Washington Law Review

Volume 47 | Number 2

3-1-1972

Constitutional Law—Freedom of Religion—Compulsory School Attendance Law: State Interests Balanced Against Beliefs of Members of the Amish Faith—State v. Yoder, 49 Wis.2d 430, 182 N.W.2d 539, cert. granted, 402 U.S. 994 (1971)

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FREEDOM OF RELIGION — COMPULSORY SCHOOL ATTENDANCE LAW: STATE INTERESTS BALANCED AGAINST BELIEFS OF MEMBERS OF THE AMISH FAITH — *State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539, *cert. granted*, 402 U.S. 994 (1971).

Defendants, members of the Old Order Amish religion and of the Conservative Amish Mennonite Church, refused to enroll their children, eighth-grade public school graduates, in public high school and were subsequently convicted of violating the Wisconsin Compulsory School Attendance Law.[1] The trial court held the attendance law to be a reasonable exercise of a governmental function of the state even though the law interfered with the defendants' sincere religious beliefs. The convictions and assessments of fines were affirmed by the circuit court. On appeal, the Wisconsin Supreme Court reversed. *Held:* The Wisconsin Compulsory School Attendance Law, as applied to the Amish, infringes upon their religious liberty and, because it serves no compelling state interest, violates the free exercise clause of the first amendment to the Constitution of the United States. *State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539, *cert. granted*, 402 U.S. 994 (1971).[2]

The *Yoder* decision, if upheld by the United States Supreme Court, may be a turning point in the conflict between state interests and first amendment rights of religious freedom.[3] Earlier cases had denied the

1. WIS. STAT. ANN. § 40.77 (1966) provided in part:
(1)(a) [A]ny person having under his control a child between the ages of 7 and 16 years shall cause such child to attend some school regularly to the end of the school term, quarter, semester or other division of the school year in which he is 16 years of age, unless the child has a legal excuse, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session.
The Wisconsin statute was modified in 1970 but reads substantially the same as the act under which the petitioners in *Yoder* were convicted. WIS. STAT. ANN. § 118.15 (Supp. 1970).

2. For the precise wording of the issues to be examined see 40 U.S.L.W. 3028 (U.S. July 13, 1971).

3. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."
It is essential to note that the first amendment contains two limitations on Congressional action affecting religion: Congress may make no law respecting an establishment of religion, and Congress may make no law prohibiting the free exercise thereof. *See* note 26 and accompanying text, *infra*.

right of an individual to be exempt, for religious reasons, from statutory compulsory education. The reasoning in these decisions is illustrated by *Commonwealth v. Beiler*[4] and *State v. Garber*.[5]

In *Beiler* the Pennsylvania Supreme Court recognized that a conflict existed between the "competing demands"[6] of the state compulsory education law and religous liberty. The problem was to determine which demand was paramount.[7] The court concluded that parents have no constitutional right to deprive their children of education or to prevent the state from preparing children "for the independent and intelligent exercise of their privileges and obligations as citizens in a free democracy."[8] The "fundamental objectives"[9] of the state are paramount and do not actually conflict with religious liberty, since without democracy religious liberty cannot exist.[10]

State v. Garber,[11] the most recent discussion of the Amish and compulsory education before *Yoder*, held that the Kansas compulsory education law[12] was a valid exercise of the police power, despite its acknowledged interference with the practice of the Amish religion.

