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Wisconsin v. Yoder: The Right to Be Different - First Amendment Exemption for Amish under the Free Exercise Clause

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WISCONSIN V. YODER: THE RIGHT TO BE DIFFERENT—FIRST AMENDMENT EXEMPTION FOR AMISH UNDER THE FREE EXERCISE CLAUSE

Jonas Yoder, Adin Yutzy and Wallace Miller were parents of school children and members of the Amish religion, the former two belonging to the Old Order Amish sect.[1] A Wisconsin trial court labeled them criminals for their violation of a Wisconsin compulsory school attendance law:[2] the offense was not sending their children to school beyond the eighth grade and until age 16. Their refusal to comply was in consonance with firm Amish beliefs that such action would cause the eternal damnation of their offspring.[3]

Although holding that the compulsory school law did interfere with

1. "The Amish as an independent sect were founded in 1693, near Erlenbach, Bern, Switzerland. Jacob Ammann, a Swiss Anabaptist and a follower of Menno Simons and the Mennonites, broke with his church in disagreement over what he felt were unwarranted departures from traditional practices. The Amish, the followers of Ammann, thus dedicated themselves to maintaining the old practices and resisting any capitulation to the sin of worldliness." Note, *The Right Not To Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 933 (1967). The usage of "Old Order Amish" is a later American development that came into common usage as the forces of assimilation and change began to penetrate the small Amish communities. Those groups of Amish who kept their older customs were simply designated by the more progressive as "The Old Order." They are the most conservative and traditional of the several branches of the sect, numbering about fifty thousand children and adults in the United States. HOSTETLER, AMISH SOCIETY 37 (1968).

2. WISC. STAT. ANN. § 40.77 (1966) provides in pertinent part: "(1) (a) unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 shall cause such child to attend school regularly. . . . (5) Whoever violates this section . . . may be fined not less than $5.00 nor more than $50.00 or imprisoned not more than 3 months or both."

3. The most basic tenet of the Amish religion is separation from the world which is commanded by the scripture, *Romans* (12:2): "Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good, and acceptable, and perfect, will of God;" and II *Corinthians* (6:14): "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness?" According to Robert C. Casad in *Compulsory Education and Individual Rights*, 5 RELIGION AND THE PUBLIC ORDER 55 (1967), to the Amish, these beliefs "are not mere social philosophy: they are fundamental to the whole question of their existence on earth." *See also*, Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832.

the freedom of defendants to act in accordance with their sincere religious beliefs, the trial court concluded that the statute represented a "reasonable and constitutional exercise of a governmental function of the state."[4] However, on appeal the Supreme Court of Wisconsin vindicated the defendant-Amish and held that the free exercise clause allows the practice or the exercise of religion which is binding in conscience. In a unanimous ruling, the United States Supreme Court affirmed that decision and held that Amish people are exempt from state laws requiring schooling beyond the eighth grade. Finding that compulsory formal education after the eighth grade would gravely endanger—if not destroy—the free exercise of defendants' religious beliefs, the Court announced that the state's interest in universal education is "by no means absolute to the exclusion or subordination of all other interests."[5] The legitimate free exercise claims of the Amish had finally become the law of the land. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The significance of *Yoder* is that despite a state interest to the contrary, the Court, cognizant of the delicate existence of a unique religious society, has determined that the free exercise clause allows such a subculture to sever its ties from the large technological society surrounding it, by granting it an exemption from those secular laws which may impede the realization of its religious pursuits. Despite the needs of contemporary industrial society, there is apparently room under the Constitution for those religions whose tenets dictate that they not depart from the past. The holding puts religion and conscience on a firmer constitutional pedestal and raises interesting implications for potential claims for exemption by future religious groups.

The purpose of this note is to provide an historical analysis of the free exercise clause with a particular focus on minority religious sects and the bases for which they have and have not been granted exemptions. Highlighting the principal religion cases, an attempt will be made to delineate the clause's ambit of coverage in commanding exemptions from secular laws, and to show that such exemptions are consistent with both the free exercise and establishment clauses in that they are the logical and necessary outgrowth of government neutrality.

