Comments

THE EDUCATION OF THE AMISH CHILD

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The Old Order Amish is the most conservative of the Mennonite religious sects in America. Members of the Old Order live in self-contained agrarian communities insulated from the larger society. Common sentiments, tradition, and nonconformity with mass society serve to integrate the Amish community and promote a sense of unity. The values of the community are religious values, and daily life is regulated in detail by the church rules or "Ordnung." Amish fields are plowed by horses, not tractors; the mode of dress is traditional and uniform; restrictions are imposed on the use of such modern contrivances as electricity and telephones.

The Amish view the public school as a threat to the continued existence of their community, for the school indoctrinates Amish children in values and attitudes alien to the Amish faith. Most particularly, the Amish object to a public education beyond the eighth grade. The child at 12 or 13 years of age begins a new period of self-awareness, and it is crucial to Amish parents that their children not be taught to identify with non-Amish values. The Amish feel that a child who achieves a level of scholarship beyond the fundamentals of the primary grades is likely to leave the community and be lost to the church. More importantly, if a child spends the great part of his day at the high school, there is less chance he will learn to appreciate the Amish way of life.[1]

The Amish conflict with the schools has a colorful and well-documented history.[2] In the past courts were unreceptive to Amish claims that compulsory school attendance infringed upon their religious freedom. Rejection of the Amish claims was premised on the notion that while religious beliefs were free from state control, religiously moti-

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1. Wisconsin v. Yoder, 406 U.S. 205, 211-12 (1972).

2. *See* J. HOSTETLER, AMISH SOCIETY 193-208 (rev. ed. 1968); H. RODGERS, COMMUNITY CONFLICT, PUBLIC OPINION, AND THE LAW 23-36 (1969); Erickson, *Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOL 15 (D. Erickson ed. 1969).

vated "actions" were subject to the police power of the state, a power that included the enactment and enforcement of compulsory attendance laws.[3] In 1971, however, the Supreme Court of Wisconsin took a different approach when faced with Amish claims for exemption from attendance laws beyond the eighth grade.[4] Instead of the belief-action distinction the Wisconsin court employed a balancing approach—weighing the burden on the free exercise of religion against the importance of the state interest.[5] It found that the interests of the Amish outweighed those of the state and held that the Wisconsin statutory requirement of two years of high school attendance could not constitutionally be applied to the Amish.

In *Wisconsin v. Yoder*[6] the Supreme Court affirmed the decision of the Wisconsin high court. Chief Justice Burger wrote the Court's opinion; Justices Stewart and White wrote separate concurring opinions and a partial dissent was written by Justice Douglas. The proper standard of adjudication was unanimously agreed to be one of balancing. The Court found that the free exercise right of the Amish and the traditional interest of the parents in the religious upbringing of their children outweighed the state interests in education beyond the eighth grade. The purpose of this Comment is to analyze *Yoder* from the perspective of the child and his education.[7] *Yoder* involves what might be called the educational trinity—the state, the parent, and the child—and provides an opportunity both to evaluate the independent interests of the child in an education and to identify rights of the child that might spring therefrom. In order to appreciate the child's position it is necessary initially to explore the rights and interests of the state and parent in the child's education. Part I of this Comment deals with the rights of the parent; part II discusses state interests. Finally, part III analyzes the rights and interests of the one party omitted in the *Yoder* balance, the child.

I

PARENTAL RIGHTS

Blackstone believed that the most important duty of the parent was to provide an education for the child. "Yet the municipal laws

3. State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

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

5. As authority for utilizing a balancing approach, the court relied on Sherbert v. Verner, 374 U.S. 398 (1963).

6. 406 U.S. 205 (1972).

7. There were actually three children involved in *Yoder*: Frieda Yoder, whose testimony indicated that her own religious views were opposed to high-school education,

of most countries," he observed, "seem to be defective in this point, by not constraining the parent to bestow a proper education upon his child."[8] While Blackstone spoke of the legal *duties* of the parent to his child, the common law emphasized the *rights* of parents in relation to their children. Parental rights and authority were fundamentally premised on the notion of the child as property.[9] There was certainly no common-law duty of parents to educate their children. Horace Mann in the early nineteenth century found parental indifference to the school to be a "most fearful and wide-spread epidemic,"[10] and he rebuked parents "who hold their children to be articles of property and value them by no higher standards than the money they can earn."[11] The development of compulsory attendance laws in this country was resisted strenuously by parents who felt such laws interfered with their rights to raise their children. True to the common-law tradition, the *Yoder* Court spoke in terms of parental rights, not duties. The parents did not assert the right to raise the child to the exclusion of the school; rather, *Yoder* involved the parent's right to direct the child's religious education.

This right, sustained in *Yoder* in a broad form, rests heavily on two Supreme Court cases of the 1920's, *Meyer v. Nebraska*[12] and *Pierce v. Society of Sisters.*[13] *Meyer* involved the constitutionality of a Nebraska statute which prohibited the teaching of any language but English prior to the eighth grade. Meyer, an instructor at the Zion Parochial School, was convicted for having taught German to a 10-year-old child. The Supreme Court defined the problem for determination as whether the Nebraska statute "as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment."[14] The Court held the statute did in fact so infringe upon the plaintiff's liberty, saying at one point that "[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."[15] Later the Court observed: "Evidently the legislature has attempted materially to interfere with the calling of modern language

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and Vernon Yutzy and Barbara Miller, whose religious views were not canvassed by the Wisconsin courts. *Id.* at 207, n.1. For simplicity's sake, however, the singular (masculine) form is used throughout when referring to the children of *Yoder.*

8. W. BLACKSTONE, COMMENTARIES 451 (T. Cooley ed. 1899).

9. *See* S. KATZ, WHEN PARENTS FAIL 4 (1971); Watson, *The Children of Armageddon: Problems of Custody Following Divoree,* 21 SYRA. L. REV. 55 (1969).

10. F. ENSIGN, COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR 50 (1921).

11. *Id.* at 48.

12. 262 U.S. 390 (1923).

13. 268 U.S. 510 (1925).

14. 262 U.S. at 399.

15. *Id.* at 400.

teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[16]

Pierce v. Society of Sisters was decided two years after *Meyer*. The voters of Oregon had approved an initiative which provided that all education of children between eight and 16 years of age was to be public education. The Society of Sisters and the Hill Military Academy sought to enjoin enforcement of the act. In a unanimous decision the Supreme Court declared the Oregon compulsory public school initiative violative of the fourteenth amendment and affirmed the grant of an injunction by the lower court. In the course of its opinion the Court stated:

> Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. 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.[17]

Evaluation of *Pierce* is difficult.[18] The above passage is dictum, for the *Pierce* holding was premised not on the rights of parents but on the notion—subsequently repudiated in other contexts—that the Oregon act was "arbitrary, unreasonable and unlawful"[19] and thus violative of due process because it would destroy the apellees' businesses, which were "not inherently harmful, but long regarded as useful and meritorious."[20]

Having long since abandoned the due process clause as a means of overturning social and economic legislation,[21] the Court has been

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16. *Id.* at 401.