4. 168 Pa. Super. 462, 79 A.2d 134 (1951).
5. 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967).
6. 79 A.2d at 136.
7. The *Beiler* court initially spoke in terms of its responsibility to "find a solution which will reasonably accommodate both demands in a manner that will preserve the essentials of each." *Id.* at 136. This language anticipated the balancing approach followed in Sherbert v. Verner, 374 U.S. 398 (1963). However, in assessing the "demands" of religious liberty, the court was satisfied to adopt the familiar doctrine that religious liberty encompasses an absolute right to believe but only a limited right to act. The decision summarizes the belief-conduct dichotomy as applied in cases involving the Mormon, Seventh Day Adventist, Jewish, Mennonite and Jehovah Witness faiths. *Beiler*, 168 Pa. Super. at 468, 469, 79 A.2d at 137. The dichotomy originated in Reynolds v. United States, 98 U.S. 145 (1878) (statutory prohibition of polygamy does not infringe upon the free exercise of the Mormon religion in that it only affects religious conduct and not religious belief) Some commentators feel that the distinction between conduct and belief was abandoned in Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause protects distribution of religious literature). *See, e.g.*, Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423, 427 n.17 (1968) [hereinafter cited as Casad]. However, the *Beiler* decision shows that the distinction persisted, at least in the state courts, until *Sherbert*. The *Sherbert* Court rejected the idea that the dichotomy is a total solution to free exercise problems.
8. *Beiler*, 79 A.2d at 134. This conclusion was adopted from Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950).
9. *Beiler*, 79 A.2d at 134.
10. *Beiler* has since been modified by the Pennsylvania legislature. *See Yoder*, 182 N.W.2d at 546 n.10. The plan passed by the legislature provides for day schools operated by church groups for eighth-grade graduates. The school must provide a minimum number of hours of instruction, with additional instruction in agricultural and domestic projects. *See also* 53 VA. L. REV. 925, 951 (1967).
11. *See* note 5, *supra*.
12. KAN. STAT. ANN. § 72-4801 (1964). The Kansas legislature effectively overruled

The court adopted the distinction between a right to believe and a right to act,[13] and concluded that the law was valid because it did not infringe upon the right to worship or believe.[14] The *Garber* decision was couched in terms of "general principles"[15] and followed those cases which have held that the state as *parens patriae*[16] may restrict a parent's control by enforcing laws enacted in the public interest.[17]

The United States Supreme Court refused to grant certiorari to review the decision in *Garber*.[18] Thus, the Court did not take the opportunity to determine whether the Kansas court erred in failing to apply the "compelling interest" test set forth in *Sherbert v. Verner*.[19] In *Sherbert*, a Seventh-Day Adventist was denied unemployment compensation because she refused to accept work on Saturday, her Sabbath. The Court held the South Carolina statute unconstitutional as applied to the petitioner because there was no "compelling state interest"[20] to justify the statute's eligibility provisions which infringed upon her right to freely exercise her religion.[21]

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the *Garber* decision by subsequent amendment of the Compulsory School Attendance Law, KAN. STAT. ANN. § 72-1111 (Supp. 1970). The passage of this bill suggests that the state conceded the lack of a "compelling state interest." *See* note 21 and accompanying text, *infra*.

13. *See* note 7, *supra*.

14. *Garber*, 419 P.2d at 902. Commentators have generally criticized the reasoning in *Garber* and have advocated the solution adopted by the *Yoder* court. *See* Casad, *supra* note 7, at 427 n.17. *See generally* 24 VAND. L. REV. 808 (1971).

15. *Garber*, 410 P.2d at 901.

16. Since the *Beiler* and *Garber* decisions, the United States Supreme Court has indicated a general disapproval of the use of labels such as *parens patriae* to justify the state's supervision of the activities of minors, especially when there is a danger of interference with procedural constitutional rights. *See In re* Gault, 387 U.S. 1 (1967). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In holding that juveniles were not entitled to trial by jury, the *McKeiver* Court indicated that *parens patriae* may be the proper basis for denying a claim of constitutional rights if the court deems the circumstances appropriate to do so. Although the Court did not rely explicitly on the state's role as *parens patriae*, the majority rejected the argument which equates juvenile proceedings with criminal trials on the grounds that this contention ignores the "paternal attention that the juvenile court system contemplates." *Id.* at 550.

17. *See* Prince v. Commonwealth, 321 U.S. 158 (1943). In *Prince* the Supreme Court observed that neither religious liberty nor rights of parenthood are beyond limitation.

18. 389 U.S. 51 (1967). No opinion was filed, and it is not clear why the Supreme Court refused to hear the appeal. Three justices dissented from the dismissal: Chief Justice Warren and Justices Douglas and Fortas indicated that there was probable jurisdiction and the appeal should have been heard.

19. 374 U.S. 398 (1963). For a critical analysis of the *Garber* decision in light of *Sherbert* see Casad, *supra* note 7. *See also* note 22, *infra*.

