The Human Right of Home Education

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Introduction

> *"I find that [the Romeikes] belong to a particular social group of homeschoolers who, for some reason, the [German} government chooses to treat as a rebel organization, a parallel society, for reasons of its own. As I stated above, this is not traditional German doctrine, this is Nazi doctrine, and it is, in this Court's mind, utterly repellant to everything that we believe in as Americans…. if Germany is not willing to let them follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for the applicants."*
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> *-Immigration Judge Lawrence O. Burman granting political asylum to the Romeike family because of Germany's anti-homeschooling policy.*

Reflecting a striking international contrast, homeschooling is legal in all 50 United States but is forbidden in all 16 German Lander. In 1925 the United States Supreme Court declared in *Pierce v. Society of Sisters* that although the state may reasonably regulate education to ensure minimum standards, parents have a "fundamental right to direct the education and upbringing of their children." By 2015, the German Federal Constitutional Court ("FCC") had twice ruled (Konrad 2003 Schaum 2014) that a total prohibition on home education did not violate Germany's Basic Law. By 2006, the European Court of Human Rights ("ECtHR") had ruled four times that German and Swedish public policy that effectively prohibited home education was not a violation of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). The ECtHR held that it was within both Germany's and Sweden's margin of appreciation to totally proscribe home education as a matter of law.

In this essay I intend to contrast the philosophical theory of rights with the "global" theory of rights to evaluate the specific claim that home education ought to be viewed and protected as a human right. I will assess how this proposed right fares under enforcement mechanisms, with emphasis on the FCC and ECtHR which employ the global theory's enforcement approach of proportionality and balancing. I plan to address some of the following questions.

What does this asymmetrical result suggest about the proposed right of home education? What does it say about the global theory of rights? Moller (2012) points to the FCC and ECHR as model courts for rights enforcement within the global model, but the proportionality/balancing approach to adjudicating human rights has failed to uphold home education as a right. Does this mean that home education is not a right, or is not a right that should be legally protected? Is the total prohibition of home education evidence of a legitimate application of the global model of constitutional rights proportionality approach? Although Moller positions the United States as an outlier home education is completely legal there. What does this contrast between the "outlier" and the global model suggest about these two approaches to evaluating/adjudicating human rights claims? Is home education so marginal a project that the global model permits total prohibition? Or is home education too novel or too idiosyncratic to be considered a traditional human right?

Home Education?

Home education is a fast-growing alternative form of education that provides an interesting window to assess public policy as well as philosophical and legal frameworks regarding the modern human rights

project[1]. "Consequently, home education and the conflicting responses to it represent a key site for exploring the meanings of democracy and the purpose of education" (Monk 2015:175). As a prospective right, home education involves the synthesis of at least two distinct rights with two *potentially* distinct right holders: children as a right holder of the right to education and parents as the right holders of parental rights, here, specifically in education.

Homeschooling or, synonymously, home education can be defined as an elective practice where children are educated directly under the personal oversight of their parents, often, though not exclusively, by their parents and usually in a home setting. Advocates, practitioners and researchers grapple with the semantics of this new and innovative form of education. Depending on the philosophical underpinning, country of origin, and other factors, homeschooling is also known as home-based education, home education, unschooling, home-centered learning, home instruction, deschooling, autonomous learning, and child-centered learning. Regardless of its various names, the decision to homeschool contains two discrete elements: a "decision by parents not to educate their child in an institutionalized setting, and the decision by parents to educate their children in a home setting" (Hadeed 1991). Homeschooling can also be determined by what a parent does *not* choose for his child's education—this definition incorporates the rejection of institutional schooling found in most government as well as traditional private schools (Murphy 2012).

Although a growing amount of research on home education practice demonstrates outcomes are generally positive (Murphy 2012), some advocate for greater regulation due to perceived or potential harms (West 2009). Far from being an easily defined and uniform practice, Murphy notes that homeschooling as a concept "has become fuzzier over recent years as hybrid models of homeschooling and public schools have emerged" (Murphy 2012:4). The author's observations as a professional working as an international homeschooling researcher and advocate suggest similar patterns in other countries where homeschooling has existed for some time. Murphy also describes homeschooling as a social movement and theorizes that homeschooling has grown so fast in the United States because of the general over-arching sociological movement towards privatization observed in the closing decades of the twentieth century. More precisely, homeschooling, at least in the United States, can be explained as an outgrowth of a national shift from seeing government as the solution for societal problems towards an increasing desire on the part of the citizenry to privatize more parts of society (Murphy 2012 Lubienski 2015).

We assume here that education does not necessarily equal school attendance Katz (2008).[2] The development of learning technologies that allow for the education of children outside of traditional schools is growing rapidly and should be taken into account when interpreting the right to education. (Munoz 2007 Mitra 2015). One state supreme court in the United States has addressed this point specifically in the home education context ruling that "a school, in the ordinary meaning of the word, is a place where instruction is imparted to the young, that a number of persons being taught does not

[1] The United States home education community numbered nearly 2 million students in 2012, approximately 3.5% of the school age population, growing over 60% between 2003 and 2012 (U.S. Department of Education 2014).