17. 268 U.S. at 534-35.

18. One problem is that of standing. How the private schools in *Pierce* had standing to assert the rights of the parents was left unexplained by the Court. For a subsequent interpretation of *Pierce* as involving an exception to the usual standing rule, see Barrows v. Jackson, 346 U.S. 249, 257 (1953).

19. 268 U.S. at 536.

20. *Id.* at 534.

21. *Pierce* was decided in an era in which the Supreme Court actively used the due process clause to strike down economic and social legislation, frequently coming very close to substituting its own judgment for that of the legislature. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). The Court has subsequently repudiated this philosophy. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and*

forced to recast the *Pierce* decision in a more acceptable mold. Thus *Pierce* is most often cited today for the proposition that parents have a constitutional right to send their children to private schools. The constitutional source of the right, however, is uncertain.[22] For purposes of analyzing the problem presented in *Yoder*, the primary uncertainty is whether the parental rights envisaged by the *Pierce* court are founded in the free exercise clause. That one of the two plaintiffs in *Pierce* was not a church school but a military academy argues strongly against such a reading; nonetheless Chief Justice Burger was willing to assert in *Yoder* that "however read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the *religious* upbringing of their children."[23]

However unsatisfactory the Court's resolution of the doctrinal confusion surrounding *Pierce*, *Yoder* clearly establishes that the general right of parents to direct the education of their children, derived from *Meyer* and *Pierce*, when combined with a free exercise claim, is entitled to the utmost deference from the state.[24] Such a right, however, is by no means absolute. The Court in *Pierce*, as Chief Justice Burger recognized, imposed express limitations on its charter. Parental rights were made subject to the right of the state

> reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[25]

Pierce in its essential aspect is a compromise between the rights of parents to choose an education for their children and the interests of

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Reburial, 1962 SUP. CT. REV. 34, 38, and cases such as Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Nebbia v. New York, 291 U.S. 502 (1934).

22. In *Griswold v. Connecticut* the Court ascribed "[t]he right to educate a child in a school of the parents' choice" to the first amendment rights of free speech. 381 U.S. 479, 482 (1965). But in an earlier dissenting opinion, Mr. Justice Stewart asserted that "[i]t has become accepted that the decision in *Pierce* . . . , upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation." Abington School District v. Schempp, 374 U.S. 203, 312 (1963) (dissenting opinion). *Pierce* itself, however, grounded this parental right on the due process clause. 268 U.S. at 535. "The due process guarantee of the Fourteenth Amendment," asserted Justice Brennan in *Abington*, " 'excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only' [citing *Pierce*, 268 U.S. at 535]. [T]he case obviously decided no First Amendment question . . . ." 374 U.S. at 248 (concurring opinion).

23. 406 U.S. at 233.

24. *Id.*

25. 268 U.S. at 534.

the state in a responsible citizenry.[26]

In practice, the nature of the "*Pierce* compromise" has been such that the rights of parents have usually been forced to yield to state interests.[27] Most states do not expressly permit parents to instruct their children to the exclusion of the school,[28] and those states that do typically condition the privilege.[29] Even where parents have coupled their asserted right to educate their child with a free exercise claim, the courts have almost invariably been unsympathetic.[30] In its willingness to indulge parental prerogatives, *Yoder* stands in stark contrast to the past administration of the *Pierce* compromise.

II

STATE INTERESTS

Recognition of the importance of parental rights does not, of course, conclude the constitutional inquiry. Those rights must be measured against the interests of the state in its compulsory education scheme. According to the Court in *Yoder*, Wisconsin advanced two primary arguments in support of compulsory education: its interest in preparing children to be effective citizens and its interest in helping

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26. The notion of the "*Pierce* compromise" is found in D. KIRP & M. YUDOFF, EDUCATIONAL POLICY AND THE LAW 7 (1974).

27. In *Board of Education v. Allen* the Supreme Court stated:

> Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters*. . . .

392 U.S. 236, 245 (1968) (footnote omitted).

28. As of 1953, home instruction was permitted by statute in only 11 states. People v. Turner, 121 Cal. App. 2d 861, 867, 263 P.2d 685, 688 (1953).

29. New Jersey and New York, for example, require parentally-directed instruction to be equivalent to that of the public school. N.J. EDUC. CODE § 18A:38-25 (West 1968); N.Y. EDUC. LAW § 3204 (McKinney 1970). California requires the parent to have a teaching credential. CAL. EDUC. CODE § 12155 (West 1969).

30. *See* Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955) (Buddhist parents who did not wish their child exposed to the tenets of the Christian faith taught the child at home); People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct. 1950), *aff'd*, 278 App. Div. 705, 103 N.Y.S.2d 757, *aff'd*, 302 N.Y. 857, 100 N.E.2d 48, *appeal dismissed*, 342 U.S. 884 (1951) (Black & Douglas, JJ., would have noted probable jurisdiction) (Orthodox Jewish parents whose religion forbade a secular education sent their children to a private, unliceused religious school); *In re* Currence, 42 Misc. 2d 418, 248 N.Y.S.2d 251 (Kings County Family Court, 1963) (parents of the Ancient Divine Order of Melchisadech kept their child out of school on a Wednesday-Thursday sabbath); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950) (Mohammedan parents refused to send their child to school on Friday, the Moslem sabbath). *See also* cases cited note 3 *supra*.

them to become economically self-reliant members of society.[31] Neither of these asserted interests, the Court concluded, would be furthered by an additional one or two years of public education—particularly in the light of the adequacy of Amish informal education "in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education."[32] In response to the interest in political effectiveness, the Court pointed to the ability of the Amish to survive as a separate community as "strong evidence" of their capability to engender social and political responsibilities.[33] As for the state interest in self-reliant and self-sufficient citizens, the Court characterized the Amish vocational education as "ideal" in terms of preparing Amish adolescents for life in the Amish community.[34] As for those who might choose to leave the community, the Court noted there was no evidence that they were doomed to become "burdens on society."[35] The significance of the fact that the Amish permit their children to complete eight grades of a state-regulated education was left unexplored. The state interests in education conceivably could be satisfied by something less than an eighth grade education, even by no formal education at all, if a religious sect could demonstrate that its alternative education produced citizens of the requisite character.[36]

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31. 406 U.S. at 221.

32. *Id.* at 235.

33. *Id.* at 225.

34. *Id.* at 212.

35. *Id.* at 225.

36. Arguably, where a religious group has no history of a religious education outside the school, the younger the children the more difficult it would be for the sect to prove its education ultimately produces effective citizens. Yet the adequacy of an alternative education is seemingly measured under *Yoder* by such permissive standards that it appears hardly an impossible task for a religious group to demonstrate that its children are destined to become neither "burdens on society" nor citizens incapable of exercising their political rights. For example, Black Muslim parents might establish a private religious school and argue that such schools are justified by the fact that the white orientation of the public school is offensive to their faith. If the Black Muslim school curriculum approximates that of the public school, a court would find it difficult under *Yoder* to declare the Muslim educational alternative inadequate.

