



Freedom of Religion and Children

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In a number of recent federal court cases parents have sought to have their children exempted from certain school activities on the grounds that the children's participation in those activities violates their (the parents') right to freedom of religion. In *Mozert v. Hawkin's County Public Schools* (827 F. 2nd 1058) fundamentalist parents of several Tennessee public school children brought civil action against the school board for violating their constitutional right of freedom of religion. These parents sought to prevent their children from exposure to beliefs or practices opposed to their (the parents') religious convictions. They claim that elementary school readers introduce ideas repugnant to their and their children's deeply held religious tenets.

The district court upheld the parents' claims, but that decision was overturned by the appellate court. Now the U.S. Supreme Court has refused to hear an appeal. The parents' case is dead. I am not entirely satisfied, however, with the resolution of the matter. Though I agree with the decision to overturn the lower court, I think the reasons for doing so are not entirely convincing. More importantly, I think all the judges and the litigants in the case have failed to address significant fundamental questions about the scope of parental authority, especially the authority to teach or indoctrinate children about religious matters. Though I realize this is an extremely sensitive matter--one which the courts are most assuredly loathe to address--that does not, in any way, undermine its importance or centrality. These are issues which must ultimately be faced squarely by the courts. I had hoped that the Supreme Court would have addressed them in this case. I was wrong. Once again the central issues were avoided. Or so I shall argue.

THE ISSUES

Most of us presume that freedom of religion is important. We are repulsed at the thought of someone forcing her religious views on us or others. "We want the option of believing and behaving as we wish--particularly on matters as significant as our religious beliefs. Although important, these rights are not unlimited. If a person's religious expression harms another, it can be legitimately restricted. Human slavery and sacrifice, for example, are impermissible even if prescribed by one's religion. Likewise for religious beliefs or practices which might harm one's children. For instance, the courts have consistently held that a parental decision to withhold necessary medical treatment from a child harms that child's interest (*Wallace v. Labrenz* 104 NE 2nd 769). In these situations the state may legitimately require necessary medical care even if the parent's sincere religious conviction forbids it.

The courts, however, have been reluctant to interfere with parental decisions except when the child's life or physical health is threatened. Though this reluctance is in many ways understandable, it is unjustified. Children's interests should have more weight than most courts presently grant them. Or so it seems to me.

The crucial (though heretofore ignored) question is: can the parents legitimately demand that the children be shielded from beliefs to which they (the parents) object? Does the fact that the children purport to agree with the parents have any legal weight? The parents claim the constitution gives them the right to have their children opt out of reading these "offensive" books and to be exposed only to texts which express views identical with their own. Are the parents right?

Before I address these questions, let me quickly review the facts of the case: the parents challenged the use of certain readers in elementary reading class. The readers in question depict children who question parental authority, discuss situation ethics, consider the tenability of divergent religious beliefs, and advocate tolerance of opposing views--views to which the parents of the children strenuously object.

Claims akin to these have been previously recognized by other courts. For example, in *Moody v. Cronin* (484 F. Supp. 270) children were exempt from physical education classes because their parents thought exposure to students dressed in shorts would incite unwholesome urges. In *Wisconsin v. Yoder* (406 U.S. 205), Amish children were exempt from high school since their attendance would

presumably undermine the Amish way of life advocated by their parents.

However, even in these cases where the courts have ruled against parental claims (as in *Mozert*), they did not justify the decisions by express appeal to the interest of children. In most cases, they did not even mention the children's interests. Instead they cited some "compelling state interest" which presumably justified overriding the parental claims. Nonetheless, I think we can discern a deep and pervasive confusion about the scope of parental right and the children's interests.

