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The Gravamen of *Wisconsin v. Yoder* at Fifty, 1972-2022

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A Collection of Essays and Book Reviews Marking the 50th Anniversary of the *Wisconsin v. Yoder* Decision, 1972-2022

THE GRAVAMEN OF WISCONSIN V. YODER AT FIFTY[1]

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After an arduous journey of more than four years that Wallace Miller, Jonas Yoder, and Adin Yutzy began in New Glarus, WI, the U.S. Supreme Court handed down its landmark decision in Wisconsin v. Yoder , 406 U.S. 205 on May 15, 1972. In affirming the Supreme Court of Wisconsin's decision reversing the convictions of Miller, Yoder, and Yutzy (Respondents) for violating the compulsory school attendance statute, the U.S. Supreme Court found that enforcement of the statute violated the Respondents' rights pursuant to the free exercise of religion clause conferred by the First Amendment and made applicable to the states through the Fourteenth Amendment of the United States Constitution. Chief Justice Warren Burger's majority opinion created a four part "Compelling Interest Test." First, a party must demonstrate a sincere and truly religious claim. Next, the party must show that the government action is injurious to religious practice. The burden then shifts to the State to show that the State action is necessitated by a Compelling State Interest. Finally, the State must demonstrate that no other alternative means is available to make the contemplated action less burdensome to religious liberty (Ball 2003, 256).

While some legal scholars have hailed the Supreme Court's decision in Yoder as a victory for religious liberty and freedom, others have criticized the decision, arguing that it ignores the Establishment Clause of the First Amendment by impermissibly conferring special protections on the Amish and claiming that the case was wrongly decided as it violates children's human and constitutional rights while enabling and fostering child abuse. In so doing, the reasoning concludes, the Yoder Court shielded the religious liberty of Amish parents at the expense of children who, as a result, experience educational deprivation. Finally, others claim that the Court's decision ignores the State's established interest in providing and maintaining an educational system (Peters 2003, 3-4).

BACKGROUND OF THE CASE

Before turning to the case's procedural history, it is important to introduce the underlying facts in Wisconsin v. Yoder, supra. that have been ignored for far too long and considered "dry."

In the mid-1960s, the Old Order Amish were being driven from Hazelton, IA, over the issue of school attendance. There was an escalating and bitter dispute with local and state officials who were attempting to force the Amish to abandon their faith-based one room schools to attend local public schools. This situation came into the national spotlight in 1966 when a media photographer snapped a picture which captured Amish children fleeing into a cornfield during the failed infamous "Round Up of Amish Youth". This led in part to the exodus of some Old Order Amish from Iowa to Wisconsin.

Green County, WI—and, in particular, the countryside surrounding New Glarus—became a destination of Old Order Amish settlers from Hazelton, IA; Plain City, OH; and elsewhere. New Glarus, approximately 25 miles south of Madison, the state capital, had been established in 1840 by Swiss immigrants. In fact, New Glarus was known as "America's Little Switzerland." Nevertheless, the New Glarus residents were wary of the Amish until they recognized that the Amish provided a much needed tourism boom to the local economy. Despite an economic boost for the town, local and state authorities were unwilling to bend appli-

[1] Dedicated to the scholars of the Walnut Valley School and their seachers, parents, and school board.

cable regulations for the Amish. Correspondingly, Amish continued resisting conformity, insisting on living their lives distinct from non-Amish. Demonstrating this tension, the state agriculture department ordered the closure of Hershberger's Bakery, forcing the Amish home business to obtain a license to re-open (Peters 2003, 7-9).

Adin Yutzy, identified in court documents as Amish-Mennonite, arrived in New Glarus from Hazelton, IA. Eventually, one of the three defendants in Wisconsin v. Yoder, Adin Yutzy had a significant history in Hazleton for not enrolling his children in an accredited public school. As a result, during the school controversy, he was repeatedly fined for over five hundred dollars ($500.00), including court costs, all of which were paid before he left Hazelton (Peters 2003, 16-17).

