COMPULSORY HIGH SCHOOL ATTENDANCE AND THE OLD ORDER AMISH: A COMMENTARY ON STATE V. GARBER

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In 1965 the Kansas legislature amended the compulsory school attendance law to require all children under sixteen years of age to attend an approved school.¹ Previously children did not have to attend school beyond the eighth grade. There is evidence that one of the main purposes of the 1965 amendment was to facilitate the “integration” of certain separated religious subsocieties into the mainstream of American culture by forcing them to send their children to high school.² Even if that was not the main purpose, the legislators did know that members of those groups believed compulsory attendance in the public high school to be a threat to their separate existence and an encroachment upon their religious freedom.³ Faced with this knowledge, the legislature, in the responsible exercise of its power, should have made some attempt to ascertain whether the interests of the state really required the imposition of compulsory high school attendance on these people. No such attempt was made, however. No data were produced to indicate how many children would be affected by the change in the law. No attempt was made to foresee what might be the psychological effects of enforced high school attendance on children who had been reared in a separated society whose values were in many ways antithetical to those of the larger society for which high school seeks to prepare them.

The failure of the 1965 legislature in this respect was finally corrected in 1968.⁴ On the last day of the 1968 legislative session the compulsory school attendance law was again amended to provide an alternative to “regular public high school” for those groups with religious objections,⁵ thereby relieving them from the threat of compelled integration.

The 1968 amendment, however, came too late to help an Amishman named Leroy Garber and his family.⁶ His daughter, Sharon, had completed the eighth grade of public school before the 1965 law was enacted, but by September she had not yet reached the age of sixteen. Her father would not enroll her in a public high school, but instead did enroll her in a “vocational school” estab-

¹ KAN. STAT. ANN. § 72-4801 (Supp. 1967).
² See letter from Rep. John B. Unruh, 120th District, to the author, Oct. 15, 1967. Mr. Unruh, sponsor of the 1965 bill, stated: “One of my main objectives was to . . . give the Mennonite youth the same opportunity to attend high school as his neighbor.” The bill was not sponsored nor actively promoted by the State Department of Public Instruction. According to Rep. Unruh, “The bill was my own idea, firmly believing it is good for all the youth of Kansas.” Of course, showing what the sponsor of the bill had in mind does not establish the legislative intent, but the circumstances of the bill’s enactment including the absence of any statistical data indicating a need for the change in the law, strongly suggest that the bill was aimed principally at the Mennonites and Amish.
⁵ In December 1967, after the Kansas Supreme Court had upheld his conviction under the 1965 law for failing to require his daughter to go to public high school, and after the U.S. Supreme Court had refused to hear his appeal from the Kansas decision, Garber sold his farm in Reno County and moved to Ohio. He had another child just coming to high school age, and he could not face a repetition of the ordeal.
lished by the Amish. However, this school did not meet the standards prescribed by the state for acceptable parochial schools. Mr. Garber was prosecuted for violating the compulsory school attendance law. Despite the defense that his religious convictions forbade him to send his daughter to the public high school, he was convicted and fined. The Kansas Supreme Court affirmed his conviction, effectively ignoring the serious constitutional issues he raised.

The purpose of this paper is to examine *State v. Garber* and to point out some of its inadequacies, so that its effect on the future of religious liberty protection in Kansas will be minimized.

To the great majority of people there is nothing inherently irreligious about attending a public high school, and accordingly most people have difficulty comprehending why Amishmen like Garber are so obstinate in their opposition to laws compelling such attendance. To understand the Amish attitude, it is necessary to know something of their religious beliefs and the value system that underlies their separated society.  

**The Old Order Amish**

During the late seventeenth century, a schism occurred among the Mennonite brethren in Switzerland. Prominent among the issues in controversy were whether "true hearted" persons (Christians who had befriended the brethren but who did not join their society) could be saved and whether the sect's sanction of "shunning" had to be observed even by the wife of a shunned member. Jakob Amman, the leader of one faction, stood for the hard line on these and other doctrinal controversies. One could not serve God as he was called to do except by unswerving fidelity to *all* of the sect's precepts. Such a life was possible only when the chosen ones, as the followers of Amman considered themselves to be, could isolate themselves from the rest of the world in their own separated society. The maintenance of this separated society, as the means by which they would be enabled to find salvation, remains the principal concern of the present day followers of Amman—the Amish.