[2] We also assume that parents do not have the right to ignore their duty to insure that children are educated. Parents who completely ignore this duty are neglectful parents, and the state should intervene to take steps to protect children from harm.

determine whether the place is a school, and that by receiving instruction in her home in the manner shown by the evidence the child was attending a private school.… The object is that all children shall be educated, not that they shall be educated in any particular manner or place" (Supreme Court of Illinois 1950:577).

Philosophers and lawyers have different approaches to figuring out what are or ought to be human rights. While not every lawyer subscribes to the global model of rights and not every philosopher subscribes to the philosophers' model, one common source of inspiration or definition that both philosophers and lawyers often look to are the numerous human rights documents that have come into existence following the adoption by the United Nations of the Universal Declaration on Human Rights ("UDHR").

The UDHR recognizes both education as an individual right but also parental rights. Article 26.1 establishes the right to education and article 26.3 establishes the right of parent in education providing that "parents have the prior right to decide what kind of education their children shall receive." The UDHR, other human rights instruments and major regional human rights treaties also recognize the family as centrally important to society and entitled to protection and explicitly recognize parental rights. Although articulated differently these provisions recognize that parents are entitled to respect of their religious, philosophical or pedagogical convictions. The right includes both the right to provide but also the right to be exempt from any particular instruction in religious or moral subjects.[3] The International Covenant of Economic Social and Cultural Rights ("ICESCR") specifically recognizes that "individuals" as well as "bodies" may form educational institutions. Article 2 of Protocol 1 of ECHR strongly enjoins the state in "all areas of education" to respect the convictions of parents.

Two Views of Rights

In groundbreaking work, Kai Moller proposes a global model of rights. He contrasts "the global theory of rights" with the "philosopher's theory of rights" by comparing two theories of rights (legal vs. philosophical) and contrasting four questions about rights.

What is a right? Everything or only a few things? Moller contrasts rights inflation vs. rights as having special importance. Are rights only negative or are they also positive? Do rights only operate vertically or also horizontally? How are rights enforced? With judicial review and special normative values or using judicial balancing/proportionality (Moller 2012)?

Moller describes the philosophers view as being most associated with American Constitutional law. Referencing well-known constitutional and rights philosophers such as Rawls, Raz, Dworkin, Waldron and Griffin, Moller characterizes the philosophers' theory of rights as first, limiting rights (too much) by including only those aspects of human behavior/action that are essential to being human or very important such that they deserve being called a human right (e.g., rights have special importance); second, rights primarily operate to restrain government from interfering (e.g. rights are negative); third, rights only or almost only operate vertically protecting individuals from state action (e.g. rights operate vertically) and; fourth enforcing rights protection through judicial review where the few rights identified are protected with a schema of special normative force (under the US Supreme Court this would be called strict scrutiny for fundamental rights).

[3] Human Rights Committee, General Comment 22, 27 September 1993). Par 4 and 6.

The contrasting view Moller presents as the global model, originates from the legal community of lawyers, law professors and judges. Influenced by Alexey's *Theory of Rights*, Moller argues that the approach is also seen outside Europe in nations including South Africa, Canada, and Israel among others. The global model contrasts with the philosophers theory in that rights are not limited but rather any act that can be conceived of by the autonomous human mind can be characterized as a potential right. For example the right to feed the birds in the park or the right to ride a horse through the fields, the right to watch pornography or even the right to kill another person are actions that can be considered as rights just as much as the more "traditional" rights of free speech or freedom of thought are considered rights (Moller 2012).

Second, in the global model both negative *and positive* obligations are imposed on the state. Under this theory the state will have positive obligations to do something for a person rather than simply *refrain* from doing something. Rights become positive obligations as is seen in the South African constitution that contains explicit social and cultural rights such as the right to have access to adequate housing, health care, food, water and education.

Third, under the global model of human rights, duties and obligations are imposed not only on the government but on other persons; rights operate not only vertically but also horizontally. Thus, for example, the government itself has an obligation to not wrongfully discriminate but also must take affirmative action to prevent others from wrongfully discriminating or otherwise disproportionately interfering with a legitimate right.

Finally, as a matter of enforcement, rights claims under the legal theory are adjudicated through judicial review also but rather than differential weighting (special normative force) as under the philosophers' approach, all rights are adjudicated applying the same approach - proportionality/balancing in which a court conducts balancing to determine whether an alleged interference with a right is proportionate. If the interference (by the state or potentially the third party) is proportionate, it is upheld as a legitimate interference; if not proportional, it is held as a violation of the right.