Consider in this context the facts of People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct. 1950), *aff'd*, 278 App. Div. 705, 103 N.Y.S.2d 757, *aff'd*, 302 N.Y. 857, 100 N.E.2d 48, *appeal dismissed*, 342 U.S. 884 (1951), a prosecution for violation of New York's compulsory education law. The defendant parents were Orthodox Jews who sent their children to an unlicensed religious school. They contended, and the state conceded, that all systematic, secular education was prohibited as a matter of Jewish law. While the ages of the children involved in the case were not given by the court, the fact that they received instruction, formally or informally, in such subjects as arithmetic, reading, civics, spelling, and English writing suggests that at least some of the children were of elementary school age. It was acknowledged by the state in *Donner* that the children were taught loyalty to the country and respect for the rights of others and "that particularly as a result of the mental discipline derived from the nature of their instruction in this religious school" the children were "mentally alert." 199 Misc. at 645, 99 N.Y.S.2d at 832. On these facts the *Donner* defendants after *Yoder* could certainly ar-

A third state argument in support of compulsory education, the maximization of the child's potential, was not considered by the majority of the Court. Justice White observed in his concurring opinion that the state "has a legitimate interest not only in seeking to develop the latent talents of its children but in seeking to prepare them for the life style which they may later choose or at least to provide them with an option other than the life they have led in the past."[37] It might in fact be argued that the interests of the "marginal" Amish child[38]—the child who wants, or who may want, after two years of high school, to live his life outside the confines of the Amish faith—ought to be the primary concern of the state.[39]

There are several possible responses to the assertion of such an interest by the state. The Wisconsin Supreme Court in *State v. Yoder* faced the issue squarely, concluding that "[t]o force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling state interest."[40] Whether a court need force all Amish children to attend high school to benefit the few is a matter discussed in part III. That point aside, it should be noted that the "dubious" benefit of a worldly education is forced upon all other children in Wisconsin, presumably in their best interests. To the extent the Wisconsin court's position dismisses the interests of the few in a public education as *de minimis*, it presents an unacceptable, and heretofore unaccepted, judicial philosophy. As Justice Douglas, dissenting in *State v. Yoder*, recognized, "The state's interest and obligation runs to each and every child in the state. In the context of the public law of the state, no child's education is below the concern of

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gue that their religious school would produce politically effective citizens not destined to become "burdens on society."

37. 406 U.S. at 240.

38. The phrase, originally expressed as "marginal Amish person," belongs to J. HOSTETLER, AMISH SOCIETY 228 (rev. ed. 1963).

39. This Comment does not deal with the effect that allowing the state to assert such an interest might have had on the resolution of the case. Instead, it deals in essence with a method, after *Yoder*, of allowing a dissenting Amish child to protect his interest in the maximization of his potential. In that sense it proceeds from the assumption that *Yoder* is correct in deciding that the state's compulsory education law cannot be applied across the board to the Amish parents and their children. One can argue, however, that the interest of the child and state in maximizing the child's potential can only be protected by a result exactly contrary to that reached in *Yoder*. Such an argument would be premised on the belief that the "marginal child" most in need of protection is not the child who dissents after the eighth grade; rather, it is the child who does not dissent at that point but who would ultimately dissent after high school if allowed to attend. For this latter child, the opportunity to exercise a choice after the eighth grade will be ineffectual. Arguably the only way to effectively protect this marginal Amish child is to require high school attendance by all Amish children, as urged by the state in *Yoder*.

40. 49 Wis. 2d at 440, 182 N.W.2d at 543-44.

the law."[41] The state may not exclude a few children from the public schools on the justification that it is only a few. Where the state attempts to include the few in the public school, it is an insufficient answer to suggest that the state interest is *de minimis.*

Although the *Yoder* majority did not deal directly with the state's interest in the "marginal" Amish child, a dual response to that argument may be inferred from the opinion. First, the Court in effect assumed that the child would choose as an adult to remain in the Amish community.[42] In response to the state's argument that a high school education is necessary to prepare deserters of the Amish community for life in the larger society, it said that "[o]n this record, that argument is highly speculative," buttressing its conclusion with the assertion that there was "no specific evidence of the loss of Amish adherents by attrition."[43]

Justices White and Douglas read the record differently. Justice White said that "there is evidence many children desert the Amish faith,"[44] and Justice Douglas referred to both Dr. Hostetler and Professor Casad to support his contention that "a significant number of Amish children do leave the Old Order."[45] In any event it can be assumed that *some* Amish children desert the Amish community. The majority's refusal to "speculate" on that fact then, hardly seems justified. Moreover, even Amish children who ultimately do not leave the faith arguably deserve the opportunity to make a meaningful choice on the question—an opportunity which exposure to the worldly influences of high school would afford.

The majority made a further response to the "marginal" Amish child argument. It noted the state had failed to show that any Amish adherents lost by attrition—"with their practical agricultural training and habits of industry and self-reliance"—would become burdens on society.[46] Yet habits of industry and self-reliance may be enough to prevent Amish children from becoming burdens on society, but they are obviously inadequate substitutes for a modern education in a technological society. As Justice White observed:

> It is possible that most Amish children will wish to continue living the rural life of their parents, in which their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer program-

41. *Id.* at 451, 182 N.W.2d at 549.
42. 406 U.S. at 224-25.
43. *Id.* at 224.
44. *Id.* at 240.
45. *Id.* at 245.
46. *Id.* at 224.

> mers, or historians, and for those occupations formal training will be necessary.[47]

There is at least one difficulty with the arguments of Justices Douglas and White. The state only requires that the child attend school until the age of 16, and it is not clear that two years of high school will ensure dissenting Amish children the opportunity to become "nuclear physicists, ballet dancers, computer programmers, or historians." However, that school is not mandatory beyond the age of 16 does not mean that the state has no interest in maximizing the child's potential. Rather, it means that beyond the age of 16 the state will not forcibly vindicate its interest. Moreover, from the child's perspective, the first years of high school may be crucial. A dissenting Amish child denied a high school education altogether will likely have little incentive to continue his education upon eventual emancipation from his parents. If it is vital that the faithful Amish child at 12 or 13 years of age learn the ways of the Amish community, then it would seem of equal importance that the dissenting Amish child at the same age be introduced to the ways of the worldly society. The Amish parents ought to be taken at their word—the years in issue are the child's crucial "formative years."

In sum, the Court in *Yoder* did not permit the state to assert the interest of the "marginal Amish person" in an education that offered an alternative to a future on the farm. As Justice Douglas expressed it:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will forever be barred from entry into the new and amazing world of diversity that we have today.[48]

III

THE CHILD'S INTEREST IN EDUCATION

Parts I and II have dealt with the interests of the parent and the state in the child's education. Part III considers the position of the child, as an independent interested party, in the decision and its aftermath. Section A critically examines the *Yoder* majority's assumption that the only two parties in conflict were parent and state, concluding that the decision must be supplemented by a procedure for ascertaining the views of the children before they are withdrawn from school after the eighth grade. Section B examines two other areas of the law that

47. *Id.* at 239-40.
48. *Id.* at 245.

involve conflicts between state, parent, and child—areas in which solicitation of the child's views is emerging as a prerequisite for resolution of those conflicts. Section C considers the importance and feasibility of making the child's voice heard in a situation such as that presented in *Yoder*.