This attitude of aloofness from the rest of the world has a scriptural foundation.

Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good and acceptable and perfect will of God.  

Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness?

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*197 Kan. 567, 419 P.2d 896 (1966).*  
*Romans 12:2.*  
*2 Corinthians 6:14.*
From these Biblical passages, the Amish have derived a dualistic conception of reality:

To the Amish there is a divine spiritual reality, the Kingdom of God, and a Satanic Kingdom that dominates the present world. It is the duty of a Christian to keep himself "unspotted from the world" and separate from the desires, intent, and goals of the worldly person . . . . This to the Amishman means among other things that one should not dress and behave like the world.10

Given these basic beliefs, it is not difficult to understand why the Amish have clung so tenaciously to the antique culture of their ancestors, while the world has changed around them.11 At stake is not only their survival as a separate subculture but also their individual salvation. For them there is little distinction between the requirements of their religion and the demands of their separated society.12 The Amish believe that all the factors that set and keep them apart from the larger society have religious significance: for example, their special plain dress; their peculiar tonsorial standards; their avoidance of automobiles, power machinery, electrical appliances, and telephones; and their language. Even agriculture as a way of life has religious significance, not only because it was the way of their fathers and because their separated community could scarcely exist in an urban setting without it, but also because they feel they are closer to God when they are working directly with Him to produce grain, animals, and other products of the land.13

The Amish avoid contact with the outside world to the extent that is possible, but they do not actively oppose the larger society except when its requirements would force them to violate deeply held religious convictions. They pay their creditors and taxes. They are thrifty and industrious. Their prowess as farmers, even with the handicap of ancient equipment, is well known. It has been said that since the Amish first came to America, no Amishman has ever been convicted of a felony.14 In many ways they are model citizens.

They will not bear arms, however. Their culture produces nonaggressive individuals, and their religious beliefs require pacifism. This has been one of two main sources of tension between the Amish and the larger society. The other is their objection to compulsory education in public schools.

The Amish resistance to public education has brought them much abuse. Persons who do not understand their religious beliefs are likely to leap to the conclusion that the Amish are opposed to education, that they are a stupid, ignorant people, perversely dedicated to keeping both themselves and their children that way. This characterization is entirely unfair. The Amish are not ignorant, nor are they opposed to education. They are, in fact, extremely concerned about properly educating their children. They want their children to learn to read and write both English and German, to learn basic mathematics, and to acquire all the arts and skills that must be mastered by a good

10 J. Hostetler, supra note 7 at 48.
11 I.d. at 66.
12 Address by Franklin H. Littell, President of Iowa Wesleyan College, at the National Conference on "Freedom and Control in Education," University of Chicago, March 28, 1967.
farmer and homemaker. They do not, however, want their children to be subjected to the integrating influences of the public schools or to be taught the values of the larger society, which they consider to be part of the "Satanic Kingdom." For this reason they want their children to be educated in Amish schools, taught by Amishmen in accordance with the Amish value system to prepare them for life in the separated Amish society. Often state educational regulations do not permit this. States commonly require that children must be taught by teachers duly certified as having the kind of training and experience deemed essential by some regulatory agency. Because of their attitude about formal education beyond the primary school level, rarely can an Amishman meet the requirements for certification. In such circumstances the Amish have generally been willing to send their children to public elementary schools. The elementary schools are mainly concerned with teaching the basic subjects that the Amish approve anyway. Moreover, since they tend to live together in rural areas, the schools are often attended primarily by Amish pupils; and, thus, they are not excessively exposed to potentially contaminating contact with outsiders. Where the only public school is a consolidated school in town, however, some Amish communities have, on occasion, refused to allow their children to attend.

But required attendance in the secondary school is quite a different matter. The same reasons that make the Amish reluctant to send their children to public grade schools, i.e., exposure to an evil value system and too much contact with outsiders, apply with greater force to compulsory high school attendance. Adolescence is regarded as a critical period by the Amish, for it is during these years that their children are to decide whether or not to follow the Amish way. They are expected to participate more fully in the adult life in the Amish church and society and to master the essential farming and homemaking skills that successful life as an Amishman requires. Through the years they have developed effective means of imparting to their children the learning necessary for life in their separated society. Accordingly, they feel their children have nothing to gain from high school.