The first major confrontation between religious exercise and secular law took place in *Reynolds v. United States*[6] where a Mormon was con-

4. Wisconsin v. Yoder, 49 Wis. 2d 430, 433 (1971), 182 N.W.2d 539, 540 (1971), *aff'd* 406 U.S. 205, 213 (1972).

5. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

6. 98 U.S. 145 (1878).

victed of bigamy. Despite the defense that polygamy was a principal tenet of defendant's religion, the Court determined that he had exceeded the bounds of permissible religious activity. In distinguishing between "religious beliefs" and "religious actions" the Court decided that while the government could not properly interfere with the former, it may preclude actions which pose a danger to society. According to the "belief-action" dichotomy, Reynolds was perfectly free, under the free exercise clause, to believe in all Mormon tenets, including polygamy, but could not articulate those beliefs into the forbidden zone of action if that action would seriously conflict with an important public interest. Thus while laws

> cannot interfere with mere religious belief and opinions, they may with practices. [Otherwise government indulgence] . . . would . . . make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself.[7]

Therefore, despite the direct burden the law placed upon the free exercise of Reynold's religion, his conduct was so repugnant to contemporary moral standards that it justified the abolition of the religious practice.[8]

An early victory for free exercise took place in *Pierce v. Society of Sis-*

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7. *Id.* at 166-67. The gist of the "belief-action" dichotomy is that religion serves as no defense to a law which regulates what has been defined as "public actions." The analysis contemplates three basic realms of behavior: 1) pure belief, which everyone would grant is private; 2) the realm of religious action which may have public manifestations; 3) the realm of action which is clearly public. That the law cannot trifle with the first realm is obvious. The problem, then, is to either distinguish the latter two, or to provide principles to justify legal regulation of the second. Religious action is action, the function of which is only to establish and perpetuate a private meaning for the individual. Religious actions create results whose effects are private, felt only by those who believe. These actions touch only the world of ideas and as purely symbolic actions are distinguished from actions with tangible, worldly consequences. Public action, on the other hand, is that which affects others in ways not limited to their beliefs. By virtue of the existence of public demands regarding tangible conduct beyond the world of beliefs, we have activity in the public world. Weiss, *Privilege, Posture, and Protection—"Religion" In the Law*, 73 YALE L.J. 593, 608-09 (1964).

8. *See* Galanter, *Religious Freedoms In The United States: A Turning Point?* 1966 WIS. L. REV. 217, 234: "[F]reedom of religion has been held not to protect those who deemed palm reading to be a religious practice against laws forbidding commercial fortunetelling. [McMasters v. State, 21 Okla. Crim. 318, 207 Pac. 566 (1922).] It has not availed against statutes prohibiting the handling of snakes in religious services. [Hill v. State, 38 Ala. App. 404, 88 So. 2d 880 (1956).] Nor can faith healers use religious liberty as a defense in prosecutions for the unlicensed practice of medicine. [People v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951), *cert. denied*, 343 U.S. 927 (1952).] Nor has it protected religious performances against statutes regulating noise. [State v. White, 64 N.H. 48, 5 Atl. 828 (1886)] and obscenity, [Knowles v. U.S., 170 F. 409 (8th Cir. 1909),] or religious pretensions against prosecutions for fraud. [Crane v. U.S., 259 F. 480 (9th Cir. 1919).]

ters[9] where an act requiring parents to send their children to public schools was successfully challenged. The Court sustained the Society's objection to the law notwithstanding the acknowledged legitimacy of compulsory education laws. It said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[10]

Considering the multiple contributions of the parents, teachers, public and parochial schools in the preparation of the child, the Court paid homage to additional interests and did not base its decision exclusively upon religious considerations.[11] But notwithstanding collateral economic considerations, in finding that the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control,"[12] the Court acknowledged the right of parents to send their children to religious schools. It was this right which *Yoder* was to characterize as "an enduring American tradition."[13]

Although *Pierce* acknowledged certain parental and religious rights, neither are absolute—they have been held to be subordinate to state regulations designed to protect children. In *Prince v. Massachusetts*[14] the Court sustained the conviction of the guardian of a nine-year old girl, both members of the sect of the Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell religious tracts on the streets of Boston. Relying on the doctrine of *parens patriae*, the Court held that the statute withstood both the free exercise and the equal protection attacks. In articulating the nature and scope of this doctrine the Court said:

> . . . the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[15]

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9. 268 U.S. 510 (1925).