The Philosophers' Question

Because the philosophers want to limit rights, they often struggle to define how and what is a human right (Waldron 2013). Philosophers explore different ways to identify the core essence of what makes a particular value a human right and how a right is or can be realized in the of political, social, cultural judicial or other contexts. Dworkin's theory of rights as a "trumps" explains how the right holder defends himself from state interference; if an individual asserts a trump she wins, if not she loses. But a right is only a trump if it imposes constraints that impair an individual's capacity for self-determinative "agency" and that are not motivated by religious justifications. Dworkin grounds human rights in human dignity which he conceives as the principles of "intrinsic value" (all persons are of equal value) and of "personal responsibility" (each person has a special responsibility to decide for himself what is important to him without external imposition). Any interference that unjustifiably interferes with either of these elements would be a violation of a human right. Dworkin formulates his concept of liberty linked to personal responsibility as "the right to do what you want with the resources that are rightfully yours." An unjustified interference means that regard must be had not only to the interference but the rationale for the interference. Because Dworkin prefers the secular state he explains that religiously motivated interference is unjustified.

Griffin posits the notion of "personhood" to ground his view and identify which human rights are special enough to merit special normative protection. For Griffin whatever is required to reach the minimum threshold of personhood qualifies as a right. In addition to a minimum level of autonomy, minimum provision and liberty are required. Autonomy requires that a person be able to define one's own path in life without being dominated or controlled by someone else. To Griffin the enemies of autonomy are indoctrination, manipulation, conformity, brainwashing and immaturity. Minimum provision means that a person has a right to the most basic goods in order to operate as a person, including education and other resources (presumably food, water, shelter). This point suggests that to Griffin at least there may be positive obligations on the government that could be enforced. Finally, Griffin requires a certain minimum amount of liberty. This means that government may not interfere with a person living his conception of what that person deems for himself "the good life."

Is education special enough to qualify for rights status under the philosophers view?

Raz notes that no human right is absolute but must be established as a right by way of something more than simply "pointing to the value of the right to the right-holder" (Raz 2015:225) but De Groof (2015:38) says that "education is a *pre*-condition for the full enjoyment of a variety of human rights." Katz (2008) probes the moral and legal question about whether there is or ought to be a human right to education. Katz points to both Dworkin and Griffin to suggest that in today's society a certain minimum threshold of education is necessary for personhood and that the right to education deserves constitutional recognition under a moral reading of the U.S. constitution.

To the philosopher even a right that is not explicit in a constitution or law does not mean that it is not a human right. Raz (2015) observes that there are certainly some moral rights that are recognized in law and some that are not and that education should be considered a moral right. Katz notes that the U.S. Supreme Court has recognized education as one of the most important functions of government but that it does not possess fundamental constitutional right status (the highest level of special normative value under the U.S Constitution) (*Rodriguez 1973)*. However, many states in the U.S. have acknowledged that education is a right, at least access to public education, either by court decision or by statute.

> *"Thus, my own position is that the right to education is the right to be adequately educated at least up to some threshold, as Guttman advocates; this right does not function as a specific entitlement but as a general principle, an ideal directive, deserving to be honored… namely having acquired the ability and inclination to think critically for oneself and to make informed reasoned decisions in one's own interests."*
> *(Katz 2008)*

For the philosopher education is a right in order for a person to achieve either agency, autonomy and thus every person, including a child, has a right to education.

What about the right of parents to control the education of the child? In other words, to what extent can the state interfere to impact the sort of horizontal relationship between the parent and child or to restrict the parent's rights to control a child's education? In this area there is some controversy.

Reich (2002) argues that children should be considered at least minimally autonomous and should be allowed to decide if they want to be home educated and that home education should be regulated by

the state. Shulman (2014) argues that education is a state-delegated duty rather than a primary right/responsibility of the child's parents and thus the state has a wide latitude for interference. For some, this is especially true in the area of home education. Ross (2010) writes "that the state can and should limit the ability of intolerant homeschoolers to inculcate hostility to difference in children." Yuracko notes that "there can and should be legal and constitutional constraints on the ability homeschooling parents to teach their children idiosyncratic and illiberal beliefs and values." Fineman argues that the solution to homeschooling is that it shouldn't be permitted so that public education can be "mandatory and universal." Monk (2015) observes that this "privatization of education which is what home education effectively represents, provokes discomfort" from those who are on the "collectivist left".

This politicization of education concerns Glanzer who says that home education is needed in a liberal society. "Although a concern with the political dimension of our human personhood is understandable and necessary in education, we are more than political citizens." The "beauty of a liberal democracy" is that it allows for pluralism to flourish (Glanzer 2013). The political dimension of education in liberal democracies, however, endangers pluralism when it becomes an "all encompassing, exclusive life philosophy or functional religion." This "increasing tendency of educational philosophers" appears to be the trend as "leaders and practitioners think about education primarily in terms of our political identity" and signals a potential danger … especially when scholars like Gutmann (1999:282) write about the "primacy of political education."