A. The Child in Yoder

The majority felt that the Amish children were not parties to the litigation. The parents were subject to prosecution for failure to send their children to school, and it was the free exercise right of the parents, not the children, that determined the power of the state to impose criminal penalties on the parents. The Court further observed that no showing had been made of actual conflict between parents and children on the need for a high school education. It dismissed the potentiality of conflict as a circumstance that existed whenever parents elected to send their children to parochial schools: "There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parent's faith."[49]

The majority's reliance on technical standing grounds to avoid assessment of the possible competing interests of parent, child, and state appears more expedient than persuasive.[50] First, as Justice Douglas points out in his partial dissent, the parents' motion to dismiss in the trial court expressly relied on the religious interests of the children.[51] That parents may have standing to assert such interests was established in *Prince v. Massachusetts*,[52] which involved a Jehovah's Witness who permitted her ward to sell religious literature in violation of the state labor laws. In *Prince*, as in *Yoder*, it was the parent who was subject to prosecution and who claimed exemption from the law on religious grounds; nonetheless, the Court considered the free exercise rights of the child in reaching its decision. The Supreme Court later construed *Prince* as holding that the parents have standing to assert the child's free exercise rights whenever the child has no effective means of asserting them himself.[53] Technical standing rules alone cannot obviate the need for an inquiry in *Yoder* into the rights of the child.

The real question is whether the child has an effective alternative means of vindicating those rights. The majority's position appears to be that the child can vindicate his rights at any point when an actual

49. *Id.* at 232.

50. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925). See text accompanying note 15 *supra*.

51. 406 U.S. at 241-42.

52. 321 U.S. 158 (1944).

53. Eisenstadt v. Baird, 405 U.S. 438, 446 n.6 (1972).

conflict develops between himself and his parents. This position makes it virtually impossible for the dissenting Amish child to attend high school. Under *Yoder* the child will first be required to confront his parents and challenge their authority, thereby generating actual conflict. Second, assuming the child to be aware of his inchoate legal rights, he will need sufficient fortitude to initiate a lawsuit. Finally, the child will be required to find a guardian *ad litem* to represent him in court and pay litigation expenses.

It seems clear that the desires of parent and child may conflict and that some Amish parents may act in accordance with their own wishes rather than their child's. The Court's refusal to consider this possibility is not justified by the fact that similar potential conflict exists whenever parents choose a church school for their child. Church schools are subject to reasonable state regulation, and to place a child in a Catholic or Jewish high school is not thereby to deny him "entry into the amazing world of diversity we have today."[54] It seems difficult, then, to dispute Justice Douglas's contention that as to their religious and educational interests "the children have no effective alternative means to vindicate their rights."[55]

The unwillingness of the Court in *Yoder* to consider the interests of the child contrasts with a large number of past decisions in which the Court has emphasized the importance and independence of the child's rights when they conflict with the claims of the parents or the state. For example, in *Prince v. Massachusetts* the Court said in a much-quoted remark that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[56] In *Wyman v. James*[57] the interests of the child served to reinforce the Court's conclusion that a welfare home visit was not a search within the meaning of the fourth amendment. *In re Gault*[58] found that the protection of the child in juvenile proceedings was better assured by the Bill of Rights than by the state's care and solicitude. The Court announced in *Tinker v. Des Moines School District* that students were "persons" under the Constitution, possessed of "fundamental rights," and not "closed-circuit recipients of only that which the State chooses to communicate."[59]

Relying primarily upon *Tinker* and *Gault*, Justice Douglas argued

54. 406 U.S. at 245.
55. *Id.* at 242 n.1.
56. 321 U.S. 158, 170 (1944).
57. 400 U.S. 309 (1971).
58. 387 U.S. 1 (1967).
59. 393 U.S. 503, 511 (1969).

that to impose the parents' notion of religious duty on the child without ascertaining the child's view was to violate the child's rights. "It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny."[60] Indeed, under *Yoder* the child is in reality a "closed circuit recipient," not of the state's communication, but of his parents' instruction. Before the Amish child is denied access to the classroom by his parents, Justice Douglas proposed that the view of the child be solicited.[61]

In evaluating Justice Douglas's proposal, it is helpful to examine two areas where the competing interests of child, parents, and state have often been faced by the courts.

B. *The Child in Custody and Neglect Proceedings*

1. Custody

The interests of child and parent and the role of the state as *parens patriae* appear in bold relief in disputes over child custody. In divorce proceedings where the contest for custody is between parents, "the best interests of the child" are generally determinative of the court's decree. In other custody proceedings—adoption, guardianship, and habeas corpus—where the dispute is often between a parent and nonparent, some jurisdictions apply the best interests test, while others follow the common law rule that natural parents unless unfit have the right to custody of their child.[62] The best interests test allows the judge, by virtue of *parens patriae*, to evaluate the total circumstances before placing the child. The parental right approach reflects both the common law view of the inalienable rights of parents and a presumption that the child's best interests are served by placement with a natural parent.[63]

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60. 406 U.S. at 245.

61. 406 U.S. at 246.

62. The general rule is codified in Michigan:

> When the dispute is between parents, between agencies or between third persons the best interests of the child shall control. When the dispute is between a parent or parents and an agency or a third person, it is presumed that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

MICH. COMP. LAWS ANN. § 722.25 (Supp. 1971). *See generally* Foster & Freed, *Child Custody (Part 1)*, 39 N.Y.U.L. REV. 423 (1964); Note, *Religion as a Factor in Adoption, Guardianship and Custody*, 54 COLUM. L. REV. 376 (1954).

63. The Court of Appeals of New York, in a habeas corpus proceeding in which a mother sought return of her child placed with a family for adoption, commingled the notion of the child's best interest with the right of the parent to produce an eloquent statement on parental rights.

> In no case . . . may a contest between parent and non-parent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child. [While the prospective adoptive parents might be able to provide the child with some material advantages,

Under both of these standards, courts often solicit the views of the child. In some states the court is required by statute to do so where the child has reached a certain age (usually 12 or 14).[64] The general rule is that the choice of the child is a factor entitled to consideration but is not controlling.[65] Not surprisingly, courts vary greatly in their willingness to indulge the child's preferences. In *In re Carlson*[66] the Nebraska Supreme Court gave the desire of the 14- and 16-year-old children to live with their grandparents only perfunctory consideration. While it was "only natural" that the children wished to remain in the community in which they had spent the greater portion of their lives, said the court, their preference was insufficient alone to outweigh the rights of their parents.[67] A Florida court expressed similar sentiments, stating that the "rights of the parent will not be disregarded in order to gratify the mere wishes of a child, when the parent is a proper person to be entrusted with its custody."[68]

A decision of a different, albeit minority, philosophy is *Marcus v. Marcus*.[69] The lower court had granted custody to the mother with leave to enroll her 14-year-old son in a military academy. The appellate court in *Marcus* reversed, holding that the evidence was insufficient to warrant change of custody from the paternal grandmother to the mother. In the course of its opinion the appellate court emphasized that the child's refusal to attend the military academy should not have been ignored by the trial court. The child's "adamant refusal to attend a military school, or to have any contact with his mother should have indicated to the court that Jeffrey's best interests and welfare were not to be 'best served' by following that course of action."[70]

Interesting examples of the interplay of parental rights and the best interests of the child arise under the California gnardianship statute, which provides that a child over 14 may nominate his own guardian.[71] In *Guardianship of Gianoli* a court of appeal found that a child had the absolute right under the statute to nominate a guardian and

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such benefits] passing and transient as they are, cannot outweigh a mother's tender care and love unless it is clearly established that she is unfit to assume the duties and privileges of parenthood.

