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Constitutional Law - First Amendment Freedom of Religion v. Compulsory Education Statute

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concerning visible emissions is quite similar to the regulation involved in *Arizona Mines*.[29] It seems very likely that the North Dakota courts, considering the similarity of the statutory construction and the strong public policy issues involved would follow the reasoning in *Arizona Mines* in a similar fact situation.

As a result of the instant case, air pollution law in Arizona does not require proof of intent for conviction where a statute is silent on that issue. The effect of this is to greatly ease the burden of proof of violations for agencies charged with enforcing air pollution laws. By further easing the burden of proof, the law gives these agencies greater discretion in deciding whether or not to prosecute a particular case. *Arizona Mines* should have a marked effect on subsequent legislation, both in Arizona and other jurisdictions. The public policy reasons for the holding should prompt lawmakers to be quite specific in spelling out the requirement of intent if intent is to be required as an element of proof in pollution cases. The opinion in *Arizona Mines* does not state whether the incidents cited for pollution were the result of unavoidable accidents beyond control of defendant or the result of his normal scope of operations and thereby foreseeable. Perhaps some future case will distinguish these two situations.

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CONSTITUTIONAL LAW—FIRST AMENDMENT FREEDOM OF RELIGION V. COMPULSORY EDUCATION STATUTE—Appellants Jonas Yoder and Adin Yutzy, members of the Old Order Amish religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church, were convicted in county court of violating Wisconsin's Compulsory Attendance Law.[1] Their children, Freida Yoder, aged 15 years, Barbara Miller, 15, and Vernon Yutzy, 14, although graduates

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No person shall discharge into the ambient air from any single source of emission whatsoever any air contaminant
3.210 of a shade or density equal to or darker than that designated as No. 1 on the Ringelmann Chart, or equivalent standard approved by the Department; or
3.220 of such capacity as to obscure an observer's view to a degree equal to or greater than that described in 3.210.

29. Maricopa County, Ariz., Health Code ch. XII, § IV, Reg. 1 (1970).
REGULATION 1. VISIBLE EMISSIONS
No person shall cause, suffer, allow or permit the discharge into the atmosphere from any single source of emission whatsoever any air contaminants for a period or periods aggregating more than three minutes in any one hour which is:
a. As dark as or darker in shade than that designated as No. 2 on the Ringelmann Chart as published by the U.S. Bureau of Mines or
b. Of an opacity equal to or greater than an air contaminant designated as No. 2 on the Ringelmann Chart.

1. WIS. STAT. ANN. § 118.15 (1971).

of the eighth grade, were not enrolled in high school. A fine of $5 each was affirmed by the circuit court.

The Supreme Court of Wisconsin in hearing their appeal, posed the question of whether the compulsory education law of Wisconsin, as applied to the Amish, infringed upon their religious liberty, and if so, whether such interference was constitutionally justified. It appears the decision is the first major court victory for the Amish in their history of challenging compulsory education. The court in an unprecedented decision, held that there was no such compelling state interest as to justify the burden on appellants freedom of religion as applied to members of the Amish religion who had graduated from the eighth grade. *State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539 (1971).

Historically, the Amish as an independent sect were founded in 1693. Their life is dedicated to maintaining the traditional practices and resisting any capitulation to the sin of worldliness.[2] The Old Order Amish, numbering about fifty thousand in the United States, have remained the most traditional and conservative of the several branches of the sect.[3]

As expert testimony pointed out at the trial, the Amish religion requires as a part of the individual's way of salvation, a church community separate from the world. The Old Order Amish dictate that the Amish child from the inception of adolescence live according to the mode of life in the Amish community; and that he should not attend high school since this would constitute a deterrent to his salvation.[4] It is clear that to the Amish, the question of how long a child should attend a formal school is of a religious nature.[5]

As the case points out, courts are not to question the validity, the reasonablelness, or the merits of the Amish religious beliefs.[6] This reasoning follows the position of the United States Supreme Court in *Everson v. Board of Education:*[7] "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers."[8]

The policy of compulsory education in the United States is directly in conflict with Amish history. Massachusetts passed the first American School Law in 1642[9] and Wisconsin adopted its compulsory education law in 1879.[10] Statutes making the education of chil-

2. Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 933 (1967).
3. *Id.*
4. State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539, 541 (1971).
5. *Id.*
6. School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 216 (1963).
7. Everson v. Board of Education, 330 U.S. 1 (1947).
8. *Id.* at 18.
9. Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 930 (1967).
10. LAWS OF WIS. ch. 121 (1879).

dren compulsory have become very general in the United States.[11] Their constitutionality is beyond dispute, for the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted by municipal law.[12] A brief analysis of state statutes, including North Dakota's,[13] indicate compulsory education to age sixteen is representative.[14] Today's views on education as presented by *Brown v. Board of Education*[15] disclose that:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. . . . It is the very foundation of good citizenship. . . . 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.[16]

The Amish, though a passive people, are not strangers to the courts and complusory education. The Pennsylvania court, in *Commonwealth v. Beiler*,[17] affirming a sentence for a violation of compulsory attendance, stated:

> [P]arents have no constitutional right to deprive their children of the blessing of education or prevent the state from assuring children adequate preparation for the independent and intelligent exercise of their privileges and obligations as citizens in a free democracy.[18]

It should be noted that the *Beiler* decision has been modified by the Pennsylvania legislature.[19]

In *State v. Hersberger*,[20] the Ohio court convicted the Amish for failure to have their children in school. The question before the court in *Hersberger* dealt with a comparison of instruction in public versus Amish private schools. The court decided such private instruction was not equal, but failed entirely to deal with the basic question of religious freedoms.