20. *Sherbert* and *Yoder* both clearly uphold the right to *act* according to one's religious beliefs, destroying the distinction between conduct and belief. *See* note 7, *supra*.

21. When state action indirectly restrains the free exercise of religion, such action must be justified by a compelling state interest. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensi-

The *Yoder* court followed the approach of the Supreme Court in *Sherbert*. First, the court decided that the state compulsory education requirements imposed a burden on the free exercise of religion by the defendants. The judges acquainted themselves with the religious philosophy of the Old Order Amish and found that because of their rejection of the materialism of the larger society, and their belief that involvement with the "Satanic world" prevents salvation and destroys their highly valued individualism, compulsory education not only infringed upon their right to worship, but also was completely repulsive to the Amish lifestyle.[22]

Second, as in *Sherbert,* the *Yoder* court held that the state had not shown a compelling state interest which justified subordination of religious freedom. The court stated that it is not enough to show that a regulation has a direct relation to a public goal;[23] there are constitutional limitations on the doctrine of *parens patriae*.[24] The majority concluded that the objectives of compulsory education were not sufficient to justify the burden placed upon the free exercise of the Amish religion.

In so holding, the Wisconsin court rejected the argument that the exemption of religious sects from compulsory attendance violates the establishment clause of the first amendment.[25] The opinion does not

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tive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occassion for permissible limitation.' " Sherbert v. Verner, 374 U.S. at 406, *citing* Thomas v. Collins, 323 U.S. 516 (1945). Thus, a compelling state interest exists only when the social interest served by the state action which incidentally burdens the individual's free exercise clearly outweighs the combined value of the individual interests which are burdened and the social interest in the preservation of the constitutional rights claimed by the individual. *Cf.* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 912 (1963). Although the phrase "weighing of conflicting interests" does not appear in *Sherbert,* it is expressly used in *Yoder* to describe the court's reasoning process. 182 N.W.2d at 542.

The "compelling interest" test has been used in other first amendment areas. *See* NAACP v. Button, 371 U.S. 415, 444 (1963) (interest of members of labor union in receiving legal representation outweighed state's interest in protecting against conflict of interests); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (state showed no compelling interest justifying statutory burden on right to associate according to political beliefs).

22. The Old Order Amish Church is a conservative sect, numbering about 50,000 in membership. 24 VAND. L. REV. 808 n.2 (1971).

For information on the philosophy of the Amish people and their culture which has given rise to the constitutional issues involved in *Yoder* see: Casad, *supra* note 7; J. HOSTETLER, AMISH SOCIETY (1963); W. SCHREIBER, OUR AMISH NEIGHBORS (1962); E. SMITH, THE AMISH PEOPLE (1958); 53 VA. L. REV. 925 (1967). *See also* 35 WASH. L. REV. 151 (1960).

23. *Yoder,* 182 N.W.2d at 543.

24. *See* note 16 and accompanying text, *supra.*

25. For a recent discussion of religious freedom and the establishment clause see

deny that by excusing the Amish children from attending school the state will in effect assist the Amish religion to some degree. However, according to the *Yoder* court, this accommodation of the Amish religion is not an establishment of that religion, but rather only a recognition of the tension between the free exercise and establishment clauses of the first amendment.[26]

Bartholomew, *Religion and the Public Schools,* 20 VAND. L. REV. 1078 (1967); Comment, *Church-State—Religious Institutions and Values: A Legal Survey—1964-66,* 41 NOTRE DAME LAWYER 681 (1966).

For a thorough analysis of the historical development of the establishment clause see Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective,* 52 VA. L. REV. 1395 (1966). Sky relates the Bible-reading and the school prayer decisions to the debates during the constitutional convention and concludes:

> The full historical significance of that constitutional enigma [the establishment clause] eludes us, and the intent of the framers who drafted it cannot therefore be circumscribed with scientific precision. There is, however, a sufficient historical evidence to justify the conclusion that by their use of the phrase "establishment of religion" the framers meant more than "an established church" and that they expected the clause to reach all vestiges of governmentally supported religion, including officially prescribed forms of worship and religious exercises.

Id. at 1463.

