# Douglas: Partial Dissent

MR. JUSTICE DOUGLAS dissenting in part.

## I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents, on the one hand, and those of the State, on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

It is argued that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious freedom to defy a state criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

First, respondents' motion to dismiss in the trial court expressly asserts not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their **[p. 242]** children as a defense.[[1]](#footnote-1) Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

Second, it is essential to reach the question to decide the case not only because the question was squarely raised in the motion to dismiss, but also because no analysis of religious liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As in *Prince v. Massachusetts,* 321 U. S. 158, it is an imposition resulting from this very litigation. As the child has no other effective forum, it is in this litigation that his rights should be considered. And if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections. **[p. 243]** Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact, testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller, as their motion to dismiss also raised the question of their children's religious liberty.

## II

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. *See Pierce v. Society of Sisters,* 268 U. S. 510; *Meyer v. Nebraska,* 262 U. S. 390. And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. *See Prince v. Massachusetts, supra.* Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again. In *Haley v. Ohio,* 332 U. S. 596, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault,* 387 U. S. 1, 387 U. S. 13, we held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship,* 397 U. S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment. **[p. 244]** In *Tinker v. Des Moines School District,* 393 U. S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

"Students, in school as well as out of school, are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

*Id.* at 393 U. S. 511.

In *Board of Education v. Barnette,* 319 U. S. 624, we held that school children whose religious beliefs collided with a school rule requiring them to salute the flag could not be required to do so. While the sanction included expulsion of the students and prosecution of the parents, *id.* at 319 U. S. 630, the vice of the regime was its interference with the child's free exercise of religion. We said: "Here . . . we are dealing with a compulsion of students to declare a belief." *Id.* at 319 U. S. 631. In emphasizing the important and delicate task of boards of education we said:

"That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

*Id.* at 319 U. S. 637.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. **[p. 245]** To do so he will have to break from the Amish tradition.[[2]](#footnote-2)

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 be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. 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.[[3]](#footnote-3) If he is harnessed to the Amish way of life **[p. 246]** by those in authority over him, and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.[[4]](#footnote-4)

## III

I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that, if a group or society was organized to perpetuate crime, and if that is its motive, we would have rather startling problems akin to those that were raised when, some years back, a particular sect was challenged here as operating on a fraudulent basis. *United States v. Ballard,* 322 U. S. 78. But no such factors are present here, and the Amish, whether with a high or low criminal **[p. 247]** record,[[5]](#footnote-5) certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds v. United States,* 98 U. S. 145, 98 U. S. 164, where it was said, concerning the reach of the Free Exercise Clause of the First Amendment,

"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

In that case, it was conceded at polygamy was a part of the religion of the Mormons. Yet the Court said, "It matters not that his belief [in polygamy] was a part of his professed religion: it was still belief, and belief only." *Id.* at 98 U. S. 167.

Action which the Court deemed to be antisocial could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed, and it even promises that in time *Reynolds* will be overruled.

In another way, however, the Court retreats when, in reference to Henry Thoreau, it says his "choice was philosophical **[p. 248]** and personal, rather than religious, and such belief does not rise to the demands of the Religion Clauses." That is contrary to what we held in *United States v. Seeger* 380 U. S. 163, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

"Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

*Id.* at 380 U. S. 176.

*Welsh v. United States,* 398 U. S. 333, was in the same vein, the Court saying:

"In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote: "

"I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that, in our failure to **[p. 249]** recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.*"

*Id.* at 398 U. S. 342.

The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words:

""I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding *duty' to abstain from violence toward another person) is not `superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.""*

*Id.* at 398 U. S. 343.

I adhere to these exalted views of "religion," and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race. *United States v. Seeger,* 380 U.S. at 380 U. S. 192-193 (concurring opinion).

1. Thus, in Prince v. Massachusetts, 321 U. S. 158, a Jehovah's Witness was convicted for having violated a state child labor law by allowing her nine-year-old niece and ward to circulate religious literature on the public streets. There, as here, the narrow question was the religious liberty of the adult. There, as here, the Court analyzed the problem from the point of view of the State's conflicting interest in the welfare of the child. But, as MR. JUSTICE BRENNAN, speaking for the Court, has so recently pointed out,

"The Court [in Pierce] implicitly held that the custodian had standing to assert alleged freedom of religion . . . rights of the child that were threatened in the very litigation before the Court, and that the child had no effective way of asserting herself."

Eisenstadt v. Baird, 405 U. S. 438, 405 U. S. 446 n. 6. Here, as in Pierce, the children have no effective alternate means to vindicate their rights. The question, therefore, is squarely before us. [↑](#footnote-ref-1)
2. A significant number of Amish children do leave the Old Order. Professor Hostetler notes that "[t]he loss of members is very limited in some Amish districts, and considerable in others." J. Hostetler, Amish Society 226 (1968). In one Pennsylvania church, he observed a defection rate of 30%. Ibid. Rates up to 50% have been reported by others. Casad, Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber, 16 Kan.L.Rev. 423, 434 n. 51 (1968). [↑](#footnote-ref-2)
3. The court below brushed aside the students' interests with the offhand comment that, "[w]hen a child reaches the age of judgment, he can choose for himself his religion." 49 Wis.2d 430, 440, 182 N.W.2d 539, 543. But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity. Children far younger than the 14- and 15-year-olds involved here are regularly permitted to testify in custody and other proceedings. Indeed, the failure to call the affected child in a custody hearing is often reversible error. See, e.g., Callicott v. Callicott, 364 S.W.2d 455 (Civ.App. Tex.) (reversible error for trial judge to refuse to hear testimony of eight-year-old in custody battle). Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult. See, e.g., J. Piaget, The Moral Judgment of the Child (1948); D. Elkind, Children and Adolescents 750 (1970); Kohlberg, Moral Education in the Schools: A Developmental View, in R. Muuss, Adolescent Behavior and Society 193, 199-200 (1971); W. Kay, Moral Development 172-183 (1968); A. Gesell & F. Ilg, Youth: The Years From Ten to Sixteen 175-182 (1956). The maturity of Amish youth, who identify with and assume adult roles from early childhood, see M. Goodman, The Culture of Childhood 92-94 (1970), is certainly not less than that of children in the general population. [↑](#footnote-ref-3)
4. Canvassing the views of all school-age Amish children in the State of Wisconsin would not present insurmountable difficulties. A 1968 survey indicated that there were at that time only 256 such children in the entire State. Comment, 1971 Wis.L.Rev. 832, 852 n. 132. [↑](#footnote-ref-4)
5. The observation of Justice Heffernan, dissenting below, that the principal opinion in his court portrayed the Amish as leading a life of "idyllic agrarianism," is equally applicable to the majority opinion in this Court. So, too, is his observation that such a portrayal rests on a "mythological basis." Professor Hostetler has noted that "[d]rinking among the youth is common in all the large Amish settlements." Amish Society 283. Moreover, "[i]t would appear that, among the Amish, the rate of suicide is just as high, if not higher, than for the nation." Id. at 300. He also notes an unfortunate Amish "preoccupation with filthy stories," id. at 282, as well as significant "rowdyism and stress." Id. at 281. These are not traits peculiar to the Amish, of course. The point is that the Amish are not people set apart and different. [↑](#footnote-ref-5)