Wallace Miller and Jonas Yoder both arrived in New Glarus, Wisconsin from Plain City, Ohio. Jonas Yoder, who had been raising ducks in Ohio, had a run in with local authorities due to unsubstantiated claims that the duck excrement had polluted a neighboring creek. However, upon further investigation by the authorities, Jonas was cleared of any wrongdoing; the pollution was subsequently linked to a nearby chemical plant. When that was discovered, Jonas Yoder believed that that local chemical plant was responsible for the death of his 5 year old daughter from bone cancer, which prompted him and his family to move. When he arrived in New Glarus, Jonas bought a farm and started to raise hogs. Wallace Miller, the third Yoder defendant, became an outspoken critic of the New Glarus public school system curriculum. Specifically, he was unhappy with Amish children having to be exposed to the theory of evolution. Additionally, Wallace Miller was displeased with the state mandating school attendance up to age 16 and questioned the constitutionality of such a statute. Wallace Miller subsequently became a member of the new Amish School Board that was established in the summer of 1968 for what was called the Pleasant View Parochial School District (Peters 2003, 21-23, 29-31).

PROCEDURAL HISTORY OF THE CASE

The Wisconsin v. Yoder case began when Jonas Yoder raised serious objections to his two daughters participating in gym class at the New Glarus public school due to immodest uniforms they were required to wear. He threatened to withdraw them from school. The "gym uniform issue," as it became known, mushroomed into, first a community, then state, concern that the Wisconsin legislature took up. In 1967, legislation was introduced which proposed to exempt children from gym classes if it could be demonstrated that their "participation conflicts with their religious practices." This Wisconsin bill was immediately met with strong opposition by, among others, Kenneth Glewen, the Superintendent of the New Glarus Public School District. Superintendent Glewen vehemently objected to any bending of the school regulations to accommodate the Amish. His concern was that such legislation would set a precedent whereby other community members might disagree with school rules and regulations. Such actions, Superintendent Glewen believed, would interfere with not only the smooth operation of the public schools but in fact make the administration of those schools much more difficult. Superintendent Glewen also reasoned that the students would attempt to exploit such exemptions, making it virtually impossible to check the veracity of each and every claim. Nevertheless, the Exemption from the Physical Education Requirement bill and a companion bill addressing school attendance for Amish and Mennonite children to eighth grade or age sixteen went to defeat in the Wisconsin Legislature. At about the same time, the Amish formed a new school board and announced the establishment of two Amish schools, Primrose and Exeter, in the New Glarus area. It was during that summer of 1968 that the new school board representing the Pleasant View Parochial School District, notified Superintendent Glewen of their intent to have their schools open that fall of 1968 (Peters 2003, 23-24, 29-31).

Upon receiving the notification that both of the Pleasant View Parochial School District Schools, Primrose and Exeter, were opening in the fall of 1968, Superintendent Glewen began to calculate what the financial impact would be on the public school system that he administered. Because the state funding formula for each school district was based on the number of public school students enrolled on the third Friday of September, Superintendent Glewen estimated the loss of revenue to be $18,000!

Prior, Superintendent Glewen opposed bending school regulations on the gym uniform issue

because challenging school regulations would interfere with the smooth operation of the public schools. Notwithstanding, Glewen came up with a plan to, what some have gratuitously described, "clumsily attempt to preserve state funding by proposing a deal to the Amish" (Peters 2003, 32).

"The Deal" that School Superintendent Kenneth Glewen proposed was that the Amish community not begin classes at their new schools of Primrose and Exeter but instead return their three dozen scholars to the public schools in New Glarus until after the third Friday of September when the state attendance census for the school district would be complete. In that way, Superintendent Glewen calculated that the three dozen Amish scholars would be included in the State of Wisconsin's funding of school aid thereby ensuring that the New Glarus School District would not lose the estimated $18,000 in state school aid. When the New Glarus Amish Settlement immediately rejected the offer to perpetrate a fraud on the State of Wisconsin, Superintendent Glewen, who was also the School District's Truant Officer, then targeted the Amish who rebuffed his fraudulent tactics by citing Wallace Miller, Jonas Yoder, and Adin Yutzy with violating the State of Wisconsin's compulsory school attendance statute. (It is not surprising that ethics and morality were not taught in the New Glarus public schools.) Shortly after being cited into court for violating the Wisconsin Compulsory School Attendance Statute, Adin Yutzy moved with his family to Missouri (Peters 2003, 33-35).

Prior to trial, the defendants' attorney proposed to William Kahl, Wisconsin State Superintendant, a compromise settlement, which would satisfy the compulsory attendance law by exploring the establishment of an Amish vocational training program similar to the one adopted by Pennsylvania and other states including Ohio, Iowa, and Maryland. Nevertheless, State Superintendant Kahl rejected the proposal, out of hand, as it did not afford Amish children "substantially equivalent education to that offered by public schools in the area." Yoder, 406 U.S. @ 208. footnote 3. See also State v. Yoder et al, 49 Wis. 2d 430, 453-54.