A Confusion

This confusion is evident even in the parents' brief in *Mozert*. The parents claim that their children agree with them, thereby implying that the school readers conflict with the children's religious beliefs. They thus suggest that being exposed to these readers violates both the children's and the parents' rights to free religious expression. This claim is intermingled, though, with the contention that the parents have a constitutional right to *control* their children's religious development. These claims are clearly in tension, if not outright contradictory. Yet the possibility of conflict between the interests of children and their parents is never mentioned by the courts or by any of the litigants in *Mozert*. Moreover, it is a conflict which, as far as I can ascertain, has been noted by a single federal judge: Justice Douglas in *Yoder*.

All parties seem to agree that parents have the right to control the religious upbringing of the child, yet also think it is important to determine if the children find the readers offensive. However, if parents have the right to control their children's religious beliefs, as the parents aver, then the children cannot have any rights in this matter which need to be or could be protected. The fact that children agree with their parents--if they indeed do--is legally irrelevant; even mentioning the children's agreement is a diversion from the presumed fundamental legal issue.

On the other hand, if children have rights which merit mention in these legal proceedings, then the parents cannot have a right to control the children's religious upbringing. If the children have rights, these may need protecting not only from state intrusion, but, at least in some instances, from parental indoctrination. The parents cannot consistently argue for both rights; nor can the judge consistently recognize both. Yet that is exactly what the district judge did.

Setting this inconsistency aside; what exactly is wrong with the parent's position? It is undeniable that it has some legal merit. Nonetheless, I think their claim is seriously misguided though the only way to demonstrate that has consequences which many will find objectionable.

Courts need not decide if a religious belief reasonable

Most lay people will quickly reject the parents' contention since they find the parents' religious beliefs unreasonable if not irrational. The parents think *Macbeth* is objectionable because it discusses witchcraft. They consider the *Diary of Anne Frank* heretical since it suggests diverse religious beliefs might be correct. They are offended by any story, television show, or movie which encourages tolerance, openmindedness, respect for differences, feminism, or children who question parental decisions--for example, most fairy tales, Aesop's Fables, "Sesame Street," etc. Most people find these claims preposterous. Even many who share the plaintiffs religious perspective would reject the contention that a child's exposure to these views is religiously forbidden.

It is insufficient, however, to find the parents' religious convictions unreasonable. The constitution protects their right to religiously instruct their children, they claim, and that protection can not depend upon a judicial decision that those beliefs are reasonable or plausible (see *Thomas v. Review Board*, 450 U.S. 710, 718). The constitution does not protect only expression deemed reasonable by the court, it protects religious expression period; that is, at least expression which does not harm others. If the courts were empowered to determine which religious beliefs were reasonable, then legal protections would likely be accorded only to those whose views meshed with, or were at least vaguely similar to, those of the sitting judges. That would undermine the very purpose of these constitutional guarantees.

The bill of rights is strongly counter-majoritarian.¹ It insures that the beliefs or views of the majority cannot automatically override individual choice. To that extent, the plaintiffs' position is tenable. Judges need not determine that a religious belief is plausible before they decide that it merits legal protection. This is not the way to undermine the parents' case. Consequently, to reject the parents' arguments, one must show that their freedom of religious expression is more limited than they and the district judge supposed.

There is, I think, both a direct and an indirect way to show that. The first begins with the claim that everyone should have the same

right to free religious expression -- regardless of the right's rationale. It then notes that the parents are striving to effectively deny to the children the same right they (the parents) find so dear. The second argues that the right to free religious expression is justified by concern for personal autonomy. This more basic concern will constrain the control parents can legitimately exercise over their children. Though these arguments differ, they are clearly interrelated.

To set the stage for these arguments I must first describe the most common rationale for freedom of religion. Moreover, it is a rationale frequently cited by courts in defense of freedom of speech and religion (see, e.g., *Dennis v. United States*, 341 US 494, 71, S.Ct. 857 and *New York Times Co. v. Sullivan*, 376 US 255; 84 S.Ct. 710). The rationale will help us understand both the force and the limitation of the parents' position and the lower court's ruling. Though a detailed and sophisticated defense of this rationale would require volumes, it is sufficiently illuminating for our purposes to briefly summarize John Stuart Mill's argument in *On Liberty* for freedom of religion (and for other rights of personal choice and action).