People *ex rel.* Scarpetta v. Spence-Chapin Adoptiou Serv., 28 N.Y.2d 185, 194, 269 N.E.2d 787, 792, 321 N.Y.S.2d 65, 72 (1971).

64. S. KATZ, *supra* note 9, at 85 n.30.

65. *See, e.g., In re* Carlson, 181 Neb. 877, 152 N.W.2d 98 (1967); Foster v. Sharpe, 114 So. 2d 373 (Fla. 1959); Marcus v. Marcus, 109 Ill. App. 2d 423, 248 N.E. 2d 800 (1969).

66. 181 Neb. 877, 152 N.W.2d 98 (1967).

67. *Id.* at 880, 152 N.W.2d at 100-01.

68. Foster v. Sharpe, 114 So. 2d 373, 376 (Fla. 1959).

69. 109 Ill. App. 2d 423, 248 N.E.2d 800 (1969).

70. *Id.* at 432, 248 N.E.2d at 805.

71. CAL. PROB. CODE § 1406 (West 1969).

that the "parental relationship is of no consequence."[72] The force of the *Gianoli* decision, however, was subsequently muted in *Guardianship of Kentera*,[73] in which the California Supreme Court held that the child's choice was not absolute and that before the child may displace his parent as guardian there must be a showing of convenience or necessity. The dissent in *Kentera* argued that the test ought to be one not of parental rights but rather of the child's best interest:

> [B]y this decision the majority . . . advance another harsh step in their consistent and regrettable refusal to give effect to modern and enlightened legislation for child welfare.
>
> Again this court places reliance upon and follows the dark view that as against parents a child is a mere chattel.[74]

These cases serve to illustrate the several philosophies underlying resolution of custody disputes. The outstanding common characteristic of custody proceedings is the secondary role usually played by the child. "When two terriers fight over a bone," explained Judge Hansen, "the bone does not join the fighting."[75] Dean Drinan noted sardonically that "[i]n all matters where children are involved courts have said with tedious regularity that the welfare of the child is the supreme goal to be attained"[76] and proposed that "[s]tressing the rights of children independently of their father and mother may offer a new and fruitful approach to a tangled and many-faceted problem."[77] Monroe Inker observed, "The teachings of *Gault* . . . have not yet been applied to custody and adoption cases."[78] All three of these critics and others[79] believe it is time to recognize the child as an interested and affected party in custody litigation. They argue that the child's interests will be best served by providing the child with independent counsel through the appointment of a guardian *ad litem*.[80]

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72. 60 Cal. App. 2d 504, 507, 140 P.2d 987, 989 (3d Dist. 1943).

73. 41 Cal. 2d 639, 262 P.2d 317 (1953).

74. *Id.* at 645, 262 P.2d at 321 (dissenting opinion).

75. Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAMILY LAW 181 (1964).

76. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAMILY LAW 101, 103 (1962).

77. *Id.* at 105.

78. Speech by Monroe Inker at 94th Annual Meeting of A.B.A., Family Law Section, July 6, 1971, in 11 J. FAMILY LAW 129, 131 (1971). *See also* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229 (1970).

79. *See, e.g.*, Foley, *Protect the Interest of Children in Actions for Divorce*, 38 WIS. B. BULL. 47 (1965).

80. Not all critics of custody determinations favor the appointment of either counsel or guardian *ad litem* to protect the child's interests. *See, e.g.*, Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC'Y REV. 167 (1969).

In most states there is no authority for the appointment of a guardian for other than a party to the action. The Wisconsin Supreme Court overcame this obstacle by

2. Parental Neglect

Parental authority is not absolute. Neglect statutes set a minimum level of care below which the rights of the parent yield by legislative fiat to the interests of the child. Neglect statutes vary as to their scope and specificity.[81] Generally they attempt to protect the child from a home environment injurious to his moral and physical welfare. Sanford Katz observed that neglect statutes, "in many respects, incorporate a community's view of parenthood. Essentially, they are pronouncements of unacceptable child-rearing practices."[82] A problem that not infrequently arises under neglect statutes is whether parents may refuse on religious grounds to authorize medical treatment for their child. The issue here, like that in custody disputes, requires the court to assess the interests and rights of parent and child and to determine the proper role of the state as *parens patriae.*

The classic cases of neglect in the context of medical treatment involve Jehovah's Witness parents who object to their child's receipt of a blood transfusion. Where the child's life is endangered courts have uniformly held that the state interest in his welfare justifies giving a blood transfusion over the religious objections of the parents.[83] In another instance the welfare of an unborn child was held to override the free exercise rights of a pregnant mother who refused to consent to a blood transfusion.[84] One court has gone still further in protecting the child, authorizing an emergency writ to permit a blood transfusion for a mother with a seven-month old child.[85] Judge Skelly Wright described the consequence to the child if the mother should die as the "most ultimate of voluntary abandonments."[86]

The problem becomes more complex where neither the life of the child nor of his parent is endangered. *In re Seiferth*[87] involved a 14-year-old boy afflicted with a cleft palate and harelip whose father believed in mental healing by letting "the forces of nature work on the boy."

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relying on the inherent power of the court to protect the child's welfare. Edwards v. Edwards, 270 Wis. 48, 71 N.W.2d 366 (1955). In 1971 Wisconsin's Family Code was amended to provide for the appointment of a guardian *ad litem* in any action affecting marriage "when the court has reason for special concern as to the future welfare of the minor children." WIS. STAT. § 247.045 (Supp. 1974).

81. *See generally* S. KATZ, *supra* note 9, at 56-82.

82. *Id.* at 57.

83. *See* State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (C.P. 1962).

84. Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964).

85. Application of the President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 978 (1964).

86. *Id.* at 1008.

87. 309 N.Y. 80, 127 N.E.2d 820 (1955).

The father, however, testified that he would not oppose an operation if his child so chose. The Children's Court judge had the various surgical techniques explained to the boy and had him taken to a speech correction school to meet children who had received medical treatment for problems similar to his own. Nonetheless, the boy chose to rely on natural forces for some time longer. After stating that an order for surgery would have been made without hesitation if the proceeding had been instituted before the child had acquired convictions of his own, the Children's Court judge declined to compel the surgery—a decision that was affirmed by the New York Court of Appeals.