Glanzer proposes that "leaders of liberal democracies, including educational leaders, need reminders of liberal democracy's limits and the fact that the child is not the mere creature of the state." He also says that homeschooling and a meaningful protection of parental decision-making in education provide these needed reminders to policy makers and citizens.

Katz put social relationships into the context of education with more importance. "Presumably, considerations of their own interests will acknowledge their relational obligations to friends, family, and members of communities to which they belong, for I do not believe in a view of personhood that disconnects persons from their social relationships" (Katz 2008).

Common sense and common law principles reflect that children are not agents capable, or at least permitted, to engage in fully autonomous decision making. As a legal matter children generally lack the legal capacity to exert their rights (Lubienski 2015). As a matter of law (at least in the United States and presumably many other countries) children in their minority are not competent to make legally binding decisions. They cannot enter into a legally enforceable contracts. They are not permitted, except for specific statutory exceptions, to give informed consent for medical treatment or to give consent for sexual relations.

The US Supreme Court has recognized that parental care, custody and control are an enduring tradition in American jurisprudence and that only after evidentiary proof can a parent be deemed unfit. In other words, the presumption in U.S. law is that fit parents make decisions that are in the best interests of their children and that this right is of special normative value and has been adjudicated that way. (*Doe v. Heck* and *Parham v. J.R*)

The right of parents to decide to home educate their children also touches upon the parents right to autonomy. Lubienski (2015) observes that home schooling is a self-selected project and thus important

and often self-defining for the parents choosing it as an educational alternative to public education. Apple describes a large portion of homeschooling mothers (if not fathers also) as obtaining great self-meaning and definition through homeschooling. “Lives are made meaningful and satisfying – and identities supported – in the now reconstituted private and public sphere” (Apple 2015). Home education is so outside the ordinary and so demanding of sacrifice that it is clearly a conception of the good life that is intense and intrinsic to the kind of autonomous self-definition that all of the philosophers explored so far would describe.

What about adjudication (special normative value)? While philosophers grapple extensively with what “gets in” as a human right, the philosopher’s approach doesn’t have as well defined model of rights enforcement other than judicial review. And philosophers argue whether judicial review fits within the democratic model where majorities rule or whether judicial review should be strong or weak (Waldron 2013). However, where education has been heavily litigated such as in the United States and Canada home education is legal in all the states and provinces. Several state and provincial courts have reviewed home education with special normative value applying a higher level of scrutiny even while acknowledging that the state has interest at stake.

In this section I have shown that the (synthesized) right to home education (the right to education plus the right of parents to decide how a child is educated) is a right that deserves recognition and protection. In many jurisdiction the right has been recognized implicitly and explicitly as such and has been protected by law. Home education does not interfere with the child’s right to education but interference with the right of home education does interfere with parental rights (and possibly the child’s own right) to the kind of education their parent chooses for them.

I turn now to the global model of rights.

The Global (Legal) Theory of Rights

Under the global theory of rights, Moller (2012) presents an explicit and efficient model for identifying rights (anything goes) and a coherent and powerful approach to enforcing rights through strong judicial review using proportionality and balancing.

The first feature suggests that the doctrine of rights inflation means that virtually any “project” that can be conceived of by a person can be justified as one that the state must not interfere with in a disproportionate way - this is the crux of the matter. Home education, therefore, is no different than any other project whether feeding the birds in the park, watching pornography or killing someone – it’s just a matter of whether the interference is proportionate. The second feature of the global model suggesting that positive socio-economic rights impose obligations on the state is relevant. As noted above, education is considered an explicit right, and there is a duty imposed on the state to provide, at least in some way, for this right. The third feature of the model, horizontal effects, is also relevant. Home education involves two right holders albeit in a special “social relationship” (Katz 2008) as well as special legally cognizable relationship (dependency). Finally the fourth feature is the adjudication of the right through proportionality/balancing.

As Moller (2012:134) explains the “doctrine of balancing holds the central position in the global model of constitutional rights…the final and often decisive stage of the proportionality test, where it is used to resolve a conflict between a right and a competing right or public interest.” Some critics quibble with

the idea of balancing as an inappropriate term. They point to the analogy that balancing rights is like balancing the length of a line with the weight of a rock (Tsakyrakis 2009). However, this criticism seems rather semantic. It isn't hard to understand that in the rights adjudication context, balancing is more about the process of reasoning or socratically grappling with issues presented and trying to come to a conclusion. This is, after all, what courts are driven to both by form and function (Kumm 2007 Moller 2012). And this is what Moller wants from his theory – not that Judges are given substantive outside guidance but rather a process they can use to reason through to the right answer (Moller2013)

Following an interference with a "prima facie" right, a party complains to a court and the court applies a four-step process to determine whether or not the interference may be justified as "proportional". First, the court assesses whether the interference with the right pursues a *legitimate* goal. Second, the court evaluates whether the interference is *suitable* or rationally connected to achieving (at least to a small extent) that goal. Third, the court must determine whether the interference is *necessary*, meaning that there is no less intrusive but equally effective alternative to the infringement, and finally, the law must not impose a disproportionate burden on the right-holder – this is the *proportionality/balancing* stage.