At a bench trial, on April 2, 1969, before Judge Roger Elmer, in the Green County Courthouse in Monroe, WI, Defense Attorney William Ball presented two motions. The Court granted the Motion to Excuse defendant Yutzy from attending the proceedings. Attorney Ball then made a Motion to Dismiss based upon the fact that the Wisconsin Compulsory Attendance Statute as applied to the Amish defendants denied them along with their children of the rights guaranteed under both the federal and state constitutions. Judge Elmer denied the Motion to Dismiss. At trial, the State immediately called Kenneth Glewen, the Superintendent of the New Glarus School, as its first witness. Upon cross examination by Defense Attorney William Ball, Superintendent Glewen, admitted under oath that the loss of approximately three dozen Amish students cost the school district $18,000 in state school aid. Superintendent Glewen also admitted to his scheme to mitigate such a financial loss to the school district by trying to persuade the defendants to wait until after the fall state school census was completed at the end of September before effecting their children's transfer to the new Amish schools. It, however, is unclear from the record whether Attorney Ball in fact drove the point home by asking Superintendent Glewen if he then, as the School District Truant Officer, was the person who actually cited Jonas Yoder, Adin Yutzy, and Wallace Miller for violation of the Wisconsin Compulsory Attendance Statute (Peters 2003, 87-88).

The defense began its case by recalling Superintendent Glewen and having him testify that the public schools did not provide any moral training, either formally or informally. Attorney Ball then called two key expert witnesses, John Hostetler, professor at Temple University, to discuss the history of the Amish faith, and University of Chicago professor Donald Erickson, who testified that the Amish were already doing a marvelous job by educating their youth post eighth grade through vocational training by learning and by doing (Peters 2003, 91, 97).

Finally, Attorney Ball had Frieda Yoder, daughter of a defendant, testify. Upon cross examination, she was asked and answered as follows:

> Q. So, I take it then, Frieda, the only reason you are not going to school and did not go to school since last September, is because of your religion? A. Yes. Q. That is the only reason? A. Yes (emphasis supplied). See Yoder, supra. 406 U.S. @ 237.

When the trial concluded, Judge Elmer requested both sides to submit briefs and present oral argument on June 13, 1969. Judge Elmer's decision

came down two months later finding that, although enforcement of the compulsory school attendance law interfered with the defendants' freedom to act in accordance with their sincere religious beliefs, it was a reasonable and constitutional exercise of the State's authority to do so. Judge Elmer found each of the defendant's guilty and fined each five dollars (Peters 2003, 100). Subsequently, a *de novo* trial was held before Judge Arthur Luebke of the Green County Circuit Court in October 1969. In an opinion issued several weeks later, Judge Luebke affirmed Judge Elmer's guilty verdicts on the same basis (Peters 2003, 101-02).

An appeal was then taken to the Supreme Court of Wisconsin to consider whether the compulsory education law of the state, as applied to the Amish, infringes on their religious liberty, and if so, whether such infringement is constitutionally justified. See State v. Yoder et al, 49 Wis.2d 430, 182N.W.2d 539 (1971). Chief Justice Hallows, writing for the majority, concurred with the trial court that the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment. Yoder, 49 Wis.2d 430, 435. In then balancing the burden caused by the infringement, the Wisconsin Supreme Court found that the burden was a heavy one, requiring the Amish to perform affirmative acts that are repugnant to their religion, such that if forced, they sold their farms and sought religious freedom elsewhere. Chief Justice Hallows also acknowledged the adverse impact on the Amish children themselves if required to go to high school but stopped short of reaching the question of whether they had an independent right of the free exercise of their religion to be protected. In addressing whether there is a compelling state interest to regulate compulsory education, the Court rejected the State's argument, noting that the State had substituted its judgment of the type of education, for that of the natural parents, making no allowance for the religion of the child or parent. Chief Justice Hallows reasoned that "To 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 a few who might later reject their religion is not a compelling interest." Yoder, supra.@ 440. Finally, the Court concluded that there is not a compelling state interest in two years of high school compulsory education to justify the burden on the Amish's free exercise of religion. For that reason, the Supreme Court of Wisconsin concluded that the Wisconsin Compulsory School Attendance Law, sec. 118./15 is unconstitutional as applied to these Amish and their convictions must be reversed. Yoder, supra.@ 447.

