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Cynthia B. Smith

Compulsory Education: Weak Justifications in the Aftermath of *Wisconsin v. Yoder*

Free exercise of religion is a right protected by the first amendment.[1] Despite the constitution's simple declaration, however, courts repeatedly have struggled to balance the individual's right to religious freedom against the state's competing interest in governing society.[2] This familiar dilemma recurred recently in the context of North Carolina's compulsory education statute.[3] The United States Court of Appeals for the Fourth Circuit found in *Duro v. District Attorney, Second Judicial District of North Carolina*[4] that despite plaintiff's religion-based aversion to structured education, North Carolina could compel plaintiff's children to attend state-sanctioned schools.[5] The *Duro* court did not clarify how the competing interests in freedom of religion cases should be balanced, but merely added to the voluminous materials addressing the issue of an individual's freedom of religious expression in our society.

Duro and his wife have six children, five of whom are school-aged.[6] The Duros are Pentecostalists.[7] Although this religion does not require that children be educated at home, the Duros' interpretation of Pentecostalism did.[8] Specifically, Duro worried that exposing his children to people who did not share the family's religious beliefs would corrupt them. Additionally, he was opposed to what he called the "unisex movement where you can't tell the difference between boys and girls and [which advocates] the promotion of secular humanism."[9] Because of these beliefs, Duro refused to enroll his children in

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The first amendment was applied to the states via the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940).

2. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982); United States v. Seeger, 380 U.S. 163 (1965); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Reynolds v. United States, 98 U.S. 145 (1878). *See generally* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

3. North Carolina's compulsory education statute requires regular school attendance for children between the ages of seven and sixteen. N.C. GEN. STAT. § 115C-378 (1983). The statute also provides: "No person shall encourage, entice or counsel any such child to be unlawfully absent from school." *Id.* Evidence that the parents were notified of thirty accumulated absences by their child that cannot be justified establishes a prima facie case that the parent is responsible for the absences. *Id.*

4. 712 F.2d 96 (1983), *cert. denied*, 104 S. Ct. 998 (1984).

5. Although North Carolina has deregulated nonpublic schools, all schools still must satisfy certain criteria. *See* N.C. GEN. STAT. §§ 115C-547 to -557 (1983).

6. *Duro*, 712 F.2d at 97.

7. *Id.* Although the *Duro* court did not examine the sincerity of Duro's religious views, many cases have pinpointed the genuineness of "religious" views as a relevant issue. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); United States v. Macintosh, 283 U.S. 605 (1931); Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

8. *Duro*, 712 F.2d at 97.

9. *Id.*

state-sanctioned schools and elected to have his wife teach them at home.[10]

Duro's refusal to send his children to school caused him to be charged in 1981 with violating the North Carolina compulsory school attendance law.[11] Duro filed suit alleging that the State's application of the statute was unconstitutional as applied because his religious beliefs prohibited him from sending his children to school. The federal district court granted Duro's motion for summary judgment.[12] The United States Court of Appeals for the Fourth Circuit reversed, holding that North Carolina could compel Duro to send his children to a regular school because the State's interest in compulsory education was stonger than his interest in freely directing his children's religious training.[13]

To understand the *Duro* decision, it is necessary to examine the 1971 United States Supreme Court decision in *Wisconsin v. Yoder.*[14] *Yoder* involved a challenge to the constitutionality of the Wisconsin compulsory education statute as applied to the Amish people.[15] On the basis of the Amish tenet that separation from the world is fundamental to salvation,[16] the parents in *Yoder* removed their children from formal schools after the eighth grade so that they could be taught the attitudes, and be trained in the skills, necessary for life in the simple, agrarian Amish community.[17]

The *Yoder* Court, recognizing the importance of the free exercise of religion in our constitutional scheme, announced its guidelines for determining whether Wisconsin could compel the Amish to attend school past the eighth grade: "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[18] The *Yoder* Court acknowledged that Wisconsin law compelled the Amish to perform acts undeniably at odds with their three hundred year-old religion;[19] therefore, state compulsion could not be allowed under the first part of the test. The Court concluded that the second prong of the test was not

10. *Id.* The court noted that Mrs. Duro did not have a teaching certificate and never had been trained as a teacher. For a discussion of what qualifies as a school under N.C. GEN. STAT. § 115C-555 (1983), see Delconte v. State, 65 N.C. App. 262, 266-67, 308 S.E.2d 898, 902-03 (1983) (§ 115C-555(4) refers only to established educational institutions).

11. Duro was charged with four violations of N.C. GEN. STAT. § 115C-378 (1983); the warrants were quashed for technical defects. *Duro*, 712 F.2d at 97.

12. *Id.* The district court opinion was not published.

13. *Id.* at 99.

14. 406 U.S. 205 (1971). For a general discussion of *Yoder*, see Note, Wisconsin v. Yoder: *The Right to Be Different—First Amendment Exemption for Amish Under the Free Exercise Clause*, 22 DE PAUL L. REV. 539 (1972); Note, *Freedom of Religion—The Amish and Their Right to Reject Compulsory School Attendance Beyond the Eighth Grade*, 24 MERCER L. REV. 479 (1973).