10. *Id.* at 535.

11. The decision, having been rendered before the religious freedom clause of the first amendment was considered applicable to the states, was actually based on the property right of the school under the fourteenth amendment due process clause.

12. 268 U.S. 510, 534-35 (1925).

13. 406 U.S. 205, 232 (1972).

14. 321 U.S. 158 (1944).

15. *Id.* at 166. This sensitivity for the rights of the children was adopted by Justice Douglas who dissented in part in *Yoder*. Realizing that the controversy

Clearly, the state is empowered to oversee the welfare of children, and when necessary it may extricate them from the "harmful" upbringing of their parents even when pursuant to religious goals. The State of Wisconsin argued in *Yoder*, that *Prince* requires that the *parens patriae* doctrine be controlling in compulsory attendance cases, irrespective of free exercise claims asserted by parents.[16] However, the Court distinguished *Prince* on the grounds that it was particularly applicable to public safety where there is a more compelling need for judicial intervention.[17]

The first case to apply the free exercise clause to the states through the fourteenth amendment on a strictly religious issue was *Cantwell v. Connecticut*.[18] Here a Jehovah's Witness was convicted of breaching the peace with a phonograph record, which he had played on the street to publicize his disdain for organized religions. Since the Court found that Cantwell's intention was to solicit money for "true" religion, it acknowledged his right to freely exercise his religion and reversed his conviction. The rationale of *Cantwell* provided a firm basis for the extension of free exercise protection in prohibiting statutes which tended to curtail religious activities.[19]

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encompasses a triangular relationship in which the interests of the children are an integral part, he expressed a fear of parental invasion of the children's freedom of thought in which the religious dogma of the parents would be imposed on them. However, he would be apparently satisfied if the children were individually canvassed as to whether they had religious scruples against attending public school.

16. Petitioner alleges that the Wisconsin Supreme Court erroneously viewed the case "as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates. The principal of *parens patriae* as applied to minors in *Prince v. Massachusetts*, was reaffirmed in *Ginsberg v. New York*, 390 U.S. 629 (1968). . . ." Brief for Petitioner at 24. Wisconsin v. Yoder, 406 U.S. 205 (1972).

17. In fact, the scope of *Prince* was tempered by Sherbert v. Verner, 374 U.S. 398 (1963). And the *parens patriae* doctrine was further undermined in *In re* Gault, 387 U.S. 1 (1967), where the Court commented: ". . . its meaning is murky and its historic credentials are of dubious relevance." *Id.* at 16.

18. 310 U.S. 296 (1940). The case followed Schneider v. State, 308 U.S. 147 (1939), which invalidated an ordinance designed to prohibit the distribution of literature on the streets. The right to freely disseminate ideas was too revered to be impinged because of a need to keep streets clean or because of a remote possibility that fraudulent appeals might be made in the name of charity and religion. However, the Court did establish that the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. This "belief-action" distinction was to be much relied upon in subsequent decisions. *See* Reynolds v. United States, 98 U.S. 145 (1878).

19. Among the ordinances which were to succumb to first amendment imperatives was an ordinance of Struthers, Ohio, which forbade knocking on the door or ringing the doorbell of a residence in order to deliver a handbill. The goals of preventing crime and assuring privacy in an industrial community where many worked on night shifts, and had to obtain their sleep during the day, were held

Government attempts to compel affirmation of repugnant beliefs have met with even more judicial opposition via the free exercise clause. In *Board of Education v. Barnette*,[20] for example, a state statute required public school children to salute the flag and pledge their allegiance to it; children refusing to manifest these affirmations were penalized by expulsion and their parents were subject to punishment. The question presented to the Court was whether a ceremony touching matters of opinion and political attitude may be imposed by official authority. In finding that the application of the statute constituted violations of the first and fourteenth amendments, the Court declared that the state would have to find some alternative method of promoting national unity that did not involve compulsory affirmations of beliefs. In speaking for the majority Justice Jackson commented:

> 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.[21]

Upholding the defendants' right to refuse to salute, the Court reasoned that the public standard invaded the character of their religion;[22] that their refusal would not have any negative effects upon others;[23] and more specifically, the statute violated the establishment clause.

