military nurses, any more than civilian nurses, are dangerous to the public well-being when they become pregnant. Refinement of the test of societal interest consequently did not insure Struck that there would be any compelling proof of the dangerousness of her condition to society. The Ninth Circuit merely made that assumption, an assumption not really too different from Waite's assumption that polygamy was contrary to the commonweal.

In contrast to *Struck*, the Pennsylvania supreme court recently applied the compelling state interest test to *In re Green*,[84] which involved a suit for judicial declaration that a minor was a neglected child within the meaning of a state law and for the appointment of a guardian. The child in question was a teenage boy suffering from curvature of the spine

82. Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *judgment vacated*, 409 U.S. 1071 (1972).

83. *Id.* at 1377. For cases in which the free exercise claim has been rejected, see Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000 (C.A.D.C.), *cert. denied*, 377 U.S. 978 (1964); Jehovah's Witnesses in State of Washington v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967); Abraham J. Muste, 35 T.C. 913 (1961); Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, *cert. denied*, 264 Ala. 697, 88 So. 2d 887 (1956); Mannis v. State, 240 Ark. 42, 398 S.W.2d 206, *cert. denied*, 384 U.S. 972 (1966); Wright v. De Witt School Dist., 238 Ark. 906, 385 S.W.2d 644 (1965); Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 366 U.S. 942 (1949); Baer v. City of Bend, 206 Ore. 221, 292 P.2d 134 (1956).

84. 448 Pa. 338, 292 A.2d 387 (1972).

who needed an operation if the condition were to be corrected. Since his parents withheld their consent on religious grounds, there was an effort to obtain the appointment of a guardian who could give consent. The court distinguished this case in which the boy's condition was not fatal from other cases involving fatal illnesses, and concluded that the parents' religious beliefs were not outweighed by any compelling state interest in protecting the minor. The state in the *Green* case had not carried its burden.[85]

Wisconsin v. Yoder[86] demonstrates the final refinement —the less drastic means concept. The *Yoder* case, as was noted in the discussion of the belief-action distinction,[87] concerned the refusal of Amish parents acting on the basis of religious dogma to send their children to the public high schools. The interest of the State of Wisconsin in having an educated citizenry was a legitimate one. But it could be met in a manner other than requiring all children to attend public high schools. Schooling in the homes or in other groups provides the Amish children with the skills necessary to become productive citizens. There was a reasonable alternative to the state's regulatory scheme, and it was one which did not do violence to the religious principles of the Amish people. So long as that other avenue of meeting the needs of society existed, there was no compelling state interest in forcing the children into the regular school sytem.

CONCLUSION

The constitutional developments in the interpretation of the free exercise clause were inspired by *Reynolds*, and its approach to solving the problem of freedom of religion still withstands the test of time. In retrospect, the people of the Utah territory had an important interest in protecting women and children and in reducing church influence in government. Statutes aimed at abolishing polygamy were passed to further what was then considered a compelling interest of society. What less drastic alternatives were available to the Mormons in meeting the objections to their system of plural marriages? What less drastic alternative was available to the courts in dealing with what Congress regarded as a serious societal problem? What compromise was open to the leaders and members of the Mormon Church other than to stop

85. For cases in which the free exercise claim was upheld, see *In re* Jenison, 375 U.S. 14 (1963), *remanding* 265 Minn. 96, 120 N.W.2d 515 (1963); Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

86. 406 U.S. 205 (1972).

87. *See* text accompanying notes 57-59 *supra.*

teaching plural marriage and to refrain from permitting any persons to enter into its practice? Eventually, the bulk of the church accepted the proposition that the retreat from plural marriage was based upon divine inspiration. The church quit performing plural marriages in Utah, the polygamists retained their wives and the system—at least among orthodox Mormons—gradually died out as the polygamists and their wives passed from the scene.