The Kansas court in *State v. Garber*,[21] again enforced the law against the Amish, relying on the police power. The decision mech-

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11. 47 AM. JUR. *Schools*, § 156, at 412 (1943).
12. *Id.*
13. N.D. CENT. CODE § 15-34-01 (1970).
14. *See* MICH. COMP. LAWS ANN. § 340.731 (a) (1967); IOWA CODE ANN. § 299.1 (1971).
15. Brown v. Board of Education, 347 U.S. 483 (1954).
16. *Id.* at 493.
17. Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).
18. *Id.* at 137.
19. Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 951 (1967).
20. State v. Hersberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955).
21. State v. Garber, 197 Kan. 567, 419 P.2d 896, *cert. denied*, 389 U.S. 51 (1966).

anically separates religious conduct from religious belief. The Wisconsin court was not persuaded by the narrowness of the latter case.[22] It is interesting to note that Garber later sold his farm and moved to Ohio. Another child was coming of high school age, and he could not face a repetition of the ordeal.[23] *Garber* should also be viewed in light of the 1968 education exemption provided by the Kansas legislature.[24]

The above decisions do not stand alone in the field of constitutional law. They must be considered, as well as the Wisconsin decision, in the frame of the continuing trends in First Amendment Freedoms.

The first amendment provides: "Congress shall make no law respecting an establishment of religion, or the free exercise thereof . . . ."[25] The fourteenth amendment applying such to the states by the provision: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[26]

The determination of whether a law infringing upon religious freedom is justified demands a weighing of the burden on the free exercise of one's religion against the importance of the state's interest asserted in justification of the infringement.[27] This is the test to be applied and the standard which the Wisconsin court used in deciding in favor of the Amish. To justify infringement, there must be a compelling state interest. Thus in *Sherbert v. Verner*,[28] the court concluded there was not a compelling state interest which could justify preclusion of a member of the Seventh-Day Adventist Church from collecting unemployment compensation because her religion would not permit Saturday labor.[29]

The *In re Jenison*[30] court stated: "[U]ntil and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt."[31] In *People v. Woody*,[32] the California Supreme Court made an exception from the use of a narcotic, peyote, which was required by the Native American Church in its ritualistic religious practices: "[T]he state may abridge re-

22. State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539, 547 (1971).
23. Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. LAW REV. 423 n.5 (1968).
24. KAN. STAT. ANN. § 72-1111 (Supp. 1969).
25. U.S. CONST. amend I.
26. U.S. CONST. amend. XIV, § 1.
27. Sherbert v. Verner, 374 U.S. 398 (1963).
28. *Id.*
29. *Id.* at 410.
30. *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1964).
31. *Id.* at 589.
32. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

ligious practices only upon demonstration that some compelling state interest outweighs defendants' interest in religious freedom."[33]

The Courts have concluded there is a compelling state interest when the child's health is endangered.[34] *Prince v. Commonwealth of Massachusetts*,[35] upheld the conviction of a Jehovah's Witness for allowing a minor to sell religious literature in public in violation of a child labor law. "The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health."[36] Likewise, vaccinations have been required[37] as well as blood transfusions.[38]

Thus the obvious question is presented: Is there a compelling state interest in compulsory education of the Amish to age 16 years? It appears the Wisconsin Supreme Court should be applauded for a decision in the negative. What is gained by forcing a student to live between two worlds? *Brown v. Board of Education*,[39] speaks of a world which is foreign to the Amish. The law only forces a father to choose between criminal sanction and loss of salvation. Is there a state interest which forces a man to sell his farm and move elsewhere? The answers to these questions can only result in a decision upholding the Wisconsin Supreme Court.

It must be concluded from the decision above that the states will have to recognize the freedom of the Amish to follow their religious beliefs, even to the point of sacrificing the compulsory education statutes. The standard of "compelling state interest" will safeguard this decision from abuses injurious to health and safety.

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CONSTITUTIONAL LAW—DEPRIVATION OF PERSONAL RIGHTS—PRIVATE PROPERTY RIGHTS YIELD TO FIRST AMENDMENT—Defendants are large, privately owned shopping centers built entirely on privately owned land, but open to the public seven days a week. Plaintiff is a citizens' environmental council which seeks an injunction against the defendant centers. Defendants had requested that the plaintiff refrain from soliciting signatures for an initiative outside of the business premises on shopping center property. The Court of Appeals of Washington, reversing the lower court's decision,

33. *Id.* at 815.
34. Prince v. Commonwealth of Mass., 321 U.S. 158 (1944).
35. *Id.*
36. *Id.* at 166-67.
37. Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).
38. Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, (D.C. Cir.) *cert. denied*, 377 U.S. 978 (1964).
39. Brown v. Board of Education, 347 U.S. 483 (1954).