August 2015

The "Compulsory School Attendance" Case: Wisconsin v. Yoder

Michael Buchicchio

THE "COMPULSORY SCHOOL ATTENDANCE" CASE

Wisconsin v. Yoder, 92 S. Ct. 1526 (1972)

ON PETITION from the State of Wisconsin, the Supreme Court granted certiorari to review the decision of the Wisconsin Supreme Court, which held the respondents' convictions for violating the state's compulsory school attendance law were invalid under the Free Exercise Clause of the First Amendment and the Fourteenth Amendment.[1]

The respondents, Jonas Yoder, Oden Yutzky, members of the Old Order of Amish religion and Wallace Miller, a member of the Conservative Amish Mennonite Church, had children, Frieda Yoder, aged 15; Barbara Miller, also 15, and Vernon Yutzky, 14, who had completed the 8th grade but who were not enrolled in any private school or within any recognized exception to the compulsory attendance law.[2] They are conceded to be subject to the Wisconsin statute. The respondents refused to enroll their children in public high school as required by the compulsory law[3] and were fined five ($5.00) dollars each. The conviction was reversed by the Wisconsin Supreme Court and their holding affirmed by the United States Supreme Court.

HISTORY OF THE OLD ORDER AMISH:

To understand the Amish attitude and comprehend why Amishmen, like Yoder, are so recalcitrant in their opposition to laws compelling such attendance, it is necessary to know something of their religious beliefs and the value system that underlies their separated society.[4]

The Amish trace their existence as an independent sect to the late 17th Century.[5]

---

1 Yoder v. State, 49 Wis.2d 430, 182 N.W.2d 539, *aff'd* 92 S. Ct. 1526 (1972).

2 WISC. STAT. ANN. § 118.15. Pertinent provisions of which statute are: "Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 shall cause such child to attend school regularly... to the end of the school term in which child becomes 16."

3 *Id.*

4 *See generally* J. HOSTETLER, AMISH SOCIETY (1968) [hereinafter cited as HOSTETLER]; J. HOSTETLER and G. HUNTINGTON, CHILDREN IN AMISH SOCIETY (1971); Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?* in PUBLIC CONTROLS FOR NON-PUBLIC SCHOOLS (Erickson ed., 1969).

5 HOSTETLER at 40. Under Jacob Ammon, the Amish broke with Mennonites in 1693.

The principal concern of the present-day followers of Ammon is the belief that separation from the world is the *sine qua non* of spiritual salvation.[6] The Amish have derived a dualistic conception of reality: "[t]o the Amish, there is a divine spiritual reality, the Kingdom of God, and a Satanic Kingdom that dominates the present world . . . therefore, the Amishmen must not behave like the world."[7] Given this basic belief, it is not difficult to understand the plight of the Amishmen. At stake is not only their survival as a separate subculture but also their individual salvation. The Amish avoid contact with the outside world to the extent that it is possible. For example, almost all Amishmen abstain from military service, payment or collection of Social Security benefits, insurance coverage, and litigation.[8] They do not actively oppose the larger society except when its requirements would force them to violate deeply held religious convictions. They abide by tax laws, are productive farmers; they are not on welfare or unemployed, and they are not proselytes of their creed.[9]

In many ways they are "model" citizens. However, the main conflict between Amish and the rest of society is their objection to compulsory education in public schools. Until recently Amish educational beliefs aroused little interest. At one time, compulsory public education consisted of limited instruction, one-room local school houses and minimal certification standards for teachers;[10] the Amish educational experience differed little from that of any rural child. Recent developments in public education have changed this situation drastically. Stringent state laws concerning compulsory school attendance,[11] minimum certification standards for teachers,[12] and uniform curricular requirements have put an end to one-room school houses.[13] The Amish do not want to be subjected to the influence of the public schools or learn the values of a world they consider to be part of the "Satanic Kingdom." To avoid "eternal damnation," they want their children to be educated in Amish schools, taught by Amishmen, in accordance with the Amish value system, to prepare them for a life in the separated Amish society.

---

[6] HOSTETLER at 48.