In dissent, Justice Heffernan rejected the notion that education, and thus compulsory school attendance, is not a compelling state interest, emphasizing its origin in the act that first set up the political structure for the territory which became Wisconsin. Justice Heffernan opined that while "this case is incomplete, it reveals a complete lack of any attempt by local or state officials to deal realistically or imaginatively with a difficult problem." In fact, Justice Heffernan continues, there is strong evidence that the purpose of this prosecution was not to further the compelling interest of the State in education but rather the reprehensible objective, under the facts of this case, to force the Amish into school only for the purpose of qualifying for augmented state aid." Yoder, supra.@ 453. Justice Heffernan concludes his dissent by stating that he would affirm (the trial courts' decision) but would stay execution of sentence for such a period of time as is reasonably required to properly organize and to commence operation of an Amish vocational school, which at commencement of operation, the judgment would be vacated and the complaint dismissed. Yoder, supra.@ 454.

When the Supreme Court of Wisconsin decision came down on January 8, 1971, the reaction was mixed. The Wisconsin Attorney General's Office was split on whether or not the State should appeal to the U.S. Supreme Court. Public sentiment, at the time, reflected misgivings about the State's move to appeal Yoder. And in a stinging rebuke to the Wisconsin's Attorney General, Robert Warren, the Wisconsin Legislature in a 76-18 vote passed a nonbinding Resolution requesting the Attorney General not to appeal the state supreme court's opinion (Peters 2003, 121-23).

Chief Justice Warren Burger's majority opinion in Wisconsin v. Yoder, 406 U.S. 205 (1972) is seen by many as the "high-water" mark of religious liberty under the free exercise clause of the First Amendment. In applying his "Compelling State Interest Test," the Chief Justice found that the State had already stipulated that the Amish Respondents' religious beliefs were sincere. Next, the Supreme Court found that the Wisconsin com-

pulsory school attendance statute to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today, such that they must either abandon their belief and be assimilated into society at large or be forced to migrate to some other more tolerant region. With the burden of proof then shifting to the State, it was argued that the system of compulsory education was so compelling that established religious practices of the Amish must give way as such education was necessary for the preparation of citizenship as well as to become self-reliant and self-sufficient. In rejecting the State's notion that Amish children are allowed to grow in "ignorance"; Chief Justice Burger returned to the record which shows that not only do the Amish accept education through 8th grade but also continues to provide an "ideal" vocational education for their children in the adolescent years. The opinion continues that the Amish communities reflect Thomas Jefferson's ideal of the "sturdy yeoman" within a democratic society. Yoder, 406 U.S. @ 224-225. Finally, the Supreme Court concluded that the record strongly indicated that accommodating religious objections of the Amish by foregoing one or two additional years of compulsory education will not impair the welfare of the child or result in an inability to be self-supporting let alone discharge the duties of citizenship. Yoder, 406 U.S. @234.

In their concurring opinion, Justices Stewart and Brennan, while joining Burger's opinion and judgment of the Court, wrote separately to make clear that "This case in no way involves any questions regarding the right of the children of Amish parents to attend public high school." This concurring opinion continues that "this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of Mr. Justice Douglas. Yoder, 406 U.S. @ 237.

A second concurring opinion, authored by Justices White, Brennan, and Stewart, joined the opinion and judgment of the Court because they "could not say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of concededly sincere Amish religious practices to the survival of the sect." Yoder, supra. 406 U.S. @ 237-38. They wrote: "A State has a legitimate interest not only in seeking to develop the latent talents of the children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option…" However, this opinion continues, "the State was unable to demonstrate that the Amish children who leave school in the eighth grade will be intellectually stifled or unable to acquire new academic skills later." Yoder, 406 U.S.@ 241.

Justice Douglas' dissenting opinion is predicated upon the right of Amish children to religious freedom, which the Court failed to address; its analysis assumes an identity of interest between the Amish parents and children that may or may not be the case, as children have constitutionally protected rights. This issue Justice Douglas believed was protected at trial in the Respondents' Motion to Dismiss. (However, it is Black Letter law that in order to preserve an issue on appeal, it must be raised not only at the earliest opportunity but also must continue to be raised at every opportunity/stage throughout the appeal, which this record clearly does not reflect.) Nevertheless, Justice Douglas' dissented as to Adin Yutzy and Wallace Miller as the Court failed to address the religious liberty of Amish children Vernon Yutzy and Barbara Miller. Frieda Yoder did testify at trial that her own religious views were opposed to high school education and therefore Justice Douglas joined the judgment of the Court as to Jonas Yoder. Justice Douglas concluded that because the views of the two children were not canvassed by the Wisconsin courts, those issues should be explicitly reserved and a new hearing conducted on remand of the case. Yoder, 406 U.S. @ 246 .