Arguably, allowing the Amish to be exempt from the compulsory education statute would constitute an establishment of religion. Yet, if the exemption is denied, to require the Amish children to attend public high school would infringe their freedom of religion. The conflict between constitutional freedoms arises from the constitution itself. In Walz v. Tax Commissioner, 397 U.S. 664 (1969), which upheld the constitutionality of the tax exemption of church property, the Court stressed the desirable rule of flexible neutrality when dealing with conflicts between government and religion. The court concluded that the first amendment ". . . will not tolerate either governmentally established religion or governmental interference with religion." *Id.* at 669. The majority appeared to recognize the futility of multiple forms of expression of the same conflict, concluding that it is all a matter of relativity:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government intanglement with religion. *The test is inescapably one of degree.* Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of those legal processes.

Id. at 674 (emphasis added). The Court concluded that tax exemption creates only a minimal and remote involvement between church and state.

See also Dixon, *Religion, Schools and the Open Society: A Socio-Constitutional Issue,* 13 J. PUB. LAW 267 (1964). In his discussion of the *Sherbert* decision Dixon condensed the expressions for interaction between conflicting first amendment interests into the adversary form, "free exercise v. establishment." *Id.* at 301.

26. The tension between freedom of religion, the establishment clause and the police power of the state is complicated by provisions found in many state constitutions which provide for uniform educational opportunities. *See* WASH. CONST. art. IX §1, Preamble:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The significance of *Yoder* is that it resolves the conflict between the free exercise clause and compulsory education statutes by a true balancing, or weighing, of interests. Before *Sherbert,* a state could prevail in a free exercise case by demonstrating that state regulation served a rational objective.[27] In *Garber,* for example, the court found it unnecessary to consider the effect of compulsory education upon the Amish people because it had concluded that education was a rational state interest.[28] Prior to *Yoder* and *Garber,* however, the Court in *Sherbert* had held that the interests of *both* the state and the individual should be probed more deeply; that these interests were to be weighed or balanced accordingly, with due consideration given both to the effect of an exemption on historical constitutional doctrine and to the more practical effects on all parties concerned; and that an exception to a statutory regulation was to be granted or denied only after such factors were studied and weighed.[29] Others have satisfactorily examined the interests of the Amish which should be considered in the *Yoder* situation,[30] and the remainder of this note will focus on the validity of interests which may be claimed by the state to preclude an exemption for the Amish.

One argument assertable by the state is that the *Yoder* decision is arguably contrary to the decisions of the United States Supreme Court which require that equal educational opportunities be provided to all school-age children.[31] These decisions follow the principle emphasized in *Brown v. Topeka Board of Education;*[32] that is, that education is possibly the most important function of state and local governments:[33]

27. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1943) (child labor law).

28. According to *Garber,* failure to comply with any reasonable requirement imposed by the exercise of that power to benefit the general welfare would not be excused "in the name of religious freedom." 419 P.2d at 901.

29. *See* note 21, *supra.* A number of free exercise cases decided since *Sherbert* have adopted the compelling interest test. *See, e.g., In re* Jenisen, 267 Minn. 136, 125 N.W.2d 588 (1963) (state failed to establish that interest in obtaining competent jurors would be jeopardized by exempting those opposed to jury duty for religious reasons); People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 269 (1964) (state's interest not sufficiently compelling to prohibit the use of peyote, a non-addictive hallucinatory drug, where its use was essential to the defendants' religious ritual).

30. *See* Casad, *supra* note 7. *See also* Note, *The Right Not to be Modern Men: The Amish and Compulsory Education,* 53 VA. L. REV. 925 (1967); Galanter, *Religious Freedom in the United States: A Turning Point?,* 1966 WIS. L. REV. 217, 236.

31. *See, e.g.,* Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Griffin v. Prince Edward School Board, 377 U.S. 218 (1964).

32. 347 U.S. 483 (1954).

33. *Id.* at 493.