[7] *Id.* at 56.

[8] The Amish are so opposed to litigation that their cause is taken to court by the National Committee for Amish Religious Freedom and the American Civil Liberties Union. Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber,* 16 U. KAN. L. REV. 423 (1968) [hereinafter cited as Casad].

[9] Casad at 425.

[10] Prior to enactment of WISC. STAT. ANN. §§ 118.15, 118.19, 118.01 (1969) discussed on page 4 of text, educational standards were minimal in Wisconsin.

[11] *See* e.g., WISC. STAT. ANN. § 118.15 (1969).

[12] *See* e.g., WISC. STAT. ANN. § 118.19 (1969).

[13] *See* e.g., WISC. STAT. ANN. § 118.01 (1969).

Prior to *Yoder*, the Amish had been unsuccessful in raising the First Amendment as a bar to state compulsory education laws in state courts.[14] The Amish legal argument is not easily analyzed and is not a simple free exercise dispute. It not only involves the state and parent but the child as well.[15] The Supreme Court has ruled that the state is allowed to infringe on the free exercise of the parent and the child for permissable reasons.[16] Generally speaking, the state may provide for the child's welfare in its capacity as *parens patriae*.[17] However, this doctrine, once giving the state substantial control over the child, is gradually being redefined.[18] The parent's control, within reasonable limits of rearing the child, has been judicially recognized.[19] The child also has his own free exercise claim as well as some ill-defined right to be free of parental control if that control is clearly inimical to his welfare.[20]

This tangled web of conflicting interests is further complicated by the absence of judicial decisions defining the child's position in relation to his parent and the state.[21] Prior to *Yoder*, Amish litigation turned exclusively on resolution of the parent's free exercise claim. Therefore, to evaluate the Amish position one must have a basic understanding of free exercise protection and the history of its judicial interpretation by the Supreme Court.

The First Amendment to the United States Constitution guarantees, in relevant part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

Until recently, free exercise protection was no defense to state regulations which, although indirectly or directly infringing on religious practices, were enacted in pursuit of a permissible secular objective.[22]

In *Reynolds v. United States*,[23] the Supreme Court upheld the federal bigamy conviction of a Mormon who took a second wife in accordance with accepted doctrine of his church. The Court found that the First Amendment deprived Congress "of all legislative power over mere opinion, but left it free to reach actions which were in violation of social

---

14 State v. Garber, 197 Kan. 567, 419 P.2d 896, *cert. denied* 389 U.S. 51 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

15 *See* Wisconsin v. Yoder, 92 S. Ct. 1526 (1972) (Douglas, J. dissenting at 1547-48).

16 Prince v. Massachusetts, 321 U.S. 158 (1944) (child-labor).

17 *Id.* at 163.

18 *See In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

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

20 The Supreme Court has recognized that the Bill of Rights protection extends to children. *See In re* Gault, 387, U.S. 1, 13 (1967); *Also*, Justice Douglas' dissenting opinion in principal case Wisconsin v. Yoder, 92 S. Ct. 1526, 1547-48 (1972).

21 Forer, *Rights of Children: A Legal Vacuum*, 55 A.B.A.J. 1151 (1969).

22 Cantwell v. Connecticut, 310 U.S. 296 (1940).

23 98 U.S. 145 (1878).

duties or subversive of good order."[24] This belief-action dichotomy was not explained by the Court, but simply stated that while laws "cannot interfere with mere religious beliefs and opinions, they may with practices."[25] For many years, the so-called "secular-regulation" rule prevailed.