But their objection runs deeper. The subject matter of many high school courses is regarded as sinful by the Amish. The Amish shun such things as art and literature, because they are conducive to individual pride and tend to con-

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19 The profound contrast between the values of the Amish and those of American society generally are aptly described in History of Psychology, 18 Encyclopaedia Britannica 717 (1956):
Among primitives like the Arapesh, Zuni and Hopi, and among certain Christian sects, such as the Amish and Mennonites, the individual is trained from birth on to be sympathetic and helpful to those around him. Rivalry and personal push are punished. The result is a rather quietistic, mild and nonaggressive person. In contrast, the highly competitive societies like those of the Kwakiutl Indians or the modern United States induct their children into a set of values and habits which stress intense interpersonal struggle, ambition for status and monetary rewards.
20 A recent, widely publicized example was the controversy in Buchanan County, Iowa, which produced the nationally circulated picture of Amish children fleeing to the cornfield to escape the sheriff's deputies who were trying to transport them to school in town. See Newsweek, Dec. 6, 1965, at 38. See also Littell, State of Iowa v. The Amish, 83 Christ. Cent. 234 (1966). The Iowa Legislature, after unsuccessfully trying to compel integration of the Amish into consolidated urban school systems, recanted by exempting them from the compulsory school attendance law. See Senate File 785, 1967 Iowa Leg. Serv. 476-77, exempting the Amish from Iowa Code § 299.1 (1966).
lict with the simple and humble life which the Amish believe God demands. The study of science tends to conflict with their literalistic interpretation of scripture. The general stress on personal achievement in high school, which is essential to successful living in the larger society, is opposed to the fundamental values that one must accept in order to adjust effectively to life in the Amish society. Success in school may depend upon the student's abandoning Amish values. This puts these people to a very stern test at an age when they are especially vulnerable to alien influences. This the Amish believe the state has no right to require. They believe, with some justification, that children who remain long in the public high schools are effectively lost to the Amish society, which the Amish regard as the only sure way to eternal salvation. The question of secondary school attendance, as they see it, is more than just a question of whether a separated primitive subculture can be permitted to survive in the midst of modern America; it is fundamentally a question of religious liberty. Does the state have the right to force Amish parents and their children to participate in activities they sincerely believe may lead to their eternal damnation?

**RELIGIOUS LIBERTY AND STATE POWER**

When the *Garber* case was appealed to the Kansas Supreme Court, an opportunity arose to answer some of the most perplexing questions concerning the scope of constitutional protection of religious liberty. Can the state forcibly integrate into the mainstream of American society a closed, separated folk culture whose religious beliefs require separateness? Can the state displace a parent's right as natural guardian to determine whether his child will be educated for life in the larger society or for life in a separated society? Do children themselves have any protectible right to religious liberty; and, if so, what are the limits of that right and at what age do children acquire it?

The Kansas Supreme Court never reached these questions. It avoided the issues by simply ignoring the recent decisions of the United States Supreme Court touching these matters. The Kansas court's decision was based upon the now largely discredited distinction between religious beliefs and religious practices which the Supreme Court had effectively abandoned by 1940. This distinction was associated with what was often referred to as the "secular regulation" rule. Under that principle, although the state had no power to regulate a person's right to believe as he chose, the state could impose reasonable restrictions on the right to act upon those beliefs. There was thought to be "no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters." If the regulation was reasonably related to some legitimate secular purpose, it could be validly

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18 See note 14 supra.
18 Galanter, *supra* note 17, at 235.
applied to one who claimed that his compliance would interfere with his freedom to exercise his religion. Implicit in this "secular regulation" rule is the notion that the regulation is to be characterized as "secular" or "religious" according to some objective community standard, not according to those standards accepted by the individual claiming religious liberty protection.