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Yet, by examining the factors considered by the Court in *Brown,* it can be shown that *State v. Yoder* does not conflict with the principles expressed above.[34]

First, the appellants in *Brown* and the appellants in *Yoder* sought different kinds of relief. The parents of the children in *Brown* asked for equal treatment, especially in education, basing their claims upon the equal protection clause of the fourteenth amendment. Yoder and the other Amish parents, however, had no objections to the equality of the state's educational opportunities. Instead, they demanded that those opportunities not be forced upon them contrary to the tenets of their religion and philosophy of life.[35]

Second, the argument that only compulsory school attendance can promote a "democratic society" and "basic public responsibilities" cannot be asserted with such confidence when the Old Order Amish are involved.[36] Their strong belief in passivity counters any argument advanced in support of compulsory education as a desirable institu-

34. The dissent in *Yoder* insisted that "[e]ducation has been a prime and compelling interest of this state since its very beginning." 182 N.W.2d at 549. The majority acknowledged the need for education to build public responsibility, good citizenship and cultural values but found "compelling merit" in the petitioners' contentions that their education "produces as good a product as two additional years' compulsory high school education does." In so finding, the majority observed that Amish ". . . cultural values are different, that their life requires no professional training and that two years of high school education does not help Amish children to adjust normally to their Amish environment." *Id.* at 543.

35. The Amish parents did not contend that the compulsory education statute or other regulatory provision was an unreasonable exercise of state power. They contended that, as applied to *them,* it violated the free exercise clause of the first amendment. *Id.* at 545.

36. *Id.* at 543.

tion for preparation for military service. Without derogating the ideals of good citizenship, democracy and public responsibility, the Amish reject many of the cultural values which public school systems impose upon children. Assuming the Amish child accepts his parents' way of life and religious ideals, he has little need for professional training.[37]

Finally, by allowing the Amish to be exempt from the compulsory education statutes, the educational objectives of these laws are not entirely lost. The Amish children are given the best education the community can afford, omitting only those academic subjects totally repulsive to the Amish ideology. The *Yoder* court seemingly assumed, or at least did not feel the state had rebutted the possibility, that the Amish are able to provide an acceptable alternative to public education.[38] Therefore, the state cannot rely on *Brown* or other expressions of the necessity of equality in education to deny religious exemptions from state compulsory education laws, especially when the exemption can be justified by the nature of the people concerned.

A second state interest which might be advanced to support the constitutionality of the Wisconsin compulsory education law as applied to the Amish is that exempting them may disrupt the entire regulatory scheme, may entail substantial expense, or may place an undue burden on the administration of the compulsory education program. However, the United States Supreme Court has recently been unreceptive when allegations of a compelling state interest were based on administrative convenience or fiscal savings. The Court agreed with the appellants in *Sherbert v. Verner* that granting an exemption from the unemployment compensation rule for Saturday worshippers did not completely prevent uniform application of the Commission's rules.[39] Similarly, allowing Amish children of high school age to be exempt from statutory requirements would not disrupt the overall uniformity of a state's educational scheme.

37. *See* note 22 and accompanying text, *supra*.

38. *Yoder*, 182 N.W.2d at 543.

39. The *Sherbert* Court found that no objection had been raised as to the possibility of abuse of the state's permissiveness by "unscrupulous claimants feigning religious objections" and felt that the state court should pass on that "state interest" if and when it is raised. Further, the Court held:

> [E]ven if the possibility of a spurious claim did threaten to dilute the [compensation] fund and disrupt the scheduling of work, it would plainly be incumbent upon [the Employment Security Commission] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

374 U.S. at 407.

First, the exemption provided in *Yoder* involves Amish children only[40] and only Amish children of secondary school age. Excusing a small number of children should not seriously disrupt an educational program.[41] Also, it is unlikely that the *Yoder* decision will cause the state to be flooded by a multitude of requests for exemption from the state's educational program. The position of the Amish is isolated and unique and cannot, in all probability, be claimed by other minority groups. Many groups that do not desire integration into society may be able to meet the state educational requirements by sending their children to private schools.[42]

Even if the *Yoder* decision should result in a deluge of requests for educational exemptions, this is not sufficient reason to overrule the state court's conclusion. The cost of determining who is entitled to an exemption is not a compelling interest that can justify deprivation of constitutional rights,[43] nor is the need for a simple procedure for eliminating insincere applicants.[44] Only if the state is unable to distinguish

40. *Yoder*, 182 N.W.2d at 540. Five justices concurred in the opinion only as applied to the Amish. Both the majority and the concurring opinions included the reservation to reexamine the question if the exception jeopardized the effectiveness of the compulsory education law. *Id.* at 547.