15. *Yoder*, 406 U.S. at 209.

16. *Id.* at 210. The Amish shun modern conveniences to promote a purer, simpler lifestyle. *See generally* Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832; Note, *The Right Not to Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967).

17. *Yoder*, 406 U.S. at 211.

18. *Id.* at 214.

19. *Id.* at 218.

satisfied because Wisconsin's interest in compulsory education—having an informed citizenry—was fulfilled adequately by the Amish alternative to formal secondary school education.[20]

Wisconsin's final argument was that exempting Amish from the statute denied the children their substantive right to an education.[21] The *Yoder* Court rejected this argument for two reasons. First, since the criminal penalties of the statute fell upon the parent, not the child, it was the parents' interests in religious freedom that was impeded. Second, the *Yoder* Court recognized the fundamental interest that parents have in guiding the religious future and education of their children and characterized their interest as an "enduring American tradition."[22] In conclusion the *Yoder* Court stated:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, . . . and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education . . . .[23]

The Court emphasized that the exemption from the statute was narrow and was not intended to undermine the general applicability of the statute.[24]

The court of appeals' decision in *Duro* relied heavily on language in the *Yoder* opinion, but reached a different result. The *Duro* court began by identifying the two issues that *Yoder* had characterized as mandatory considerations: whether the individual's religious expression was being infringed upon by the state, and whether the state had demonstrated a competing, overriding, compelling interest.[25] The *Duro* court recognized the validity of plaintiff's allegation that his religious expression was being hampered by the State and allowed him to satisfy the first prong of the *Yoder* balancing test. Despite the

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20. *Id.* at 235. The *Yoder* Court also noted that because they had received a basic education, Amish children would be prepared to reenter secular society if they desired. *Id.* at 224. Some commentators doubted whether an eighth grade education adequately prepares a person for worldly life. *See, e.g.*, Note, *The Balancing Process for Free Exercise Needs a New Scale*, 51 N.C.L. REV. 302, 308-09 (1972).

21. *Yoder*, 406 U.S. at 229. Justice Douglas' dissenting opinion was based on the right of the child to an education. *See id.* at 241-49 (Douglas, J., dissenting). *See also* Comment, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1515-31 (1974); *cf.* Note, *supra* note 20, at 309-10.

22. *Yoder*, 406 U.S. at 232.

23. *Id.* at 235.

24. *Id.* at 236. Many commentators believed that because the *Yoder* exception was so narrow, the case set a meaningless precedent. *See* Note, *Balancing Test Employed to Resolve Conflict Between State Statute and Resulting Burden on Free Exercise of Religion—State Interest in Compulsory High School Attendance Outweighed by Resulting Burden on Free Exercise of Amish Religion*, 18 VILL. L. REV. 955, 967 (1973) [hereinafter cited as Note, *Balancing Test Employed*]. *Cf.* Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 244-45 (1973); Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAW. 530, 540-44 (1975).

25. *Duro*, 712 F.2d at 97. The *Duro* court stated that the two issues in *Yoder* were "(1) whether a sincere religious belief exists, and (2) whether the state's interest in compulsory education is of sufficient magnitude to override the interest claimed by the parents." *Id.*

genuineness of Duro's religious beliefs, however, the court concluded that *Yoder* arose in "an entirely different factual context"[26] and therefore was not controlling. According to the court, it was the "unique facts and circumstances associated with the Amish community"[27] that mandated the *Yoder* result. In distinguishing *Duro* from *Yoder* the court stated:

> The Duros, unlike their Amish counterparts, are not members of a community which has existed for three centuries and has a long history of being a successful, self-sufficient, segment of American society. Furthermore, in *Yoder*, the Amish children attended public school through the eighth grade and then obtained informal vocational training to enable them to assimilate into the self-contained Amish community.[28]

The second part of the *Duro* opinion contained a disappointingly shallow discussion of the State's interest in education. The *Duro* court stressed the continuing, vital interest the State has in private schools and rejected the district court's conclusion that North Carolina had abdicated its interest in nonpublic education.[29] Without defining the nature or purposes of the State interest in education, the court noted evidence of the State interest's strength in state-required attendance records, standardized testing, and disease immunization requirements in private schools, as well as in fire, health, and safety standards.[30] These regulations demonstrated to the *Duro* court the compelling nature of North Carolina's interest in education.[31] The court also mentioned that since "Duro [had] not demonstrated that home instruction [would] prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system,"[32] the State's interest in education prevailed over Duro's interest in religion.[33]

In a lengthy footnote, the *Duro* court explained that in addition to the mandates of *Yoder*, its chief consideration was the welfare of the children.[34] The State's interest in "[t]heir well-being, along with their state constitutional right to an education"[35] convinced the court that state sanctioned education was appropriate. The *Duro* court compared denying children an education to neglecting them, because both wrongs occur in environments injurious to their welfare.[36] The State's interest in the children's welfare indicated a sufficiently

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26. *Id.* at 98.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* These requirements are contained in N.C. GEN. STAT. §§ 115C-548 to -558 (1983).