In *Cantwell v. Connecticut*,[26] the Court seemingly abandoned the belief-action distinction. Cantwell, a Jehovah's Witness was arrested for distributing anti-Catholic literature in an area of New Haven which was 90% Catholic. The Court reversed his conviction for violation of an antisolicitation statute when it found that the First Amendment guarantee of free exercise "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[27]

At this time, the Court embarked upon a search for some principle for saying just how far action was protected. "In every case, the power to regulate must be so exercised as to not, in attaining a permissible end, unduly infringe upon the protected freedom."[28] "No clear test emerged out of this case but having given up the belief-action distinction and with it the secular regulation rule, the Court had to find some means to weigh the interests involved."[29]

In *Prince v. Massachusetts*,[30] the defendant was convicted of violating a Massachusetts child labor law by permitting her nine-year-old niece to sell religious magazines on a street corner in the evening. The girl and her aunt were both, according to Jehovah's Witness' doctrine, ordained ministers; the girl "believed it was her religious duty."[31] The Court found it must balance "the rights of children to exercise their religion, and of parents to give them religious training"... against ..."the interest of society to protect the welfare of children."[32]

While the state cannot wholly prohibit the form of adult activity, this "... does not mean it cannot do so for children." The Court posited a higher interest, "Acting to guard the general interest in youths' well being, the state as *parens patriae* may restrict the parent's control....

---

[24] *Id.* at 164.
[25] *Id.* at 166.
[26] 310 U.S. 296 (1940).
[27] *Id.* at 303-04.
[28] *Id.* at 304.
[29] Galenter, *Religious Freedom in the U.S.: A Turning Point*, 1966, WISC. L. REV. 217 at pg. 237 [hereinafter cited as Galenter].
[30] 321 U.S. 158 (1944).
[31] *Id.* at 163.
[32] *Id.* at 165.

The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health."[33]

Prince was the last important free exercise case decided by the Supreme Court until 1961. In the Sunday closing law cases,[34] the secularly oriented state laws had only an "indirect" effect on the defendants' religious freedom and did not violate the First Amendment. But the Court adhered to the theme of *Cantwell* by noting, for example, that:

> [i]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden.[35]

In 1963, the Court expanded free exercise in *Sherbert v. Verner*,[36] which one writer states as the dawn of a new day for religious freedom claims.[37] In *Sherbert*, a Seventh-Day Adventist textile worker was discharged by her employer for unwillingness to work on Saturday (her Sabbath). Her claim for unemployment compensation was denied on the ground that she was not "available for work according to state law." Mr. Justice Brennan, writing for the Court, found that "if the purpose or effect of a law is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[38]

The Court also stated: "[t]he state cannot condition public benefits whatever their purpose, so that they operate to inhibit or deter the exercise of first amendment freedoms."[39] A burden on free exercise may be "justified by a 'compelling state interest in the regulation of a subject within the state's constitutional power to regulate.'. . ."[40] But such justification must be more than a "showing merely of a rational relationship to some colorable state interest. . . ."[41] " 'Only the gravest abuses, endangering paramount interests gives occasion for permissible interest.' "[42] The state must also show there are no "alternative forms

---

[33] *Id.* at 168.

[34] Braunfield v. Brown, 366 U.S. 599 (1961); Gallagher v. Croon Kosher Super Market, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 585 (1961).

[35] Braunfield v. Brown, 366 U.S. 599 at 605 (1961).

[36] 374 U.S. 398 (1963).

[37] Galenter, at 220.

[38] 374 U.S. at 404.

[39] *Id.* at 405.

[40] *Id.* at 403, quoting from NAACP v. Button, 371 U.S. 415, 438 (1963).

[41] 374 U.S. at 406.

[42] *Id.*, quoting from Thomas v. Collins, 323 U.S. 516, 530 (1945).

of regulation."[43] In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.[44]

In *Sherbert*, there is presumably no such justification for not having an exemption. *Sherbert* departed most markedly from prior cases by expanding the definition of protected activity and by increasing the burden on the state in justifying infringements on religious activity. Prior to the new approach to religious freedom, taken by the Supreme Court in *Sherbert*, state courts[45] had denied the constitutional claim.

Justice Burger, in *Wisconsin v. Yoder*,[46] readily admits the importance of a state to educate its citizens and "to impose reasonable regulations for the control and duration of basic education."[47] But, using *Pierce v. Society of Sisters*,[48] the Chief Justice notes that "however highly we rank it [education], it is not totally free from a balancing process when it impinges on other fundamental rights and interests such as those specifically protected by the Free Exercise Clause of the First Amendment."[49]

The opinion then applies the *Sherbert* test consisting of a two-step procedure: first, inquiry whether the challenged statute interferes with the constitutional freedom to act in accordance with one's sincere religious beliefs and second, if there is evidence of such interference, whether there is a "compelling" state interest which would warrant such infringement.