For cases in areas other than education dealing with requests for exemptions, see People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 269 (1967); Leary v. U.S., 383 F.2d 852 (5th Cir. 1967) (marijuana is not essential to practice of Hindu religion and state has compelling interest in protecting public safety, peace and order); and State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (compelling state interest test not applied). For an examination of the drug exemption cases, see Casad, *supra* note 7, at 430, 431.

41. According to one commentator, Amish are found in most states, with large communities in Indiana, Iowa, Ohio, Pennsylvania and Wisconsin. The Old Order Amish is the most conservative sect, numbering about 50,000. *See* 24 VAND. L. REV. at 808 n.2 (1971).

If the Amish were compelled to send their children to public school, it is conceivable that rural areas would experience a problem of shortage of facilities and instructors.

42. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state law requiring every person having custody of a school-age child to send the child to *public* school in the district where he resides held invalid as an unreasonable interference with the liberty of parents to direct the upbringing and education of their children). For a casenote which discusses what is an "approved" private school see 35 WASH. L. REV. 151 (1960).

43. The Supreme Court has often stressed that the saving of money does not justify infringement of constitutional rights. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (avoidance of expense does not justify invasion of welfare recipients' right to equal protection of the laws); Goldberg v. Kelley, 397 U.S. 254 (1970) (increase in fiscal and administrative burden does not justify termination of AFDC aid without prior notice or hearing); Boddie v. Connecticut, 401 U.S. 371 (1971) (inability to pay court fees and costs to bring divorce action does not justify depriving indigents of their right to due process of law).

44. In *Yoder* the sincerity of the defendants was unquestioned and therefore "stipulated to" in the record. Yet, even in situations where it will be more difficult for admin-

between insincere and sincere applicants by any feasible means should religious exemptions be denied for administrative reasons. It is doubtful that the state will have great difficulty in determining which groups or individuals, if any, are entitled to a religious exemption under *Yoder*.

The most appealing argument the state might make for enforcing the compulsory education statute is based on the welfare of the child. What chance for success will the Amish youth have if he is denied a public high school education and later decides to leave the community to compete in the larger society? Without that education, that child conceivably will not be able to cope with the demands of the outside world.[45] Further, if the exemption is upheld, the Amish youth will not be introduced to any elements of life outside the limited experiences of his Amish upbringing. *Yoder* would deny him the chance to "sample" the alternative environment.

To resolve this dilemma, the Supreme Court must first accept the proposition that the Amish will ultimately lose something; the Amish child will lose the fruits of a well-rounded education, or the Amish parents will lose the freedom to rear their children according to the tenets of their religion. The Amish child, practically speaking, will lose his freedom of choice in any event, for whether or not he will receive a public education and whether or not he will be able to retain his uncomplicated religious faith are decisions that will be made for him, before he reaches majority.

No formal study has been discovered which determines the exact number or percentage of children who leave the Amish community upon reaching majority. Yet, regardless of the number, it is possible that those Amish children who ultimately leave the community may make the transition out of the Amish community more easily than those who have been compelled to learn conventional social values are able to re-enter the narrowly focused Amish lifestyle.

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istrative bodies to determine whether an individual is a sincere believer, Supreme Court opinions indicate that the desire for simple administrative procedure does not justify invasion of constitutional rights. *See* Shapiro v. Thompson, 394 U.S. 618 (1968) (desire to decrease number of welfare applicants does not justify a simple procedure which interferes with the rights of qualified welfare applicants); Goldberg v. Kelley, 397 U.S. 254 (1970) (increase in administrative burden does not justify curtailing due process rights); Sherbert v. Verner, 374 U.S. 398 (1968) (exemption does not present administrative problem of such magnitude that entire statutory scheme rendered unworkable).

45. *See* Casad, *supra* note 7, at 433, 434 nn. 47 & 51. Casad concludes that the number of Amish "defecters" is indeterminable. *Cf. Yoder*, 182 N.W.2d at 549.