Why freedom of religion is important

Mill claims that freedom of thought and belief (including religious belief) is essential because it is the best avenue to truth. That is not to say freedom guarantees truth, but it is to say it provides the most reliable means for attaining it. Suppressed views, Mill points out, frequently turn out to be true, and even when they aren't, they still contain elements of truth (or insights)--elements which might have escaped notice had the view been repressed. Moreover, even when the view the majority desires to suppress is completely false (something which is rarely the case, he urges), something vital is lost by suppressing it. The majority would have benefitted from discussing the mistaken view; they would have better understood the strengths (and weaknesses) of their own beliefs. Unless balanced by serious consideration of opposing and even false views, the majority's received beliefs cease to be living truths for them and become instead dead dogmas--items of belief which make no real difference to their lives. The presence of divergent religious views enlivens discussion about important issues, thereby increasing the opportunity for finding truth and for determining one's personal beliefs.

Mill is not concerned merely with freedom of belief; he is equally concerned with freedom of action, with the *exercise* of one's

deeply held beliefs, including one's religious beliefs. It is better, on Mill's view, for someone to live according to her own rights -- even if she is wrong--than to engage in the "ape-like quality of imitation." A person's life is her own even if it is, from some external perspective, misguided. She will be better off making her own mistakes than in mimicking other people's "correct" views. She has a better chance of discovering what really is best for her.

Furthermore, if her life is self-directed, she can see and learn from her mistakes; something she cannot do if she merely follows someone else's life plan. The freedom to exercise one's religion, to engage in experiments in living, is as essential as freedom of belief. Freedom of religion, then, is legitimate since it increases the chance of finding the truth and because it gives each individual the means to a self-directed and satisfying life. It does not guarantee these worthy goals, but it is a vital social mechanism supporting them.

I recognize there are plausible objections which can be raised about aspects of Mill's account. Nonetheless, I think the broad outline of the account is correct. Moreover, something like this justification has been offered by the courts in defense of individual rights of conscience (see citations above). Consequently, it will provide a means to assess the legal merits of Judge Hull's decision in *Mozert*. It will enable us to discern its initial plausibility as well as its defects.

WHAT'S WRONG WITH THE PARENTS' CLAIMS

Children's interests have been ignored

As mentioned earlier, all of the litigants in the case have assumed that the only constitutionally recognized interests are those of the parents and the state. This is demonstrated clearly in Judge Hull's decision:

The parents claim their religion compels them not to allow their children to be exposed to the Holt series. Plaintiffs have also alleged that the Board's policy interferes with the inherent right of the parents to 'direct the upbringing and education of children under their control' (Pierce)... the court FINDS that the plaintiffs beliefs are sincerely held religious convictions entitled to protection under the Free Exercise Clause of the First Amendment.

In short, according to Judge Hull, the only legal issue is: "What do the parents want?" What they want, they get. The children's interests are irrelevant.

The appeals court decision was not much better. Justice Lively, in issuing the court's opinion, rejects the parents' claims because the children were not required to believe what they were reading, and thus, the reading program did not burden anyone's constitutional rights of freedom of religious expression. In a concurring opinion Judge Kennedy comes closest to identifying what seems to me to be the fundamental issue. She claims that even if the parents' rights of free religious expression were constitutionally burdened, that such a burden would still be legitimated by a compelling state interest, namely, the interest in having an informed citizenry. Apparently, though, this interest applies only to children who attend public schools, for there is no such expectation of children attending private schools. Thus, she does not recognize that all children have interests which may be harmed by overly zealous parents.