31. *Duro*, 712 F.2d at 99.

32. *Id.*

33. *Id.*

34. *Id.* at 99 n.3.

35. *Id.* The court also remarked that "Article 1, § 15 of the North Carolina Constitution expressly provides that, '[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right.' " *Id.*

36. *Id.* The *Duro* court borrowed this analogy from Matter of McMillian, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976). *McMillian* involved parents who had been charged with neglect

strong State interest in compulsory education to override Duro's religious freedom claim.

Two factors in *Duro* suggest that the result was correct. First, in contrast to the facts in *Yoder*, Duro insisted on controlling all levels of instruction for his children. Obviously, the State interest in education becomes stronger when the child has not received even a basic education in approved schools.[37] Second, the *Duro* result seems justified in that Mr. Duro planned to send out his children at age eighteen to make their way in society. In contrast, the Amish children in *Yoder* were expected to lead simple, traditional agrarian lives; their vocational training adequately prepared them for their future. The prospect that Duro's children would reenter secular society heightened North Carolina's interest in directing their education.[38]

Although it is apparent that *Duro*'s outcome was correct, the court's logic and reasoning are disturbing. First, *Duro* misinterpreted the nature of the right to religious freedom that was recognized in *Yoder*. Although the *Yoder* Court limited its discussion of religious expression to the peculiarities of the Amish community, it is a mistake to read that case as narrowly as the *Duro* court did. The *Duro* court found that the situation was sufficiently different from that of the Amish and, therefore, *Yoder* was not controlling.[39] Yet, in allowing the Amish an exemption from the Wisconsin statute, *Yoder* did not impose a new set of requirements that must be met before an individual's interest in religion can triumph over the state's education interest. *Yoder* did not hold that only Amish people will be allowed religious exemptions from compulsory education statutes; rather, the *Yoder* Court concluded that, in the particular case of the Amish, an exception was justified.[40] The fact that the Duros' religion and situation did not conform to those of the Amish should have been irrelevant to the court's analysis of Duro's first amendment claims. The first amendment protects individuals' freedom to practice any religion, not merely the freedom to be Amish.

The second problem with *Duro* is the court's inadequate discussion of North Carolina's interest in education. Surely there is stronger evidence of the State's interest in education than its health and fire regulations. Presumably,

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of their children under N.C. GEN. STAT. § 7A-278(4) (1976) (repealed by Act of June 7, 1979, ch. 815, § 1, 1979 N.C. Sess. Laws 966).

37. The nature of the state's interest in educating its citizenry has not been articulated clearly. *See* Note, *Balancing Test Employed*, *supra* note 24, at 962. One commentator suggests that the state's interest in education is the selfish one of making each citizen more productive. *See* Kurland, *supra* note 24, at 215.

38. *Duro*, 712 F.2d at 99.

39. *Id.*

40. The Court's rationale for providing an exception to the Amish was that societal diversity should be respected:

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

Yoder, 406 U.S. at 223-24.

the State's legitimate interest in education is in having an informed electorate.[41] By summarily concluding that Duro failed to show that he had prepared his children to be intelligent members of society, the court glossed over what should have been an important component of its analysis.

A third problem with the *Duro* court's rationale was its offhand pronouncement that the children's welfare was the primary issue in the case.[42] Although this consideration could be the basis for compelling school attendance in another context,[43] in *Duro* it was entirely inconsistent with *Yoder*. In *Yoder* Justice Douglas' dissenting opinion argued that children's rights were determinative;[44] the *Yoder* majority, however, made clear that the relevant issue was the *parents'* right to direct freely their children's religious training. Thus, the question of the allowable extent of parents' religious control over their children is an unresolved and controversial issue.[45] The *Duro* court's quick reference to the children's welfare as a justification for its decision dodged the issue of the parents' right to direct their children's religious training.

The *Duro* decision is a deceptively simple opinion resting on questionable premises. The issue of whether a state may compel a child's education against the wishes of his parents was resolved only partially in *Yoder*. North Carolina's right to compel the Duro children's school attendance in contravention of their father's religious beliefs warranted a more convincing definition of the State's interest than the court offered in *Duro*.

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41. Brown v. Board of Educ., 347 U.S. 483 (1954), expanded on the importance of education: "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." *Id.* at 493. For a suggestion that *Yoder* is inconsistent with this aspect of *Brown*, see Note, *supra* note 20, at 307.

42. *Duro*, 712 F.2d at 99 n.3.

43. *Yoder* recognized that children's rights would be relevant if there was a conflict between the wishes of the parent and those of the child. *Yoder*, 406 U.S. at 231-32.

44. *Id.* at 241-46 (Douglas, J., dissenting). *See also* Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

45. Some of the most interesting cases on this point involve the Jehovah's Witnesses. For a collection of these cases, see Note, *Their Life is in the Blood: Jehovah's Witnesses, Blood Transfusions and the Courts*, 10 N. KY. L. REV. 281 (1983).