The Wisconsin court assumed that the Amish received an education adequate to meet the demands of adult life in the community. Relying on the Supreme Court's recent deflation of the doctrine of *parens patriae* as a justification for deprivation of constitutional rights,[46] the *Yoder* court concluded that the state cannot use this protective rationale to abridge the natural parents' right to rear and teach their children according to their religion. Otherwise, the state destroys the child's choice upon reaching majority to choose his religion for himself.[47]

The Yoder court did not deal with the question of those who leave. It is submitted, however, that the court correctly concluded that the doctrine of *parens patriae* is not applicable in this setting. The doctrine should be invoked to protect a child when the interests of the state can be achieved only by governmental regulation and not by alternative means. Unlike the areas of child labor and child health,[48]

46. *See* note 16, *supra.*

47. The compulsory education cases involve the rights of two classes: the parents and the children. The cases of concern herein have involved criminal prosecutions of parents for non-compliance by a member or members of a religious faith. *See* note 1 and accompanying text, *supra.* Since the children are not being sued as "truants," the court did not reach the question whether they have an independent right to freely exercise their religion. *Yoder,* 182 N.W.2d at 542.

Aside from that question, it should be noted that in many cases it is doubtful whether the children want to go to public school. *See* State *ex rel.* Shoreline School District v. Superior Court, 55 Wn.2d 177, 346 P.2d 999 (1959), *cert. denied* 363 U.S. 814 (1960) (parents withdrew child who was ridiculed at public school because of her nonconformity regarding eating, dancing and music; *held,* state's exercise of authority was proper). In *Shoreline,* Judge Hunter dissented on the ground that the compulsory school attendance law does not "contemplate that every child of compulsory school age must come within the operation of the statute." 55 Wn.2d at 188, 346 P.2d at 1005-06. Judge Hunter did not examine the merits of the religious tenets but grounded his dissent in terms of what was best for the welfare of the child.

There do not seem to be any cases which deal with the problem arising if the child desires to go to public school and his parents refuse to allow him to attend. If this conflict has been present in any of the Amish cases, the court has not found that it is a serious problem.

48. *See* Prince v. Commonwealth, 321 U.S. 158 (1943). *See also* Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964) (religious beliefs afford parents no legal right to prevent vaccination of children); *accord,* Mosier v. Barren County Board of Health, 308 Ky. 829, 215 S.W.2d 967 (1948).

In *Prince,* a guardian had given her minor ward religious literature to distribute in the streets. The court held that enforcement of the Massachusetts child labor law was not violative of freedom of religion nor a denial of equal protection of the laws. The opinion points out that the power of the state to control the conduct of children is broader than its power over adults. 321 U.S. at 170. *See* note 17 and accompanying text, *supra.*

The *Prince* case can easily be distinguished from the *Yoder* issues. *Prince* was decided when the belief-conduct distinction reigned, and reiterated the conclusion that the practice of a belief can be controlled through police powers of the state to protect the safety

where state interference with parental prerogatives may at times be necessary to protect the welfare of both the child and society, the state can achieve the aims of compulsory education without forcing the Amish to attend public schools or comparable private institutions.

For example, the standards of Amish education could be scrutinized and the capability of the teachers examined by the state board of education and raised to a level more consistent with the state's educational standards.[49] The curriculum could also be analyzed and expanded to include all facets of public education except those so repulsive to the Amish philosophy as to infringe upon their religious beliefs. In this way, the objectives of compulsory education could be safeguarded while, at the same time, the child who might leave the Amish community would be protected. Moreover, the Amish would not be restrained in the exercise of their religious beliefs. Society's real concern should be with those Amish children who may wish to retain their heritage and with their parents who want the opportunity to offer it to their descendants. The first amendment demands at least an attempt to protect that freedom.

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of its citizens. *See* 24 VAND. L. REV. 808, 810 (1971). The *Prince* court did not weigh the interests of the state against the interests of the parent and child. Sherbert v. Verner, 374 U.S. 398 (1968), announced a new test which requires balancing. *See* note 21, *supra*. Thus, *Yoder* was properly decided according to the *Sherbert* test rather than regressing to the unsatisfactory reasoning of *Prince*.

49. For a solution proposed by a state legislature see notes 10 and 12 *supra*. *See also* 35 WASH. L. REV. 151 (1960); Annot., 14 A.L.R.2d 1369 (1950).