Following the secular-regulation-rule approach, the Kansas court said that "the question of how long a child shall remain in school is not a religious one."20 This meant, then, that regardless of how Garber himself felt about it, neither he nor his daughter had any constitutional claim to an exemption. The court's conclusion was bolstered by the following statement: "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom."21 This statement is tautological at best. However, the Kansas court here was undoubtedly referring to requirements that were "reasonable" exercises of police power when applied to persons generally, i.e., valid "secular regulations." As such, the statement is false. In *State v. Smith,*22 the Kansas Supreme Court said, in applying section 7 of the Kansas Bill of Rights, that it would condone refusal to salute the flag when based on religious objections. Many other cases uphold the failure to comply with generally valid regulations in the name of religious freedom. The most significant is a case which completely refutes the "secular regulation" approach. That case is *Sherbert v. Verner,*23 a landmark decision that has been viewed as heralding "the dawn of a new day for religious freedom."24 There is nothing in the Garber opinion to indicate that the court was even aware of the Sherbert decision. It is principally the court's failure to apply the analysis of Sherbert that makes the Garber decision such an unsatisfactory one. Had the Sherbert analysis been employed, the court still might have decided to affirm Garber's conviction, but in the process of reaching its decision the court would necessarily have shed some new light on the critical and difficult questions relating to the relation between religious freedom and state power.

The Sherbert decision was announced by the United States Supreme Court on the same day as the better known but probably less significant decision of *School District of Abington Township v. Schempp.*25 It was an appeal from the South Carolina Supreme Court's ruling that Mrs. Sherbert was ineligible for unemployment compensation because she refused to accept a job that would require her to work on Saturday. To be entitled to compensation one must be "available for work." This had always been understood to mean that the claimant must be willing to accept a job suitable for his abilities on any working day, including Saturdays. Mrs. Sherbert did not deny that this was a valid rule, but she did argue that it could not validly be applied to her since her refusal to

21 Id. at 573, 419 P.2d at 901.
24 Galanter, supra note 17, at 241.
work on Saturday was based on the fact that, as a Seventh Day Adventist, Saturday was her Sabbath day.

The Supreme Court agreed with appellant's position, holding that even though a regulation is reasonable when applied to everyone else, if it substantially infringes on the religious freedom of one individual it can not be constitutionally applied to him. He is entitled to an exemption from the regulation unless there is a "compelling state interest," not just in the subject of the regulation but also in applying the rule without exemption.

Justice Brennan's majority opinion noted that governmental regulations of certain kinds of overt acts had been upheld in the past in the face of religious liberty objections, but it stressed that "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." The finding that the refusal to work on Saturday posed no such threat, the Court declared that the South Carolina decision could not stand, unless the regulation either did not substantially interfere with appellant's free exercise of religion or, if it did, was justified by a "compelling state interest."

The Court held that conditioning benefits on the availability for work on Saturday did constitute a substantial, although indirect, impairment of religious freedom.

The [state's] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

In considering whether a "compelling state interest" existed, the Court said: "It is basic that no showing merely of a colorable state interest would suffice; in this highly sensitive constitutional area "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." The Court rejected the state's contention that granting an exemption might lead other claimants to feign religious scruples to avail themselves of such an exemption, thereby diluting the unemployment compensation fund. Of course, the state does have an interest in preventing the filing of spurious claims, but it would seem that this danger could be averted by some means short of denying an exemption to sincere Sabbatarians. The Court felt that the prospect of fraudulent claims was not a serious one, but, it noted that even if it were, "it would plainly be incumbent upon the appellees [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

Two justices dissented in the Sherbert case, but a short time later the Court, apparently unanimously, extended the Sherbert principles to one who sought exemption from jury duty on the ground that her religious scruples forbade her

\footnote{374 U.S. at 404.}
\footnote{Id. at 406, citing Thomas v. Collins, 323 U.S. 516, 530 (1945).}
\footnote{Id. at 407.
to sit in judgment of others. In *In re Jenison*\(^{30}\) the Court, in a short *per curiam* decision, summarily reversed a Minnesota Supreme Court decision which upheld a criminal contempt conviction for refusal to serve as a juror and remanded the case "for further consideration in the light of Sherbert v. Verner."\(^{31}\) On remand the Minnesota court undertook the two-step analysis called for by *Sherbert*, finding that the requirement of jury service did substantially interfere with petitioner's free exercise of religion and that the state had failed to establish that its interest in obtaining competent jurors would be jeopardized by exempting those who were opposed to jury service on religious grounds.\(^{32}\)

The Supreme Court has not refined the *Sherbert* principle any further, but certain state courts have considered it. In *Wright v. DeWitt School District*\(^{33}\) the Arkansas Supreme Court, without really applying the *Sherbert* analysis, ruled that a *Sherbert*-type exemption should not be allowed to one who objects to a compulsory smallpox vaccination on religious grounds. However, even if the court had analyzed the case in accordance with the *Sherbert* approach, it seems likely that a compelling state interest could have been found. A refusal to submit to vaccination can have an effect on persons other than the one seeking exemption. Its success as a public health measure depends upon the extent of its coverage. Thus, the state's interest in preventing disease would undoubtedly be deemed sufficiently compelling to override the individual's religious objection to inoculation.