Judge Boggs, on the other hand, claims the school board should have accommodated the parents, though there is no constitutional requirement that they do so. School boards may, on his view, lay down virtually any requirements they wish, and unless these abridge the establishment clause, they are constitutional. All these decisions, though, skirt the central issue, namely, what to do if a parent's practice of religion harms the interests of the adult that the child will become?

In other situations where the parent's religious beliefs or practices directly and physically harm the child, the courts have ruled that the parent's wishes (even when the child claims she concurs) may legitimately be overridden. For instance, when parents have refused to allow treatments thought to be medically necessary for their child's health, for example--blood transfusions and some surgery--courts have intervened and authorized them (see, for example, *Wallace v. Labrenz*).

We must remember, though, that not all harm is physical. Repressing political speech, for example, does not physically damage anyone, but it can harm them. Slandering a person harms her even if it doesn't cause physical damage. Admittedly it is easier to identify physical rather than psychological harm; but the law must some times make difficult decisions. I want to suggest that the judge's decision in *Mozer* ignores non-physical harm to children. Parental indoctrination, normally thought well within the scope of legitimate parental authority, can harm the child. Children have interests which should constrain that authority; interests which legitimate the state's intervention on the child's behalf.

However, I need not assume that children's interests or rights are more important than or are even equal to those of parents. Nor

do the judges in aforementioned cases like *Wallace v. Labrenz* make this assumption. I need only hold that children's significant interests may not be legitimately ignored; they must be taken into consideration and in some cases may override parental interests.

Parents should have extensive authority

Let us consider, for a moment, the central claims of the parents' case, namely, that they have a right to control the religious, moral, and political upbringing of the child (see *Pierce v. Society of Sisters* 268 U.S. 510, 534). I think most people will agree that parents do and should have wide-ranging influence over the religious and moral instruction of their children. In fact, I would go further. Even though parental authority is limited, as I shall argue in a few pages, I would contend parents not only have a right to teach their children moral and religious beliefs, they have a solemn duty to do so. To instruct a child--even if the beliefs she is taught turn out to be wrong--is preferable to not instructing her at all.

Some parents, out of a fear of giving their children wrong beliefs (or possibly out of indifference), fail to provide them with any moral, political, or religious guidance. Though this decision may be well motivated, it is usually disastrous for the child. If a child is not taught any substantive beliefs she comes to think that ideas and beliefs are largely irrelevant. "If they are important," the child might think, "why haven't my parents taught me their beliefs?" Conversely, if a parent teaches their children religious, political, and moral views, then the child will learn a vital lesson, namely, that one's beliefs and ideas are not insignificant appendages; they are essential parts of who and what she is. Even if her beliefs change, she is likely to retain the general conviction that a person's beliefs are important.

Conversely, if a child is brought up in an environment without parental instruction, the child fails to acquire an initial set of beliefs. One's initial beliefs set the stage against which she can compare beliefs she later encounters--to see how they are similar and how they diverge. Without these, there is no point of comparison. When confronted with opposing views later in life, an individual reared without parental instruction will likely be indifferent to the alternatives. Since she has no strongly held beliefs, the alternatives don't conflict with anything she deems important.

Consequently parental instruction is probably essential for a person's genuinely considering alternative views, and thus, is essential for the child's full development. This is exactly what Mill's view

would suggest. However, parents may legitimately instruct their children not because they have a God-given right to mold them, but because instruction is vital to the child's long-term interests. Yet the same considerations which explain the need for parental instruction also constrain it. But neither the parent nor the courts seem to recognize that.

Why parent authority should be limited

First, we should note that the parents are not asserting a right to religious expression per se. No one has proposed limiting their religious expression; nor has anyone told them they cannot instruct their children as they wish. What is at issue is whether they should or could obtain state support to limit the child's access only to views which are consonant with their own. The parents asked for that support and the district judge obliged. Though the appeals court rejected the parents' legal arguments they did not, I am sad to say, challenge this presumption of parental control.