In the next section I will assess how the FCC and ECHR have applied the proportionality/balancing test to the right of home education.

A Tale of Two Courts: Testing the Global Model

Spiegler (2015) observes that "home education is not allowed in Germany as an alternative to public schooling." He affirms that fines, criminal prosecution and loss of custody of children are possible state actions against families who persist in homeschooling. It is widely reported that many families who wish to home educate their children felt they had no choice but to emigrate. This cultural hostility in Germany, and similarly in Sweden, have contributed to the bulk of international human rights case law on the issue. We will focus on the German cases because they are the most recent, well documented and because Germany is a highly regarded court.

In *Konrad* a religious family sought to home school their children. They were fined by the local authorities for not sending their children to school. They appealed all the way to the FCC arguing they had a right under the German Basic Law to decide how to educate their children. In 2003, the FCC denied their claim arguing that a ban on home education in the Federal Republic of Germany was consistent with the Basic Law because "society has an interest in counteracting the development of parallel societies and integrating minorities" (Konrad 2003 Schaum 2014).

The FCC reasoned that even if home education could meet the academic needs of students, the social integration required for a "tolerant" society could not be achieved in any other way but by attendance within the closely supervised/controlled system of state and private schools (Konrad 2003). The FCC further reasoned that because children were unable to foresee the long term consequences of home education (presumably harmful in the court's mind) that the court had an obligation to protect children from such potential consequences. The FCC finally reasoned that the German Basic Law endowed the state with an *equal* interest in the education of children and could thus prevent a parent from home educating their children.

German Basic Law in Article 6 states that "the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall supervise them in the performance

of this duty." Article 7 of the Basic Law grants authority to the state to supervise the "entire school system" and explicitly allows for approval of private education as long as it is "not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby." Spiegler (2015) suggests that a major reason for German education policy may have as much to do with the overarching cultural goals of maintaining cultural homogeneity which underscores the FCC's concern about the development of "parallel societies" as a major reason the FCC was willing to ban home education.

In 2006, the ECtHR rejected the Konrad's application essentially agreeing with every point of the FCC's reasoning and finally noting that Germany was within its margin of appreciation ("MoA"). As an international human rights court, the ECtHR has different authority, interests, and enforcement capacity. There are other important differences between the two courts but the important similarity for our purpose is that they both apply the doctrine of proportionality. The MoA doctrine is one key difference between the two courts and is why I do not interlaced the MoA discussion within the four-step test below – it seemed distracting from the flow of applying the global model's four-part test and there doesn't appear to be a very parallel concept applied by the FCC. Therefore I have placed a separate section after to specifically discuss the MoA.

My review of the *Konrad* case indicates that the FCC's concern regarding societies' legitimate interest in "counteracting the development of parallel societies" was a major/the primary goal of the policy. The educational needs of children as the court indicates were secondary; therefore I will primarily assess the counteracting parallel society's policy goal as the primary reason the FCC ruled against the Konrad family.

In the first stage of proportionality we ask if counteracting the development of parallel societies is a *legitimate* goal of the state.

It is noteworthy that neither the FCC nor ECHR describe what they mean by term parallel societies. I have explored this issue elsewhere and suggest that if one contrasts the idea of parallel societies with pluralistic societies one should view a parallel society as a group of people who live inside or within another society but do not share minimum common characteristics. I define these commons as a common boundary, common language, a common economic system, a common legal system and common political authority reflecting the will of the people with respect to laws that apply equally to all. Parallel societies, then, seek to limit restrict its connection with the larger society and to operate its own civic institutions, judiciary, reject using a common language, seek to maintain a separate economic system and seek to apply its own political will. It may even dispute the boundary authority of the society (e.g. the Kurds in Iraq).

If we accept the idea that government exists to maintain order by establishing a rule of law that applies equally to all within its jurisdiction—then indeed parallel societies could be dangerous to democratic nations with well-established polities. In such parallel societies the rights that should be protected and enjoyed by all citizens might be repressed in the name of some other philosophy, legal system or religion. If this were permitted it would undermine a key tenant of a free democratic society - that all citizens receive equal protection under the law. Because it is a duty of the state to protect the rights and equal application of the law to all people living within its jurisdiction—this cannot be allowed. Because the FCC does not explicitly tell us that this is what they mean, one might surmise that what they had

have in mind was what some would call pluralism – where people with even significant differences, religious, cultural, linguistic, philosophical (educational) preferences, live together peacefully pursuing their concept of the good life. But where parallel societies may indeed be the enemy of a democratic state, dogmatic and coerced uniformity is the enemy of a pluralistic society.