In *People v. Woody*,\(^{34}\) the California Supreme Court applied the *Sherbert* analysis in holding that a general criminal prohibition against the use of peyote, a non-addictive hallucinatory narcotic, could not constitutionally be applied against a member of the Native American Church—a religious group composed mainly of American Indians, which employs peyote as a central feature of its ritual and which regards peyote itself as an object of worship. The court found no "compelling state interest" sufficient to justify this substantial interference with religious freedom. The state could not show that peyote had any physically deleterious effect on its users or that its use made them susceptible to addiction to other drugs. It was argued that exemption would lead to serious difficulties in enforcing the law because of the likelihood of fraudulent claims, but the state failed to persuade the court that these possible difficulties were sufficient to warrant denial of the exemption to the individual defendant.

The state attempted to establish that it had a duty to eliminate the use of peyote among the Indians because of its symbolic significance in "obstructing enlightenment" and its tendency to tie the Indians to primitive conditions. The court rejected this contention in words that could be applied as appropriately to the situation of the Amishman Garber: "We know of no doctrine that the state, in its asserted omnipotence, should undertake to deny to defendants the

\(^{30}\) 375 U.S. 14 (1963).
\(^{31}\) *Id.*
\(^{32}\) *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963).
\(^{33}\) 238 Ark. 906, 385 S.W.2d 644 (1965).
\(^{34}\) 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition.'

In two other cases claimants sought unsuccessfully to obtain the same type of exemption from the narcotics laws as California had extended Woody. In State v. Bullard, the defendant claimed his church, the Neo-American Church, regarded peyote as essential and marijuana as "most advisable" in its religious services. The North Carolina court did not apply the Sherbert test but simply ruled that the use of drugs, even peyote and marijuana, was a threat to "public safety, morals, peace, and order." It seems likely, however, that the court would have reached the same result by following the Sherbert route. The sincerity of defendant's belief was questionable: the "Neo-American Church" appeared to be a thinly veiled attempt to take advantage of the exemption the California court had accorded Woody. If the defendant does not sincerely believe what he claims, it is impossible for him to demonstrate the substantial impairment of religious liberty that Sherbert requires.

In the other case, the United States Court of Appeals for the Fifth Circuit upheld the conviction of Dr. Timothy Leary for unlawful possession of marijuana in spite of Leary's contention that he sincerely believed the use of marijuana was important in his religion, Hinduism. The court found a compelling state interest in the need to regulate the traffic in marijuana, which Congress had found to be a threat to public safety, peace, and order. Moreover, the court could find no evidence that the use of marijuana was essential to the practice of Hinduism, as the use of peyote was in the Native American Church.

**Balancing the Interests**

Although the number of cases decided since Sherbert v. Verner has not been great, it is becoming increasingly clear that the solution to religious liberty cases must be reached by a process of weighing and balancing the individual's religious freedom interest on the one hand against the public's interest on the other. The factors to be considered in weighing the individual's interest would include the sincerity of his belief; the "centrality" or importance of the activities for which the exemption is claimed to the beliefs and practices of the religion espoused by the claimant; and the extent to which the application of the regulation would burden his ability to exercise his religion.

It is more difficult to generalize the factors to be considered in weighing the public interest. The kind of interest that must appear is an interest, not in regulating the activity generally but in not allowing any exceptions. Generally,
the state would have to show that the exception would have some undesirable effect, for example, that it would disrupt an entire regulatory scheme, that it would entail substantial expense or cause administrative difficulty, or that it would adversely affect the interests of "unconsenting others."43

If the balancing process that Sherbert calls for had been applied in Garber, the conviction probably would not have been upheld. Language in the Kansas Supreme Court's opinion itself shows that Garber's religious freedom interest was strong. Considering the factor of "sincerity," the Court said: "It can scarcely be doubted that defendant is sincere when he says his religious convictions are violated if his daughter receives a secular type of education found in the secondary public schools . . . ."44 The "centrality" or importance of the religious practice to the defendant's faith was likewise conceded to be very strong.