Of course, inasmuch as the parents think they know the truth about how their children should live, it is not surprising that they want this control. They think there is one and only one way for their children to attain salvation, and salvation, for them, is the most important good in the world. It is a good which they think will be blocked by the corrupting influence of the textbooks.

However, the intensity of the parents' beliefs is insufficient to bar state intervention. For instance, if a child needs a blood transfusion, the state will and should authorize it even if the parents think the transfusion will hinder or even block the child's search for salvation. The child's interests demand it.

We are now in a better position to see the direct objection to the judge's decision. If the parents have a right to free religious expression, then no one should force them to hold any particular religious belief. No one should compel them to espouse a belief. More relevant to the present point, no one should brainwash them so that they are "compelled" to adopt a particular belief. Their children have the same right--even if not as children, then as the adults the children will become. However, the parents have requested and been granted court permission to indoctrinate their children, thereby undermining the child's ability to freely choose, and thus, abrogating their right of free religious expression. That makes the parents' right more important than the children's. That is unjust.

A parallel argument can be mounted in a somewhat more circuitous fashion. The claim that the parents should morally instruct

their children is based on a Millian argument that such instruction is in the child's best interest. However, it is not the child's immediate interest which explains (or justifies) the need for parental instruction; it is the interests of the adult whom the child will become. The child may somewhat benefit from parental instruction now. The primary benefit, however, is that it helps her develop into a fully functioning adult. By instructing her the parents enable the child to become an enlightened citizen and an autonomous individual. Concern for the future of the child explains the parental right to instruct, the right does not emerge in a vacuum.

This same concern, however, also serves as a brake on the parental right. Some teaching aids the child while some could harm her. Certainly there are ways in which indoctrination can harm the child, most notably by effectively closing off the alternatives for the adult the child will become. An individual can choose only among the options of which she is both aware and can consider seriously. If parents limit the child's exposure to religious and moral views identical to their own, then the child will see only one option and choose it; she will likely hold the same beliefs when she becomes an adult.

Of course the parents in *Mozert* realize this. That is exactly why they are so adamant. They know that if their children are aware of alternatives, they might eventually choose them. *That* is most assuredly what they don't want. They wish to be not only the primary instructional influence on their children; they should be the sole influence. They think they should determine the beliefs of the adult the child will become.

"But what," the parents might ask, "is wrong with that?" Parents understandably desire that their children grow up to be certain kinds of people, among other things, people who live up to parental ideals. True. But that does not show that the state should take steps to help them realize these desires at the expense of the child's interests. Parental indoctrination, particularly when coupled with an absence of exposure to alternative views, can limit the options of the adult whom the child will become. It can limit her options as much as, if not more than, legal prohibitions against the adoption of those views. Let me explain.

The parent's complaint is based on the claim that adults should be able to control and direct their own lives, particularly in those matters they deem important, for example, in their religious beliefs. To say that one has right of religious belief and free religious expression is to say that no one else should limit her options of belief and expression. Yet there are multiple ways in which the options

can be limited. They can be limited by explicit prohibition -- that is the parents' fear. They can also be limited by certain kinds of indoctrination or brainwashing--that is my fear.

Interestingly enough, the parents in *Mozert* recognize this latter possibility; they make essentially this very point in stating their case. They cite approvingly the U.S. Supreme Court's ruling in *Tinker v. Des Moines Independent School District* that public school students 'may not be regarded as closed-circuit recipients of only that which the state chooses to communicate' (393 US 503,111). Moreover, in their initial brief before the federal district court they also include a long citation from "The Manipulation of Consciousness," originally printed in the *Harvard Civil Rights Civil-Liberties Law Review*, (Vol. 15, p. 309). That quote deserves

reiteration:Free expression makes unfettered formulation of beliefs and opinions possible. In sum, free formulation of beliefs and opinions is a necessary precursor to freedom of expression. If the government were to regulate development of ideas and opinions through, for example, a single television monopoly or through religious rituals for children, freedom of expression would be a meaning less right. The more the government regulates formation of beliefs so as to interfere with personal conscience, the fewer people can conceive dissenting ideas or perceive contradictions between self interest and government sustained ideological orthodoxy. If freedom of expression protected only communication of ideas, totalitarianism and freedom of expression could be characteristics of the same society.