In the summer of 1961 the Supreme Court considered cases involving the validity of Sunday Closing Laws.[24] The onus of these laws was most

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insufficient to justify the ordinance in the case of handbills distributed on behalf of Jehovah's Witnesses. Martin v. Struthers, 319 U.S. 141 (1943). Non-discriminatory taxes on solicitation were deemed improper when imposed upon itinerants in Murdock v. Pennsylvania, 319 U.S. 105 (1943) and upon sellers of religious books in Follett v. McCormick, 321 U.S. 573 (1944).

20. 319 U.S. 624 (1943).

21. *Id.* at 642.

22. Defendants were Jehovah's Witnesses and adhered to the belief that saluting is sacrilegious idolatry—the flag being a forbidden "image." In his dissenting opinion, Justice Frankfurter lamented: "[t]he validity of secular laws cannot be meaured by their conformity to religious doctrines." *Id.* at 654. The majority opinion countered with a free speech balancing analysis and contended that what the action called for lacked the character of public action in that it called for private dedication rather than public participation. *See* Weiss, *Privilege, Posture, and Protection—"Religion" In The Law*, 73 YALE L.J. 593, 609 (1964).

23. The potential effect of the exemption upon others is a key factor in the balancing process used by courts. An exemption from a law requiring immunization against a disease could adversely affect those coming in contact with the non-immunized individual. In *Yoder* the Amish's history of 300 years of self-sufficiency negates any argument that their failure to attend public school for an additional two years will make them wards of the state.

24. McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366

heavily borne by Sabbatarians and Orthodox Jews who were already abstaining from work on Saturdays in observance of their religious beliefs. Barred from transacting business on an additional day they found themselves in a position of competitive disadvantage.

The major case in this area, representing a retreat from *Barnette*, was *Braunfeld v. Brown*,[25] in which appellants asserted a denial of free exercise, effected through what was tantamount to a tax on religious practice. The Court's answer was that the statute did not make unlawful any religious practice, but simply regulated a secular activity, which when applied to appellants, made the practice of their religious beliefs more expensive.[26] Such an impact, moveover, did not inconvenience all members of the Orthodox Jewish faith "but only those who believe it necessary to work on Sunday."[27]

Addressing itself to the severity of the impact of the laws, the Court concluded that although they adversely affect free exercise, the effect is merely indirect:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.[28]

Therefore, where a state enacts a general law designed to advance its sec-

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U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961).

25. 366 U.S. 599 (1961).

26. *Id.* at 605. This is precisely what Justice Brennan thought was unconstitutional about the law. In his dissent he focused on this as the key issue, i.e., whether a state may put an individual to a choice between his business and his religion. Finding that such a law prohibits the free exercise of religion, he stated: "This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature." *Id.* at 613. Furthermore, he found no compelling state interest but instead relied on the mere convenience of having everyone rest on the same day.

27. *Id.* at 606.

28. *Id.* at 607. In sustaining the Sunday Laws the Court nevertheless provided a limitation on burdens on religious exercise. "By requiring attention to 'effects' as well as purposes of the law, this standard implies that the Court will evaluate the impact of the regulation upon the religious practice—something that it did not have to do under a straight secular regulation rule where it was sufficient for the Court to determine that the purpose or objective of the law was properly secular." Galanter, *Religious Freedoms In The United States: A Turning Point?* 1966 WIS. L. REV. 217, 239 n.142. "The 'no alternate means' requirement means that in every such case it is not sufficient merely to determine the secular character of the regulation, but that it is also necessary to ascertain the feasibility of alternate means of regulation." *Id.* at 239. However, the Court rejected a one-day-in-seven statute as inadequate to serve the state's ends. It also felt that granting exemptions would cause an administrative burden and undermine the purpose of the statute.

ular goals, it is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. The alternatives, in *Braunfeld*, were held insufficient to achieve the state's purpose of bringing about a general day of rest.