With little evidence, the court assumes that home education leads to the development of parallel societies. But is this true? The court doesn't investigate. However Murphy (2012) suggest that homeschoolers are a social movement but although distant from some aspects of society, do not isolate from the commons I propose above. Nevertheless, at this stage we are simply investigating whether the court has a legitimate goal viz. counteracting the development of truly parallel societies. We will give the benefit of the doubt to the FCC and acknowledge counteracting the development of parallel societies is a legitimate goal and move on.

The next step is to determine whether the policy articulated by the FCC is *suitable* for the (presumed) legitimate purpose of counteracting the development of parallel societies. Does banning home education counteract the development of parallel societies, even a little?

The court establishes the importance of inculcating the value of tolerance in youth as a means of preventing the development of parallel societies. Here the court presumes that this value can only be obtained by exposure to others who have different beliefs and that this necessary exposure can only be achieved in an appropriate way in the school system. Interestingly, Cheng (2014) has established that political tolerance is higher with more exposure to home education. However, the threshold for this stage of analysis is also low. It seems plausible that requiring children to attend school increases the chances of interaction with others at least physically and perhaps in the language of the host culture, thus preventing a society from completely walling itself off from mainstream society. Whether school attendance actually contributes to developing the values of tolerance is difficult question that should not be assumed. However with limited space and little actual research on this issue in Germany we admit that the policy contributes, at least a little, to the legitimate policy goal.

The third step in the proportionality analysis is to determine whether the policy is *necessary*. As Moller (2015) puts it, the "principle of necessity requires that there must be no other, least restrictive policy that achieves the legitimate goal equally well."

Here the court steps into what I would say is the global rights model's reliance on trusting to strong judicial review based on proportionality and balancing. Courts are institutions insulated by their own power and prejudice, and because the four-step model does not recognize special normative value for rights, every right is treated the same way; thus courts can reason their way wherever they want based on their own cultural and majoritarian presumptions. This also reveals a challenge for the ECtHR; it has limited access to factual information about such complex policy questions.

A fairly superficial effort at comparative jurisprudence in the European Community, this question seems easy to answer. The fact that a great majority of European nations explicitly permit home education suggests that there *probably is* a less restrictive approach (Donnelly 2012). Although one can understand why the FCC as the Supreme Constitutional Court of Germany may not undertake any serious comparative jurisprudence to inform its view about home education and whether other countries have laws, regulations or other procedures that protect the state's interest in counteracting the development

of parallel societies or insuring that children are properly socialized, the ECtHR certainly must be blamed for failing to undertake this important task.

In, *Konrad* the ECtHR simply "observes in this respect that there appears to be no consensus among the Contracting States with regard to compulsory attendance of primary schools. While some countries permit home education, other States provide for compulsory attendance of its State or private schools" (Konrad 2006:7). Hardly a searching scrutiny when evaluating a complete ban on an activity implicated by an explicit and strong guarantee under Article 2 of Protocol 1 of the ECHR. The undocumented and unanalyzed comment adds nothing to the margin of appreciation analysis and rather undermines the court's decision as being political, hasty and ill informed. The only policy alternative the FCC assesses is hardly an alternative at all. And the court doesn't really assess it but rather glibly notes that parents aren't prevented from homeschooling their children during the afternoons or on weekends.

Overall The FCC's tautologically presumptive conclusion, supported by the ECtHR, is that proper socialization can only occur *in* schools. And this is what is needed to prevent the development of parallel societies. This disappointing assumptive reasoning cuts the court off from engaging in the kind of policy analysis that at this state ought to be expected when evaluating a total ban on an important right. The FCC shows possible cultural or institutional bias (Spiegler 2015). This contrasts with the philosophers' model where at least some rights have special normative value and thus the court is given guidance that certain rights are to be treated with greater scrutiny because of their importance, as seen in the United States. But the ECtHR, deferential, it would seem, to the German court, appears to have reasoned its way to a result that has been rejected by scores of other jurisdictions.

This leaves me wondering - how can a model that purports to be globally descriptive, and positions itself as globally prescriptive, explain a total failure to explore policy alternatives? Are there particular cultural biases at work? Spiegler does point to some strongly Germanic cultural biases - but can that also explain the ECtHR's rulings? Or is it just that any theory must have exceptions?

In the fourth and final stage of proportionality review is balancing (cum reasoning) to resolve a conflict between a right and a competing right or public interest. In *Konrad*, the interest of the child is a right to an education (ECHR Article 2 of Protocol 1). The parents have a right to ensure that the education of their child is in accordance with their religious and philosophical convictions (ECHR Article 2 of Protocol 1). The public interest – this is the policy goal of the state expressed by the FCC - is the public interest in counteracting the development of parallel societies and integrating minorities thereby.

But neither court really engages in any real balancing – either in the previous stages or at the fourth stage trying to examine the weight of the interest, severity of the restriction etc. Rather the courts just glide through dismissing the parental rights as insignificant, policy alternatives that aren't and comes to a rapid conclusion that home education is and ought to be verboten.