A cardinal tenet of the Amish faith is the Biblical injunction, "Be not conformed to this world," adherence to which, under their rigid interpretation, has doubtless contributed to their survival as a cultural group. Opposition to public secondary schools derives from their feeling that eventually this exposure of their children to that secular influence will erode the Amish way of life.45

Finally, the state's interference with Garber's right to freely exercise his religious beliefs was serious and direct. The law commanded that the child do something the Amish believe may lead to eternal damnation. The state enforced this command by a criminal sanction directed against the parent, requiring him to disregard the command of his religion that he raise his children for life in the Amish society as the only sure way to salvation. The interference here is clearly more serious than that involved in Sherbert v. Verner itself. The burden on free exercise there was indirect. South Carolina did not require Mrs. Sherbert to work on Saturday; it only made it economically disadvantageous if she did. Here, the interference with both the parent's and the child's right of free exercise (if a child has a protectible interest in his own right) was direct.

In the face of a strong religious liberty claim, it would seem that only a very compelling state interest could justify denying the Amish an exemption from the compulsory school attendance law. No such interest could be predicated upon expense or administrative difficulty caused by the exemption. On the contrary, such an exemption would save the state the expense of educating a number of children. There would be no difficulty in administering the exemption, for the Amish are readily identifiable.

Finally, exemption of the Amish would have no adverse effect on outsiders. If the effect of exemption were to be that these children would be set at large in a competitive, technological society without the proper training to make their own way, then exempting them from educational requirements reasonably necessary to avoid unemployment or poverty could adversely affect others.

43 Galanter, supra note 17, at 281.
44 Id. at 282.
46 Id. at 569, 419 P.2d at 898.
The state clearly has a strong interest in seeing that its people are productive and not dependent on public welfare for their livelihood. However, this argument could not be made in the case of Amish youth. They will not become burdens on the public; they will simply disappear into the separated Amish society, where they will undoubtedly become productive members. No one has ever suggested that the Amish lack diligence, industriousness, or skill in their agricultural calling. If an Amishman becomes incapacitated for farming, he is cared for within the Amish community; he does not become a public charge. Although the Amish believe that insurance “yokes them unequally” with outsiders, they have provided institutional arrangements for loss-spreading within the Amish community so that such things as natural disasters and crop failures do not impoverish individual members. Certainly, insofar as the children who remain in the Amish society are concerned, exemption from high school poses no burden or expense on outsiders. Of course, some do leave the separated society, but before that fact could be used to justify requiring all Amish children to go to public high school, the state would have to show both that a substantial problem exists and that no alternative solution would be feasible.\(^{47}\)

Whether allowing an exemption would undermine a major purpose of the Kansas compulsory school attendance law is a more difficult question, because the legislature failed to disclose what its purpose was in extending the period of compulsory attendance to age sixteen. If the purpose was to insure more adequate preparation for life in society at large, that purpose would not be subverted by an exemption for citizens who would remain in an isolated sub-society. But there may have been other purposes. To some extent the 1965 change in the law may have been intended as a means of protecting a vulnerable group—children—from unwise decisions by themselves or their parents. The state does have an interest in protecting those persons who through immaturity or incapacity are unable to protect themselves. Religious objections by parents have not been allowed as a basis for avoiding their duty to provide medical care for their children.\(^{48}\) Blood transfusions have been ordered, over religious objections, for children and even for adults who, in view of their condition, were regarded as incapable of deciding for themselves.\(^{49}\) The lack of an adequate education can handicap a child in a way analogous to the sort of handicap that lack of medical care could cause. This analogy, however, depends upon the assumption that the child would be exposed to the evils associated with inadequate education if he did not go to high school. In the case of most children this assumption is probably warranted, but in the case of children who are

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\(^{47}\) See Erickson, *Storm Front: State Regulation of Nonpublic Schools*, 62 Liberty, Nov.-Dec. 1967, at 19-20, suggesting the possibility of special training programs for members of isolated sub-societies who decide to leave. Erickson notes that the same idea has been advanced by Dean Kelly, who refers to it as a “half-way house for escaping Amishmen.” Kelly, *Is There Room For the Amish?*, TOWN AND COUNTRY CHURCH, May-June 1966, at 7-9, 30.


members of a separate society that has its own institutional protections against those evils, as the Amish society does, the argument lacks merit. In fact, prolonged exposure to secondary education almost surely will handicap the Amish child by making it more difficult for him to adjust to a happy and successful life in the Amish society. The state can hardly be said to have a compelling interest in seeing that children who will not be participating in the life of the larger society and whose nonparticipation causes the state no burden or expense and which produces no adverse effect on "outsiders," are prepared for life in the larger society, especially when that will undermine their preparation for the society in which they will make their life.