In summarizing the analysis of Sunday Closing Laws, one commentator highlights the three emerging propositions: (1) that Sunday Laws are valid if they can be interpreted as directed to a nonreligious end, i.e. a uniform day of rest and recreation; (2) that merchants who close their businesses on Saturday need not be exempt from the Sunday closing requirements; (3) that if an exemption is granted, this does not make the legislation invalid as an establishment of religion.[29]

Just over two years after it decided the Sunday Closing Law cases the Supreme Court spent what was perhaps its most eventful day regarding religion cases. In *Abington School District v. Schempp*[30] the Court found required Bible reading and the recital of the Lord's Prayer in public school violative of the establishment clause. On the same day it proceeded to broaden the scope of protected activities under the free exercise clause in *Sherbert v. Verner*.[31]

In the latter case, the Court reversed the Supreme Court of South Carolina's decision to deny unemployment compensation benefits to a Seventh Day Adventist who refused to work on Saturdays. Finding that the denial of such benefits by the state infringed upon the free exercise of appellant's religion, the Court departed from prior decisions, which had limited state action which constituted direct burdens on religion, and expanded the scope of free exercise activities to include indirect burdens. The Court also increased the burden on the state in justifying infringements on religious liberties.[32] *Sherbert* is perhaps the most significant case to articulate free exercise principles in that it lays out an analytical framework from which the constitutionality of laws alleged to burden religion can be tested. Quoting from *NAACP v. Button*,[33] the Court imme-

29. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 14 (1964).

30. 374 U.S. 203 (1963).

31. 374 U.S. 398 (1963). *See* Galanter, *Religious Freedoms In The United States: A Turning Point?* 1966 WIS. L. REV. 217, 241, where the author characterizes *Sherbert* as "the dawn of a new day for religious freedom claims."

32. The Supreme Court had "for the first time struck down a measure as an onerous though indirect burden." 374 U.S. 398 (1963). Note that the increased burden of justification upon the state is akin to the "no alternate means" requirement articulated in *Braunfeld*. *See supra* note 28. *See also* Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832.

33. 371 U.S. 415 (1963).

diately set out the constitutional test which must be satisfied by state laws affecting religious freedom: the law must be able to withstand constitutional challenge because it

> . . . represents no infringement by the State of . . . constitutional rights of free exercise; or because any incidental burden on the free exercise of appellant's religion may be justified by a "*compelling state interest* in the regulation of a subject within the State's constitutional power to regulate . . . ."[34] (emphasis added)

As to the variables entering the "compelling state interest" test the Court said:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly constitutional area, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[35]

In addition to the "paramount interest" standard, a consideration of whether or not a less offensive form of regulation could be adopted is equally vital. Here the state's contention that the decision would lead to unscrupulous claimants feigning religious objections to Saturday work was rejected for lack of documentation. Assuming *arguendo* the state's ability to show the drastic threat of a deluge of spurious claims, it would nevertheless be obligated to show the unavailability of alternate forms of regulation.

The utility of the *Sherbert* doctrine is evidenced by the subsequent decisions which used its impetus to carve out exemptions from state laws. The following year the Court remanded, in light of *Sherbert*, *In re Jenison*,[36] where the interest of the state in having a source of jurors was claimed insufficient to deny an exemption for a juror who had a religious aversion to judging others. In perhaps the most significant state decision in this area, the Supreme Court of California held that a statute which made it illegal to possess peyote was an unconstitutional infringement on the religious freedom of Navajo Indians.[37] The salient feature of that case was the centrality of importance attributed to the Navajos' use of peyote as a sacramental symbol. So inherently essential was the

34. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

35. *Id.* at 406. Here the Court found that no compelling interest would justify the forcing of appellant to choose between free exercise of her religion and unemployment compensation. What apparently distinguishes *Sherbert* from the Sunday Closing Law cases is the Court's belief that the administrative burden resulting from exemptions from the law coupled with spurious claims for such exemptions would severely undermine the intent of the legislature and defeat its purpose, whereas in *Sherbert* the state could easily allow an exemption from its unemployment compensation policy without endangering the whole program. *See* Note, *State Law Imposing An Indirect Burden Upon The Free Exercise of Religion*, 11 U.C.L.A. L. REV. 423 (1964).