Dzehtsiarou's (2015: Kindle Locations 2905-2906) recommends that the ECtHR, contrary to some (Legg), that it is important for balancing to be done openly so that the court's reasoning can be understood. This, Dzehtsiarou says will enhance the court's legitimiacy.

> *"it is suggested that the Court should not clearly indicate how it has arrived at a particular solution but provide a smokescreen to cover its motives. It is very doubtful that such a strategy can be sustainable in the long run. Such reasoning is open for*

criticism from a wide range of stakeholders, for not presenting clear evidence supporting the judgment. One can argue that transparent and fair examination of comprehensive comparative data would increase trust in the Court's rulings."

In response to Urbina's criticism that proportionality doesn't provide, as I have also observed, guidance as to how to treat certain moral claims, Moller writes that proportionality and balancing is more about process and less about substance. As long as a competent judge follows the process and engages in good faith moral reasoning the outcome should be just.

Properly understood, proportionality does not provide, nor does it claim to provide, a "shortcut to moral truth"—such shortcuts do not exist. Rather, its value is that it helps judges identify and address all morally relevant considerations when resolving a rights issue. (Moller 2013:222).

Later he notes in response to a concern about the "problem of the confused judge" that it is the judges' job to:

…ask questions, press the state for justifications for its actions, and assess the plausibility of the reasons given. This strikes me as fairly close to the core business of judging and therefore as something which a capable judge will most likely be comparatively good at. (Moller 2013:225)

I would agree with Moller that a capable Judge ought to be good at this. But I wonder if in *Konrad* we find a case of the confused judge. Neither the FCC nor the ECtHR undertake the kind of questioning and moral reasoning Moller suggests at least not to the level of depth a complete ban would suggest. Moller suggests that his expectation is that outcomes under the global model will be "reasonable" since judges are not called upon to determine if policy makers have arrived at the "correct" policy (Moller 2013). A complete ban on home education seems quite unreasonable.

I wonder, is it really appropriate to expect over-worked judges to engage in the kind of thoughtful moral reasoning that Moller would like to see in the global model? Sometimes a subject may not interest a judge sufficiently to do the kind of moral reasoning needed. Perhaps they have too many cases to do it well. Perhaps Judges aren't really equipped to do moral reasoning which seems more philosophical – not something that lawyers are really trained in. After all, aren't most judges lawyers? And don't lawyers tend to be more pragmatic, practical and problem solving rather than being philosophical thinkers with an ability, let alone desire, to engage in this kind of moral reasoning? How does moral reasoning filter out cultural or institutional bias? Perhaps judges do need more guidance, at least on *certain* rights that are of a higher value to prevent such burdensome outcomes.

Margin of Appreciation

Because the MoA was a major deciding factor in Konrad and is a prominent interpretive device used by the ECtHR we discuss it here. Dzehtsiarou (2015) observes that European consensus is a powerful tool that the court can use to enhance its legitimacy but warns the court that its MoA analysis, although improving, remains inconsistent and open to criticism. Dzehtsiarou also notes that commentators such as Letsas, Murray and Benvenisti challenge European consensus, which is directly linked to the MoA, as

an interpretive device that has no place in human rights adjudication. They argue, as the philosophers above, that human rights are of special normative value, and therefore consensus is an improper tool with which to determine a human right. Greer and Jones also are critical of the MoA doctrine as "lack[ing] the minimum theoretical specificity and coherence which a viable legal doctrine requires." Judge Macdonald has accused the court of using the Margin of Appreciation as a "pragmatic device" to accommodate sovereignty concerns of the state and as a way to hide the principles that the court is actually applying in deciding whether or not to decide a case (Mowbray 2012: 635).

Kavanaugh (2009) and Mahoney (Mowbray 2012) are more positive on the MoA observing that the MoA can help the court to determine what level of scrutiny it will apply in a proportionality analysis in a given case and that the doctrine reflects the basic philosophical values of the convention system such as evolutionary interpretation, subsidiarity, democracy, and cultural diversity.

Home education isn't the only area where the court has applied a noticeably fluid approach to the MoA. Freedom of speech is another area the court has trouble with – so much so that a comment from the Organization for Security and Cooperation in Europe ("OSCE") Rapporteur on Media has publicly criticized the most recent ruling from the court, *Delfi AS v. Estonia* (OSCE 2015).

In the 2001 case *VGT v. Switzerland* the court held that an advertisement by an animal rights groups using pigs in a video to communicate an anti-meat message should not have been prohibited from being broadcast because, contrary to the Swiss authority's findings, the message was not "commercial speech" but rather speech of a public interest nature and therefore more akin to political speech. Thus the court found a narrow margin of appreciation under article 10(2), giving less deference to the Swiss authorities finding a violation of the anti-meat group's convention rights. But when a religious group wanted to broadcast its message, in the 2003 *Murphy v. Ireland* case the court found that a wider margin of appreciation should be granted states when they regulate "matters liable to offend intimate personal conviction within the sphere of morals or, especially, religion." Yet again in 2005 the Grand Chamber reversed this trend when in *Animal Defenders v UK*, Lord Bingham delivered a strong defence of the UK's political advertising ban applying the ECHR jurisprudence pursuant to the Human Rights Act and noted that there was no consensus in Europe; thus he opined that subsidiarity suggested that the ECHR ought to back off. The court did so when the Grand Chamber voted 9-8 that there was no violation of Article 10. The court's opinion in this case also provided a comprehensive analysis of the precise laws of the member states to determine that there was indeed no margin of appreciation.