Another case recognizing the importance of the child's interests is *In re Green.*[88] There the parents of Ricky, a 16-year-old boy with a collapsed spine, for religious reasons refused to permit the administration of a blood transfusion preparatory to a spinal fusion operation. The Pennsylvania Supreme Court indicated that where the child's life was not endangered, the interests of the state did not outweigh the religious conviction of the parents. Significantly, however, the court withheld its final decision in order to solicit the child's view. The "ultimate question," in the court's opinion, was "whether a parent's religious beliefs are paramount to the possibly adverse decision of the child."[89] The court felt it would be "most anomalous" to ignore the child in *Green* when the adolescent's preference is considered in determining custody. The court further pointed out that in Pennsylvania a minor can sue his parents for personal injuries, waive constitutional rights, and receive a life sentence. It concluded:

> We need not extend this litany of the rights of children any further to support the proposition that Ricky should be heard. The record before us does not even note whether Ricky is a Jehovah's Witness or plans to become one. We shall, therefore, reserve any decision regarding a possible parent-child conflict and remand . . . in order to determine Ricky's wishes.[90]

3. *The Relevance of Custody and Neglect to Yoder*

The child's interests in custody and his physical well-being are especially important in their potential impact on adult life.[91] The child's

88. 448 Pa. 338, 292 A.2d 387 (1972).

89. *Id.* at 342, 292 A.2d at 392.

90. *Id.*

91. *See, e.g.*, Hansen, *supra* note 75, at 181. Judge Hansen said of custody proceedings that "[t]he whole future of the life of the child will be affected by the court's decision in the matter of custody." *Id.* In the neglect context, it could of course be argued that the child's interest in survival is more important than his concededly strong interest in education. When survival is at stake, the courts have routinely overriden any parental objections to treatment. See text accompanying notes 83-86 *supra.* What is interesting is that the development of the technique for soliciting the child's views has

interest in education is of equal magnitude; nonetheless *Yoder* did not go as far as the custody and neglect cases in protecting the child's interests. In the custody area, even those courts which adhere most strongly to the parental right approach have frequently given at least some weight to the child's preference. Moreover, some courts and many commentators have urged a stronger and more independent vote for the child in such disputes.[92] In the context of neglect, cases like *Green* and *Seiferth* indicate a growing awareness that solicitation of the child's view is essential in resolving conflicts between parent and state. *Green* is particularly striking in this respect because the court opted for solicitation without a showing of actual conflict between parent and child.[93]

In *Yoder*, however, the best interests of the child were not a factor, nor was the child's opinion sought. The majority's failure to recognize the child as an interested and affected party meant that the child's interests were lost in the determination of the respective rights of parents and state. There was only token recognition of the fact that the interests of parent and child may conflict. If nothing else, the lessons of custody and neglect serve to strengthen the contention of Justice Douglas that the Amish child should have been given a voice in his educational future.

C. *The Preference of the Child*

The discussion now turns to the position of the child in the matter of his education. The forgotten child in *Yoder* is the "marginal" Amish child, the child who ultimately deserts the Amish community. The particular educational interest denied this child is his future autonomy. To put it another way, he is denied the chance to maximize his potential—to have the option of becoming a nuclear physicist, ballet dancer, computer programmer, or historian. It is proposed in this section that in

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occurred in cases where actual survival is not at stake and thus where the child's interests are of comparable magnitude to his educational interests. See text accompanying notes 87-90 *supra*.

92. The suggestion of the dissent in *State v. Yoder* that a guardian *ad litem* should have been appointed to represent the Amish child's interests, 49 Wis. 2d at 430, 452 n.1, 182 N.W.2d at 539, 549 n.1, mirrors the argument that the appointment of a guardian *ad litem* for the child should be made in custody disputes.

93. The *Green* court did cite Justice Douglas's opinion, distinguishing the majority's view in *Yoder* with the statement that "it is the child rather than the parent in this appeal who is directly involved which thereby distinguishes *Yoder*'s decision not to discuss the beliefs of the parents vis-à-vis the children." 448 Pa. at 342, 292 A.2d at 392. Of course, if the Pennsylvania Supreme Court had decided to deny the child a voice in *Green*, it, like the majority in *Yoder*, could have said that "[i]t is the parents who are subject to prosecution here" for neglect of their child, and "it is their right of free exercise, not that of their [child], that must determine [the state's] power to impose criminal penalties on the parent." 406 U.S. at 230-31.

order to protect the interests and rights of the dissenting Amish child, the Court in *Yoder* should have given the child an opportunity to be heard before allowing withdrawal from school. As mentioned earlier, Justice Douglas believed it was a violation of the child's rights to deny such an opportunity. The discussion below attempts to buttress the arguments of Justice Douglas and to anticipate objections to giving the child a choice.

1. The Importance of the Child's Interest in Education

The child's interest in education is one of great importance. Opinions of the Supreme Court reflect judicial awareness of the centrality of education in American life. The classic pronouncement came in *Brown v. Board of Education,* where the Court termed education "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him 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."[94] More recently, the Court in *San Antonia Independent School District v. Rodriguez* noted its "complete agreement with the conclusion . . . that 'the grave significance of education both to the individual and to our society' cannot be doubted."[95]

Courts have most frequently considered the importance of a child's education in the context of litigation involving the state's obligation to provide an education to all children within its borders. It is quite clear that the state may not exclude or take action which results in exclusion of children from public schools.[96] Two cases which illustrate this principle are *Manjares v. Newton*[97] and *Hosier v. Evans.*[98] In *Manjares* the school board, for reasons of economy, refused to provide special transportation for plaintiff children who lived six miles from the nearest regular school bus stop. The California Supreme Court deemed the board's action "arbitrary and unreasonable" and directed it to provide transportation. The court found most persuasive the consideration

94. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

95. 411 U.S. 1, 30 (1973).

96. Cases involving total exclusion from the school appear to be unaffected by the recent decision in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *Rodriguez* found the Texas school finance system did not violate the equal protection clause despite the fact the Texas system resulted in disparate per-pupil expenditures among school districts. The Court in *Rodriguez* was at pains to point out that the case presented a circumstance of relative rather than absolute deprivation. *Id.* at 23-25. It was assumed that every child in Texas received a "basic education." *Id.* at 24-25. See text accompanying note 106 *infra.*

97. 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966).