36. 375 U.S. 14 (1963).

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

smoking of peyote that the Navajos could simply not practice their religion in its absence. Acknowledging this as a *sine qua non* of defendant's faith, while also noting the state's failure to show that claims of immunity would preclude effective enforcement of the law, the court safeguarded this ritual under the free exercise clause.[38]

The free exercise clause commanded further exemptions from compulsory vaccination requirements for a parent who refused to subject his child to such vaccinations at school,[39] and for a woman on her deathbed who refused a blood transfusion necessary to save her life.[40] In the latter of these state decisions the court found no "clear and present danger" sufficient to enjoin the religious beliefs of the woman.

The *Sherbert* doctrine is of drastic importance to free exercise claimants such as the Amish, who relied upon it as principal authority in *Yoder*. Through the expert testimony at trial of Dr. John A. Hostetler,[41] the Court learned that the basic tenet of the Amish faith is individual salvation achieved through a church community separate from the world.[42] Since the Amish religion must of necessity pervade totally the lives of its followers, the question of how long a child should attend a formal school is a religious one within the context of Amish belief. The Court was aware that the possible reluctance of Amish children to return to their society after exposure to high school would inevitably result in the extinction of the religion.

Having found an infringement on free exercise, the Court looked to the second prong of the *Sherbert* analysis, i.e., whether an exemption for the Amish would undermine the purpose of the Compulsory Attendance Law. The state's interest in attaining an educated citizenry is a valid

38. This is parallel to the "centrality" of importance the Amish religion attributes to separateness. Without the right to withdraw their children from public school the Amish would suffer the plight of ultimate extinction.

39. State v. Miday, 263 N.C. 747, 140 S.E.2d 325 (1965).

40. *In re* Brook's Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The issue here was whether the state has the right to subject a person to what he believes will be eternal damnation.

41. Dr. Hostetler is co-author of CHILDREN IN AMISH SOCIETY (1971), and author of AMISH SOCIETY (1968).

42. *Supra* note 3. Since the *sine qua non* of spiritual salvation is separation from the worldliness of contemporary society, high school attendance constitutes a deterrent to salvation. Were Amish children to be subjected to the competition-oriented value system typical of public education it would be virtually impossible for them to return to the agrarian form of Amish life, which commands skills and wisdom quite different from "worldly" society. *See* Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968).

one, but one which was not controverted by the Amish, who revere education as a vital force in their own community. In the expert opinion of Professor Donald Erickson, not only do "the Amish definitely provide for their children what could be called an education" but "they do a better job in this than most of the rest of us do."[43] The Amish child is exposed to an emphasis on moral wisdom, on living life, and on achieving union with God, providing an education in the finest sense of the word in a "school without walls."

In recognizing the adequacy of Amish education for fulfilling its cultural and economic needs, the Court opened free exercise protection to include the articulation of religious principles in daily life. Regardless of the magnitude of the state's interest in universal education, where such fundamental rights as parental direction and religious freedom are infringed upon, this interest must be weighed in a balancing process. A state interest of sufficient magnitude would be necessary to override the free exercise claim. Finding the religion clause to be more revered and deeply embedded into our constitutional system than the countervailing state interest, the Court said succinctly:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[44]

The Supreme Court proclamations concerning the constitutionality of tax exemptions for religious institutions also provided some rationale for the decision in *Yoder*. The Court recently sustained such exemptions for religious organizations as consistent with the religion clauses of the first amendment. In *Waltz v. Tax Comm'n.*[45] the Court held that consistent with the doctrine of "benevolent neutrality" freedom from taxation was not an establishment of religion, but instead a necessary measure to help guarantee the free exercise of all forms of religious belief. An interesting principle which emerges from these exemption cases is the rationale that in certain sensitive areas there can be no exercise of religion without a government sponsored exemption from some threatening law. The unarticulated premise is that government acquiescence is sometimes government hostility. In *Yoder*, the premise is that exempting the Amish from the compulsory education law is not an unconstitutional establishment,

43. Donald Erickson is a professor at the University of Chicago. Brief for Respondents at 37. Wisconsin v. Yoder, 406 U.S. 205 (1972).