In weighing the quality of the claims of the individual interest, the opinion touched upon all the factors considered in *Sherbert*.[50] The factors involved are the sincerity of the individual's belief[51] which the opinion notes is obvious from the record, and the "centrality or importance of the activity for which the exemption is claimed to the beliefs and practices of the religion espoused by the claimant."[52] Here Justice Burger states

---

[43] Braunfield v. Brown, 321 U.S. at 165.

[44] 374 U.S. at 409.

[45] These state court decisions recognized the Amish life style as a belief but found the state's interest in educating children paramount to parental claims based on religion or conscience. Accord, Commonwealth v. Beiler 168 Pa. Super. 462, 79 A.2d 134 (1951); State v. Hershberger 103 Ohio App. 188, 144 N.E.2d 693 (1955); State v. Garber 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied* 389 U.S. 51 (1969).

[46] 92 S. Ct. 1526 (1972).

[47] *Id.* at 1532.

[48] 268 U.S. 510 at 534 (1925). This case suggests "that values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."

[49] 92 S. Ct. at 1532.

[50] *See* Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development, Part I: The Religious Liberties Guarantee*, 80 HARV. L. REV. 1381 (1967) [hereinafter cited as Gianella].

[51] *Id.* at 1417.

[52] *Id.* at 1419.

that the Amish faith and their mode of life must be "inseparable and interdependent," not just a "subjective evaluation or rejection of the contemporary values accepted by the majority." However, he notes "giving no weight to such secular considerations, we see that the record in the case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference but one of deep religious conviction."[53]

The Chief Justice drew some rather strict religious lines around this newly defined area of liberty when he stated "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."[54] The final factor to be weighed is "the extent to which the application of the regulation would burden the individual's ability to exercise his religion."[55]

The Chief Justice balances again in favor of the Amish when he states:

> [T]he impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe but inescapable . . . [and this regulation] . . . carries with it precisely the kind of objecting danger to the free exercise of religion which the First Amendment was designed to prevent.[56]

Having found that this regulation interfered with the Amish religious freedom guaranteed by the First Amendment, the state must show a "compelling interest." The majority held that this more demanding test had not been met. In reaching this conclusion, the Court rejected the State's broad contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. "The court must examine the interests which the state seeks to promote by its requirement for compulsory education to age sixteen and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."[57]

It is an important constitutional doctrine that a law generally constitutional "on its face," may be unconstitutional "as applied" in specific instances. The Amish case marks the first occasion that the Court has clearly articulated that exception in favor of a minority religious group. It would appear that compulsory education laws are—"on their face"—within a state's constitutional powers, but under the facts of this case, the First Amendment requires that the Amish be exempt. The opinion stated:

---

53 92 S. Ct. at 1533.
54 *Id.* at 1533.
55 Gianella at 1421.
56 92 S. Ct. at 1534.
57 *Id.* at 1536.

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[58]

The Court admitted the existence of a valid state interest yet recognized this exception for the Amish. The Court felt that education beyond the eighth grade would work involuntary assimilation of Amish children into the mainstream of American life at the expense of the continued existence of the Old Order Amish.

Perhaps most significant is that the entire controversy boiled down to one or two years of additional schooling since the Wisconsin statute does not require schooling past age sixteen—Justices White, Brennan and Stewart based their concurring votes on this factor. The Court realized that the interest of the State in securing one or two more years of education for a small minority of its youth was not of such importance as to justify the possible disestablishment of a unique American subculture. The opinion states:

> . . . [T]here is strong evidence that Amish are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. . . .[59]

The Court also rejected the State's argument from *Prince v. Massachusetts*,[60] indicating that due regard should be given to the power of the State in its capacity as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of the parents. This case, as noted by the Court, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred.[61] The Court felt that:

> . . . the state's argument appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory education law might allow some parents to act contrary to the best interest of their children by foreclosing their opportunity to make intelligent choices between the Amish way of life and that of the outside world.[62]

---

[58] *Id.* at 1536-37.