98. 314 F. Supp. 316 (D. Virg. Is. 1970).

that the plaintiffs "are deprived of an education if transportation is not authorized by the board."[99]

In *Hosier* the federal district court rejected the contention that children of alien parents could be excluded from public school on the grounds that their admittance would place an extreme financial burden on the government and would strain already severely inadequate facilities. "These litigants," said the court of the plaintiff children, "may not be relegated to such a state of neglect, 'benign' or otherwise."[100]

What is less clear, however, is the extent to which the state is obligated to provide its children with education of roughly equivalent quality. The recent Supreme Court case, *San Antonio Independent School District v. Rodriguez*,[101] has cast some doubt on the state's obligation in this respect. In *Rodriguez* the Court refused to invalidate under the equal protection clause the Texas school finance system, despite the fact that its operation resulted in substantial disparities among school districts in expenditures per-pupil. Although a cursory analysis of the case might suggest that qualitative differences in educational offerings are immaterial in evaluating the extent of the state's obligation to its children, such a reading is manifestly erroneous. First, the Court emphasized that the Texas system was essentially affirmative and reformatory[102] and intimated that if the system had been shown not to provide a "basic education" for some of the state's children, its conclusion might well have been different.[103] Second, the Court relied heavily on the inconclusiveness of the evidence suggesting a correlation between educational expenditures and the quality of education.[104] Qualitative differences, then, *do* make a difference after *Rodriguez*; they must, however, be substantial and provable in order to justify intervention by a court. Furthermore, *Rodriguez* does not affect the state court decisions based on state constitutional provisions which have invalidated school financing schemes substantially identical to that involved in *Rodriguez* on the ground that such schemes fail to provide the requisite equality of educational offerings.[105]

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99. 64 Cal. 2d at 374, 411 P.2d at 907, 49 Cal. Rptr. at 811.
100. 314 F. Supp. at 321.
101. 411 U.S. 1 (1973).
102. *Id.* at 39.
103. *Id.* at 23-24.
104. *Id.* at 43.
105. Two of the most notable cases in this regard are Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), and Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972). Although there is some doubt that *Serrano* rests on state constitutional grounds, the court strongly intimated such a position. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. The Michigan high court in *Milliken* based its decision explicitly and primarily on the Michigan constitution. 389 Mich. at 33, 203 N.W.2d at 471-72.

Against this background it should be clear that the state could not compel the child to accept Amish education in lieu of high school education in a public school. The Amish school is in reality no school.[106] Thus, compelling a child to attend an Amish school would no doubt represent an exclusion from the educational offerings of the state, relegating the child to an education of such substantially and demonstrably inferior quality as to be suspect even under *Rodriguez*. If the state is not free to force an inferior education upon the child, then it is not unfair to ask why the parent should be free to do so.

Indeed, some courts are moving to ask precisely this question. In *Chandler v. South Bend Community School Corp.*, the district court labeled "intolerable" a school practice of suspending students whose parents failed either to pay a textbook fee or to establish their indigency because it "conditions [the children's] personal right to an education upon the vagaries of their parents' conduct."[107] The result in *Yoder* is similarly intolerable in its approval of the parent's right to compromise his child's education. The ultimate question in *Yoder* is whether the rights and religious beliefs of the parent outweigh the possibly conflicting preferences of the adolescent. The answer is that they do not, because the child's interest in education is extremely important and has consistently been recognized as such by the courts. If the dissenting Amish child desires to attend public high school, then the state should "be able to override the parents' religiously motivated objections."[108]

2. *The Nature of the Choice*

As the Court expressed it in *Yoder*,

> The high school tends to emphasize intellectual and scientific accomplishment, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning through doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.[109]

Later in its opinion the Court stated that "[t]here can be no assump-

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106. One Pennsylvania educator had the following to say of the Amish vocational program implemented in his state:

> Forcing people to do something and to endure red tape, as the state does in this case, may be worse than if we do nothing. But, the law is the law, and the three-hour school tied to the vocational-home program is about the most practical arrangement acceptable to both the Amish and the state at this point in time.

Holliday, *The Amish and Compulsory Education*, 37 EDUC. DIGEST 21, 23 (1972).

107. Civil No. 71-S-51 (N.D. Ind., Aug. 26, 1971).

108. 406 U.S. at 242 (Douglas, J., dissenting in part).

109. *Id.* at 211.

tion that today's majority is 'right' and the Amish and others like them are 'wrong.' "[110]

In essence, the Court in *Yoder* was unwilling to choose between two sets of values. If the child instead of his parents were permitted to choose, it would obviously be difficult for a court to criticize his choice. After completing the eighth grade, the child may be in a particularly advantageous position to make an intelligent decision. He has, after all, spent the greater portion of his life either in school or in the Amish community. A decision on the child's part is at least potentially reflective of the values of both places.

3. *The Maturity of the Child*

The foregoing discussion presupposes that the adolescent is sufficiently mature to exercise a meaningful election. Justice Douglas asserted that "there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the fourteen year old approaches that of the adult."[111] The growing maturity of the 14-year-old is reflected in statutes and court decisions that give the adolescent a voice in the matters of custody and neglect. It may be objected that in most states the child is denied contractual capacity until he reaches majority, but the nature of contract is more complex, and the factors involved more alien to the child's experience than the educational value choice outlined above. If the judgment of the child is not to be trusted unequivocally, then the child's decision as to his educational future need not be absolutely controlling. It must, however, be given more than perfunctory consideration. If the parents choose to contest their child's choice, the burden should be placed on them to show why the child's choice should not be conclusive. The parents ought to be able to meet this burden only on the ground of the educational needs of their child, not on the basis of their notions of religious duty.

The concept of allowing a child to influence his educational destiny is not novel. Illustrative are cases dealing with the child's religious education in the context of a custody proceeding. While the majority rule is that the custodial parent may direct the child's religious upbringing, New York courts have allowed the child to make his own choice. In *Martin v. Martin*[112] the Court of Appeals upheld the modification of the terms of a custody award to permit a 12-year-old child to attend the church of his choice and, if he so chose, to transfer from the parochial school he was attending to a public school. The *Martin* case was

110. *Id.* at 223-24.
111. *Id.* at 245 n.3.
112. 308 N.Y. 136, 123 N.E.2d 812 (1954).

followed in *Hehman v. Hehman*,[113] in which the father contended that the mother, in violation of the separation decree, had taken their child to a Catholic church and planned to enroll him in a Catholic high school. In the course of its opinion, the court stated that the child, who had attended both Lutheran and Catholic services, could not be forced to enter a religion against his wishes; he might desire to remain in the religion of his father "despite his mother, brother, and sisters." As the court put it: "He has been made acquainted with both credal points of view and forms of worship, and with the heart of a child he may speed directly to what is truth for him more quickly and accurately than we adults whose lives and actions, like Hamlet, are 'sicklied o'er with the pale cast of thought.' "[114]

4. The Dimensions of the Child's Choice

It is not the child's right to a choice *per se* that is defended in this Comment; rather it is the right to a choice that furthers the child's interest in a quality education. Two important limitations on the child's choice flow from this distinction. First, the child should be denied the option to drop out of high school against the wishes of his parents. Because the child has the right to an education beyond the eighth grade, it does not follow that he has a right over his parents' objections to discontinue his education. In this situation the right of the parent to direct the upbringing of his child, reinforced by the recognition of the importance of education, outweighs conceivable interests of the child, even religious interests. The crucial factor, in the balance, is the child's interest in a quality education, and a choice which frustrates that interest, if opposed by either parent or child, should not be permitted.