44. 406 U.S. at 215.

45. 397 U.S. 664 (1970).

but rather an exercise of government neutrality designed to ensure that the delicate existence of a tiny religion will not be erased.

Citing *Sherbert*, the *Yoder* Court said the following:

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . . By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a tight rope and one we have successfully traversed."[46]

This concept of "benevolent neutrality" is poignantly developed by author Wilbur Katz, who illustrates that the purpose of provisions for pastoral care in the armed services, prisons and state hospitals is not to promote religion but "to avoid limiting religious freedom."[47] He interprets the statement of author William Gorman, "no help unless no help would be harm,"[48] to mean that the concern of protecting religious freedom is not that protected by the Constitution from legislative restraint but the concern for a wider discretion in which legislatures may insure accommodation for religious belief as well as non-belief. Under this principle, the state is a secular state, but a secular state which does not give preference to secularism and is actively concerned for religious freedom.[49] Clearly, this is the gist of *Sherbert* and *Yoder*.

In conclusion, the *Yoder* Court has added a dimension to the first amendment by setting aside an objectively legitimate state law so that a religious people could follow the professed dictates of their consciences. However, the facts of the case were confined to general educational requirements, and whether *Yoder* is authority for greater exemp-

46. Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972), quoting from Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).

47. Katz, *supra* note 29, at 21-22.

48. GORMAN, A CASE OF DISTRIBUTIVE JUSTICE IN RELIGION AND THE SCHOOLS 34, 60 (1959).

49. *See* Comment, *Religious Accomodation Under Sherbert v. Verner: The Common Sense of the Matter*, 10 VILL. L. REV. 337, 341-47 (1965), where the author elaborates on the scope of the Court's position of "benevolent neutrality": affirmative action is limited to the "removal of barriers, governmentally implaced, which obstruct freedom of exercise. This is not granting the religion . . . a special status but merely returning him (the religious practitioner) to the status he rightfully possessed before his rights were abridged by government intervention." *Id.* at 347. As Justice Douglas succinctly put it in *Sherbert*: "This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." 374 U.S. at 412.

tions in other areas of law is yet to be determined. It should be noted that the Court was moved by the demonstrated sincerity of the Amish—taking judicial notice of three centuries of Amish history, it found persuasive the accomplished self-sufficiency of Amish society, of which its efficient educational system was an integral part. Whether such demonstration is the criterion for exemption is crucial; for the religious sects of the future would otherwise be handicapped in their embryonic development.[50] Nevertheless, the Court clearly recognized that the rights of conscience are firmly embedded in our constitutional framework.[51]

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50. Clothing itself in the cloak of "religion" did not earn an exemption for the Neo-American Church which allegedly could not worship without the use of psychedelic drugs. United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968). That the courts are not prone to excusing people from state laws merely because they assert a religious standing was also apparent in Leary v. United States, 383 F.2d 851 (5th Cir. 1967). *But see* Ball, *Law and Religion In America: The New Picture*, 16 CATHOLIC LAW. 3 (1970), where the author, who incidentally was the attorney for the Amish in *Yoder*, suggests that the term "religion" is one of great latitude and encompasses non-theistic religious groups. Relying upon Toracaso v. Watkins, 367 U.S. 488 (1961) in which the Court specifically included secular humanism, ethical culture, Buddhism and Taoism in its definition of religion, he anticipates litigation on behalf of "LSD religions, snake cults and other off-beat groups" who will seek protection under *Yoder*. *Id.* at 9-10.

51. Religion and conscience have traditionally occupied a revered position in the American value structure as the consequence of being transfixed in a cultural heritage rooted in the Old and New Testaments. Colonial attitudes paid homage to the rights of conscience, and it was this climate, superimposed over the memories of religious persecution in England, which shaped the thoughts of Madison and Jefferson who provided the principal impetus for the adoption of the first amendment. *See* Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958). For a contemporary analysis of the development of the concept of "religion" within the parameters of the first amendment see Welsh v. United States, 398 U.S. 333 (1970) and United States v. Seeger, 380 U.S. 163 (1965).