[59] *Id.* at 1537-38.

[60] 321 U.S. 158 (1944).

[61] *Compare* Jacobsen v. Massachusetts, 197 U.S. 11 (1905); Wright v. DeWitt School District, 238 Ark. 906, 385 S.W.2d 644 (1965).

[62] 92 S. Ct. at 1540-41.

The Court rejected this notion when it stated:

> Indeed, it seems clear that if the State is empowered as *parens patriae* to "save" a child from himself or his Amish parents by requiring an additional two years of formal high school education, the State will in large measure influence the religious future of the child....We cannot accept a *parens patriae* claim of such all-encompassing scope....[63]

Finally, the Amish opinion has some phrases that cannot help but benefit the whole spectrum of religious minorities. The Chief Justice admonished, "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[64]

And yet the opinion warns eccentrics, radicals or even individualists who have rejected social values:

> ... it cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process.... In light of this convincing showing, one which "probably few other religious groups or sects could make"... it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.[65]

Douglas' dissent found criticism mainly in the area of the rights of children. The majority essentially balanced the interests of the State against the defendant's right to raise his child in a manner consistent with his religious beliefs. Justice Douglas criticized the majority for failing to take account of the Amish child's right to a formal state-approved education and to a meaningful choice whether or not to remain in the Amish faith after adolescence. He believed the child's continuing formal education was clearly denied as a result of the decision:

> If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notion of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his view... if the child is mature enough to have that desire, the State may well be able to override the parents' religiously motivated objections. Religion is an individual experience.[66]

Justice Douglas noted that recent cases have clearly held that children themselves have constitutionally protectible interests.[67]

---

[63] *Id.* at 1541-42.

[64] *Id.* at 1528.

[65] *Id.* at 1543.

[66] *Id.* at 1546.

[67] *See* Haley v. Ohio, 332 U.S. 596 (1948); *In re* Gault, 387 U.S. 1 (1967); *In re* Winship 397 U.S. 350 (1970).

While the judicial recognition of children's rights is in an embryonic stage, the cases cited above provide some standard by which those rights can begin to be measured and refined. Justice Douglas was keenly aware that the standard in the *Yoder* decision raised questions concerning the extent to which it may deprive the Amish child of free exercise of religion, due process or equal protection of the law. He stated that "On this important and vital matter of education, I think the children should be entitled to be heard . . . before the State gives the exemption which we honor today."[68]

Though the majority opinion ignored the rights of Amish children, undoubtedly the Chief Justice's opinion will be regarded as a milestone in the development of the exercise of religion clause.

The Court rejected the antiquated notions that actions, even though religiously grounded, are outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Supreme Court departed from the teaching of *Reynolds*.[69] As Justice Douglas stated:

> Action which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed....[70]

The decision goes to a greater length than ever before in extending the constitutional exemption to factions of American religious impulses. Prior decisions of lower state courts[71] had held contrary to Amish beliefs in school cases on the basis of the now-questionable distinction between "belief" and "actions." Now that the "belief-action" dichotomy has been swept away, many other religious practices may receive constitutional protection. Do Black Muslim prisoners have the right to pork-free diets? Do Seventh-Day Adventists have to suffer loss of employment under union-shop contracts when, in accordance with their church's teachings, they refuse to pay union dues? Is it permissible for members of the Native American Church (Indians) or members of the Neo-American Church (non-Indians) to use drugs as a part of a religious ceremony?[72]

Before the Amish decision, constitutional lawyers would have been hesitant to predict how the Supreme Court might act but this decision seems to have opened the doors to "sincere" religious sects.

MICHAEL BUCHICCHIO

---

[68] 92 S. Ct. at 1548.

[69] Reynolds v. United States, 98 U.S. 145 (1878).

[70] 92 S. Ct. at 1549.

[71] *Supra* note 41, 42-44. Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

[72] *See* N.Y. Times, May 22, 1972 at 2, Col. 1.