Second, the child would be permitted a judicially recognized choice only in situations where the alternative to public education is a school that is not subject to the full impact of state regulation—as is the case with the "Amish vocational school."[115] This proposition means, of course, that the child could not effectively protest being sent to a military academy, a Catholic school, or any other of a variety of private schools operated under regulations imposed by the state. There are two general justifications for this restriction on the child's preference. First, it is the truncated nature of the unregulated or "free exercise" school education that gives rise to a child's right to be heard. A state-regulated education leaves the child with future options and access to the world of diversity. The second justification for limitation on the child's choice is one of manageability. Requiring that the state so-

113. 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).
114. *Id.* at 322, 178 N.Y.S.2d at 331.
115. *Cf.* 406 U.S. at 208 n.3, 236 n.23.

licit the child's consent to attendance in any nonpublic school would lead to an unjustifiable administrative burden on the state.

5. *Family Harmony*

Courts are properly solicitous of the sanctity of the family. Justice Goldberg argued in *Griswold v. Connecticut*[116] that the integrity of the family is protected by the ninth amendment. Yet the doctrine of family privacy, as salutary as it generally may be, should not be used to frustrate the emergence of individual rights within the family.[117] The family does not exist in the abstract; it is a relation among people. If the child is to be denied a voice in his educational future, it must be because the rights of other family members are paramount or because the child's welfare would thereby be promoted. The proposition that parental rights are superior to those of the child in the *Yoder* context has previously been rejected. As for the child's welfare, when the parents have aligned themselves against further education, it is the child himself who ought to determine the course which will best promote his welfare. If the potential for family disruption is so great, the child may decide on that basis to attend a free exercise school. But the decision ought to be his. A refusal to canvass the view of the child in *Yoder* may result in a family harmony more superficial than real. The semblance of peace that follows from denying the child an opportunity to make a choice may reflect only the inability of the dissenting Amish child to voice a meaningful protest. Said one Amish child of

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116. 381 U.S. 479, 495-96 (1965) (concurring opinion).

117. That society at large would tolerate intrusion into the family on the child's behalf more readily than the courts or legislatures is indicated by the results of a survey conducted in Nebraska. The aim of the survey was to ascertain the "moral sense" of the adult community on selected issues of family law, with questions designed to elicit considered responses rather than "yes" or "no" answers. The research group summarized the core of its findings as follows:

> The majority of the community feels that the law should restrict parental control over children in a substantially greater number of ways than the law actually does at the present time.
>
> The majority of the community feels that the law should grant pre-adolescent children freedom from parental control in more areas than the law in fact does.
>
> This last-mentioned community view is even more marked when the child reaches the later stages of adolescence. From the age of 18 years, the majority of the community feels that the law should permit the child to have rights in a considerably greater number of situations than at the present time.
>
> The majority of the community feels that the law should recognize a gradual transition during the period of adolescence from childhood to adulthood by assigning the child an increasing number of rights and obligations, rather than make an abrupt change at the age of 21 from childhood to full adulthood, as the law does at the present time.

J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 113 (1958).

his unhappy adolescent years: " 'There was nothing to do but live it out with my dad until I was twenty-one.' "[118]

The virtue of family harmony did not at common law prevent the child from suing his parents concerning property or contract rights.[119] While the prevention of family discord has long been the chief rationale for not allowing the child to sue his parents for personal injuries, this doctrine of parental immunity has been abrogated by the courts of many states.[120] The possibility of an adverse effect on family harmony did not prevent the Pennsylvannia Supreme Court in *Green* from reserving judgment until the view of the child was obtained.[121] The question arises whether family concord is less a factor under the circumstances of *Green* or of a suit by the child againt his parents than under the circumstances of *Yoder*. Arguably it is. The child's decision to receive a blood transfusion or to sue his parents need be made only once. The dissenting Amish child's decision to attend high school must be made every day, and each day the child chooses to spend in school would remind his parents of his rebellion and aggravate parental and community hostility.[122]

Even if family discord is the most likely consequence of an Amish child's decision to attend high school, the question remains whether that fact is enough to foreclose the child's opportunity to decide. Because family equilibrium is very much dependent on the parents, an affirmative answer means in effect that parents—in the guise of family harmony—can deny their child a voice in his educational destiny. There would appear to be little to justify parental ability to achieve indirectly that which they are unable to achieve directly by reliance on parental rights. As stated above, the child can be expected to appreciate the consequences that may befall him if he opts for the high school. He, not the court, can best judge whether his parents are more or less tractable. It is true that the child's choice may be a psychologically difficult one, but that fact seems an insufficient reason to deny him the opportunity to choose.

6. *Effectuating the Choice*

When the parents are before the court there is no difficulty in having the child testify to his feelings on his educational future. One child in *Yoder* did just that. The views of the Amish children not involved

118. J. HOSTETLER, AMISH SOCIETY 233 (rev. ed. 1968).

119. W. PROSSER, LAW OF TORTS 866 (4th ed. 1971).

120. *See* cases collected *id.* at 867-68 nn. 91 & 92.

121. See notes 86-88 *supra.*

122. It is at least possible that Amish parents might in fact vary in their religious zeal, with some Old Order parents being capable of accepting their child's decision to attend high school.

in the *Yoder* litigation, however, can only be reached through affirmative effort on the part of the state. Justice Douglas believed that "canvassing the views of all school-age Amish children would not present insurmountable difficulties."[123] The problem is accomplishing this survey in a way which will give the child a meaningful opportunity to express his feelings. A classroom announcement by the grade school teacher that all students are free to attend high school the next year would hardly suffice. To conduct Justice Douglas's survey on school grounds seems unsatisfactory, not only because the parents would be undestandably distrustful of such a procedure but also because it would present the school as an adversary in a context in which it should appear neutral.

To enable the child to understand more fully the options available to him, including such alternatives as continuation school and adult education, the state might require parents and children to consult with a "neutral" party (perhaps a psychologist) prior to the child's decision. To require such a meeting does not appear to violate the letter or spirit of *Yoder*—any sacrifice of parental autonomy that might accompany compulsory consultation is outweighed by potential benefits to the child. The child's ultimate decision could be elicited through a correspondence sent to his home or, if overreaching on the part of the parents is feared, at a subsequent meeting of the consultant, the child, and his parents. No matter how the child's choice is obtained in practice, it should be made clear to the child that his decision is not irrevocable and that he may later opt for the alternative previously rejected.

CONCLUSION

A balancing concept assumes the competing interests of two parties. In *Yoder* the state and the parents were chosen to stand on the scales, and a party of at least equal importance, the child, was consigned to spectator status. The Court gave the child no voice in determining his destiny. Indeed, the Amish child did seem to be regarded as a chattel to be awarded the highest bidder. The education of the child ultimately matters most to the child, but apparently the perception of the child as a "person" does not make him an interested party when parents and state debate his educational future. It can be said that *Yoder*, like *Pierce*, affirmed the ideal of America as a pluralistic society. The Amish even in their "idiosyncratic separateness" exemplify "the diversity we profess to admire and encourage."[124] Yet an ideal encouraged at the expense of the child hardly seems worth the price.

123. 406 U.S. at 246 n.4.
124. *Id.* at 226.