There is no doubt, I think, that what the authors claim and the parents aver is true. A one-sided presentation of views by the state is bad. If the government allowed only the expression of one view, the individual's chance to develop her own views would be greatly reduced. Moreover, from a broader perspective, government indoctrination would be detrimental to the entire society. It would block the means for progress, it would hinder the search for truth.

The judge, parents, and the state, however, seem oblivious to the fact, that *for the individual child*, governmental indoctrination is not *nearly* as likely as is carefully orchestrated parental indoctrination to make freedom of expression meaningless. If the state teaches one view in the school, the child might still be exposed to variant beliefs by her parents. But if the parents push a unitary view, and the state supports the parents' decision to stop their children's exposure to alternatives, then the child will doubtless grow up without genuine freedom of expression. That is, she can, without

overt constraint, express the views she holds; it is just that the views she holds won't be freely chosen. She will only be able to mimic the views she learned. By substantially altering the child's ability to reason and choose, the parents will effectively control, her actions as well as, if not better than if they tried, to overtly control them.

Successful indoctrination is at least as much a limitation on her freedom as is an explicit rule backed by law. That seems obvious. If indoctrination would not have this effect, why would we take the trouble to oppose governmental propaganda? And why would any government even be tempted to indoctrinate its citizens?

Objectionable indoctrination is likely to occur, however, only when there is a single view to which the child is exposed. Parental instruction is not likely to have this disastrous effect (though on occasion it might) if the child is eventually exposed to alternatives. If a child attends school where alternatives are presented, then she will have an opportunity to adopt them, even if, in the end, she doesn't. Her chance to develop into a mature, self-directed adult is enhanced by exposure to alternative views.

Since the parents in *Mozert* are asking the state to keep the children from being so exposed, then the parents' claim should be denied, the appellate court's ruling sustained. It should be sustained, though, not because the decision will place a burden on the school system (which it doubtless would), but because it will harm the children.

So both the direct and the indirect arguments lead to the same result. If we assume freedom of religious expression is justified by the value of autonomy, then we must reject the judge's decision because it supports parental decisions which damage, if not completely undermine, the child's budding autonomy. Or, if we assume freedom of religion is a non-derivative, intuitively grasped right which is not supported by an appeal to autonomy, we may reject the judge's decision because it gives parents justifiable power to violate their children's rights.

We may hold this conclusion without undermining parental authority. Parents will still have wide-ranging control over their children. Nor need we conclude that children's interests and rights are more weighty than those of their parents; I do not think that we even need hold that the children's rights are as strong as those of their parents--though perhaps they are. I have only argued that the children's interests cannot be completely ignored as they were in this case and as they have been typically within the American judicial system.

A radical implication

This argument undercuts the judge's decision, but it may have radical implications. The argument has stated that children should be given a meaningful right of free religious expression, regardless of the parents' wishes. This requires allowing the child to be exposed to alternative views. Otherwise the child will not have genuine freedom of choice or derivatively, meaningful freedom of expression. Hence, it seems that *any* system that prevents such exposure is suspect.

Consequently, not only should the state not support the efforts of parents of public school children to deny their children exposure to alternatives; they should not do so for the parents of private school children either. Children who attend private religious schools may well be denied access to alternatives. If they are--and that would have to be determined by careful study--then those schools should be banned or forced to change. Of course if such schools don't block children's exposure to alternative views, then nothing I have said shows they are objectionable.

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NOTE

1. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). Also see Justice Jackson's decision in *Barnette v. West Virginia*: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts . . . [they] may not be submitted to vote, they depend upon the outcome of no elections."