The legacy of Wisconsin v. Yoder, supra immediately began to lose its luster as the New Glarus, WI, Amish settlement, which Chief Justice Burger was so desperately trying to preserve, began to come apart as the numerous Amish families sold their farms and moved out of the area. While the Amish were split over the decision to "go to law" in violation of their faith tradition of non-resistance, the Yoder decision also brought with it undue and unwanted attention to the settlement both from Amish and non-Amish people. Adin Yutzy and his family almost immediately left the New Glarus settlement when he was cited for violation of the state compulsory school attendance statute. Following the Supreme Court's decision in June 1972, Yoder and his family followed suit and left the settlement in the fall of 1973 for an Amish settlement in Missouri. Miller, the last defendant,

left the New Glarus settlement in fall 1977 for an Amish settlement in Evansville, WI, leaving only a few Amish families behind in New Glarus.

In the 1970s-80s, Yoder's legacy left an indelible mark on parent rights, homeschooling, as well as state regulation of religious schools. It also benefited some Amish in the 1980s-90s in their opposition to state laws mandating display of bright triangles on slow moving vehicles as too 'worldly". However, according to Jay S. Bybee, Yoder had a limited impact raising religious liberty claims and in fact appeared to be "long on rhetoric and short on substance." Chief Justice Burger's decision was also criticized for being too narrowly tailored to the Amish making its application to other faiths difficult (Peters 2003, 172, 175). However, the core of Yoder's constitutional legacy began to crumble in 1982 with the U.S. Supreme Court's decision in United States v. Lee, 455 U.S. 252 (1982), then through the 1980s with the Court's decisions in Goldman v. Weinberger (1986); Bowen v. Roy (1986) and Lyng v. Northwest Indian Cemetery Protective Association (1988). The death knell for Wisconsin v. Yoder, supra came in the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990) in which Justice Antonin Scalia scrapped the Yoder "compelling interest test." Smith now states that a statute's neutrality toward religion was enough for it to be constitutional. In response, Congress passed the Religious Freedom Restoration Act (RFRA) which in 1993 was meant to reestablish the compelling interest test as applied in federal law. The legal challenge to RFRA occurred in City of Boerne v. Flores, 551 U.S. 507 (1997). The Supreme Court found the law unconstitutional as it exceeded the powers of the Congress granted by the Fourteenth Amendment in a decision written by Justice Anthony Kennedy.

THE GRAVAMEN OF WISC. V. YODER

The gravamen may not be purely as a legal precedent. It may have mellowed and aged for the readers to reflect upon how people should be treated and should treat one another. Instead of trying to manipulate and scheme to fraudulently obtain precious and limited state funds for purposes of unjust enrichment, why should not all of the stake holders work collaboratively to solve the community problems as Justice Heffernan opined. "Do unto others as you would have them do unto you" (Matthew 7:12; Luke 6:31) .The gravamen of Yoder could also be to educate and reacquaint non-Amish people with Amish and other plain Anabaptist people. Chief Justice Burger's opinion provides a sweeping and insightful view of Amish history, Amish religious beliefs, and more importantly the simplicity and well-grounded educational system from the schoolhouse through the vocational training received. A visit to the Amish classroom may dispel some "ignorance" that each of us can harbor. In so doing, greater insight can be obtained into the role of the National Amish Steering Committee as well as the National Committee for Amish Religious Freedom, a guiding force in Yoder. Yoder's gravamen may also be found in footnote 1 of Wisconsin Justice Heffernan's dissenting opinion: "With our ostensible solicitude for the fate of children who are in other legal situations affected by conduct of their parents, it is surprising that no guardian ad litem was appointed to represent these children's interests." Without Court appointed *Guardian ad Litems* or attorneies to represents children's legal and constitutional rights, the children's liberties are at a great peril. Finally, the gravamen of Yoder at 50 reflects the acknowledgment that, in order to ensure that the vitality and strength of the Amish people is preserved, Amish/Mennonite Restoration Teams have been established to *inter alia* ensure survivor/victims' rights are acknowledged and respected and the responsible party is held accountable (Hoover and Harder 2019).

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