The state can, of course, act to protect the interests of those children who will leave the Amish society. But normally even the children themselves do not know at the time they finish the eighth grade whether they will leave the Amish fold. Is that group so numerous or does it cause such problems as to justify requiring all Amish youth to go to high school? It is difficult to answer these questions on the basis of available data. It is possible, of course, that if all Amish youth are required to attend high school until age sixteen, the result will be that the number of defections from the Amish fold will increase to the point that they could become a serious problem if not properly educated. But this self-fulfilling prophecy could hardly be regarded as demonstrating a compelling state interest.

Thus, the Kansas Supreme Court erred seriously in failing to consider the Garber case in light of Sherbert v. Verner. The attempt made here to apply the Sherbert analysis indicates that Garber’s conviction probably should have been reversed. It must be noted, however, that when appeal from the Kansas court’s decision was taken to the Supreme Court of the United States, the Court refused to hear argument on it. With three justices dissenting, the Court dismissed the appeal for want of jurisdiction, and, considering the appeal as a petition for certiorari, denied it. Since no opinion of any kind was filed, it is not possible to determine why the Supreme Court refused to hear the case. If they themselves were not yet ready to grapple with the problems posed by the Garber case, it nevertheless seems incredible that they would not at least remand the case for consideration in the light of Sherbert v. Verner as they did in In re Jenison.

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50 See Erickson, supra note 47, at 20. “When individuals are alienated from their origins and close-knit communities are disrupted, psychological malfunctions usually ensue.”
51 One ex-Amishman, now a college senior, told me that roughly half of the children of his age group left his community. He felt the proportion of defectors would be considerably higher if children were forced to go to high school. It should be noted, however, that he was referring to a marginal Amish community that was on the verge of leaving the Old Order (which it since has done) to affiliate with the slightly less conservative Beachy Amish Church. The rate of defection in stable Old Order communities is not so high. Hostetler notes that “the loss of members is very limited in some Amish districts and considerable in others.” In one Pennsylvania church he found that 30 per cent of the children did not join the parents’ church. J. Hostetler, supra note 7, at 210.
53 Chief Justice Warren and Justices Douglas and Fortas thought probable jurisdiction should be noted.
CONCLUSION

A combination of errors at each stage of the legal process has produced an unfortunate breakdown of constitutional protection. The legislature erred in precipitously enacting the amendment to the compulsory school attendance law without any data indicating the need for or probable effects of the change. The Kansas courts erred by treating the case in accordance with the long discredited "acts—practices" distinction and in ignoring the Supreme Court's decisions of the past two decades, most notably *Sherbert v. Verner*. It is hard to say that the United States Supreme Court erred, since it is not clear just what they did. Nevertheless, unless there was some procedural defect in the appeal that deprived the Court of jurisdiction, the conclusion seems inescapable that even that high tribunal misconceived the nature of the case when it refused either to hear the case or to send it back for reconsideration under the test of *Sherbert v. Verner*. The Court's refusal to hear this case is especially unfortunate in view of the fact that the Amish oppose litigation almost as strongly as they oppose compulsory high school attendance. It is, therefore, unlikely that the Court will get another opportunity to reconsider the Amish problem in this context.

The legislature has now decided to permit the Amish to maintain a separate educational system, and that will probably satisfy the Amish for the time being. But the *Garber* decision remains unaltered in the *Kansas Reports*, a reminder to the Amish that the privilege accorded them by the 1968 law is merely a matter of legislative grace, not of constitutional right. If a later legislature should again attempt to force the Amish into public high school the situation of the *Garber* case could arise again. In that unfortunate event it is to be hoped that the Kansas court will be aware of the inadequacies of the decision in *State v. Garber* and will not feel bound to follow it.

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The *Garber* case was carried for him to the Supreme Court by the National Committee for Amish Religious Freedom and the American Civil Liberties Union.