Protocol 15 when ratified will formally incorporate the MoA doctrine as part of the ECHR. The court would be well advised to take Dzehtsiarou's observations and recommendations seriously if it hopes to retain its legitimacy and continue to use the MoA. The *Konrad* case is a perfect example of how not to do it.

Conclusion

Human rights as a tool of activism and policy have grown rapidly and forcefully; this is not, as Raz also notes, accidental. "One of the most important transformations brought about by human rights has been the empowerment of ordinary people, and the emergence of a powerful network of non-governmental as well as treaty based institutions pressurizing states and corporations (and, to a lesser extent, international organizations) in the name of individual rights. The human rights movement launched a

new channel of political action, which continues to be a major corrective of power in governmental and corporate hands" (Raz 2015).

I have proposed that home education as a project, although a synthesis of two rights, is itself worthy as a human right under both the philosopher's theory of rights framework, and (although this is no great feat) also a right under the global theory of rights framework. As a right under the philosopher's theory, the right should, and does, receive special protection due to its higher normative value in jurisdictions including the United States, Canada, and the U.K. However, in Germany and the ECtHR, two prominent jurisdictions held up as models for the global theory of rights, home education has not only been severely targeted but in Germany has been effectively banned with the approval of the ECtHR upon review.

With respect to this particular right, both the FCC and the ECtHR's application of proportionality, in this case, fails to protect an important right and falls short of what the global model demands. The ECtHR's abysmal application of the margin of appreciation undermines its legitimacy has prompted the United States' House of Representatives to introduce legislation specifically identifying home education as a reason for asylum (Smith 2015).

Whatever one personally thinks about the wisdom of home education, Monk (2015) is right that the differential treatment of the practice is an interesting window regarding the two distinctive rights frameworks explored in this essay; perhaps even a window into the soul of a nation with regard to how it views a number of important issues including individual freedom, democracy, the family, education, child's rights and parental rights.

The failure of the FCC and ECtHR to allow for home education has resulted in real personal pain and tragedy for numerous families who have been unreasonably fined, criminally prosecuted and essentially chased out of Germany (and Sweden) because they want to home educate their children. While the global theory of rights is plausible as a descriptive global model, it fails in application to protect what I have demonstrated is an important human right. This failure raises questions about the model's efficacy as a prescriptive approach to protecting human rights.

References

Albertson-Fineman, M., & Worthington, K. (2009). *What is right for children? The competing paradigms of religion and human rights.* Burlington, VT: Ashgate Publishing Company.

Apple, M. (2015) Education as God Wants It, Gender, Labour and Homeschooling, In Rothermel, P., and (Ed.). I*nternational perspectives on home education: do we still need schools*, Palgrave Macmillan.

Brady, A., (2009) A structural, institutionally sensitive model of proportionality and deference under the human rights act 1998. PhD thesis, The London School of Economics and Political Science (LSE). Retrieved from: http://etheses.lse.ac.uk/255/

The Berlin Declaration (2012). http://www.theberlindeclaration.org/

Burman, L. (2010) Oral Decision of Immigration Judge. In asylum proceedings, in the Matter of Uwe Andreas Josef Romeike et. al. http://www.hslda.org/hs/international/Germany/Romeike_Official_Decision_Transcript_1-26-10.pdf

Cheng, A., (2014). Does homeschooling or private schooling promote political intolerance? evidence from a christian university. *Journal of School Choice 8: 49-68.*

Children As Believers (2002) "Children As Believers Minors' Free Exercise Rights and the Psychology of Religious Development, *Harvard Law Review*, 115 Harv. L. Rev. 2206. http://www.jstor.org/stable/1342531

Committee on The Rights of the child (17 April 2001). The Aims of Education n12. *General Comment No. 1 (2001) Article 29 CRC/GC/2001/1*

De Groof, J., (2012). Legal framework for freedom in education. In Glenn, C & De Groof, J., (Eds.), *Balancing freedom, autonomy and accountability in education*. Nijmegan, Netherlands. Wolf Legal Publishers.

Dewey, J. (1897). 'My pedagogic creed', *The School Journal, Volume LIV, Number 3 (January 16, 1897),* pages 77-80.

Donnelly, M. (2011). Religious freedom in education: real pluralism and real democracy require real choices for parents, *International Journal of Religious Freedom*, Vol 4:2, 61-75.

Donnelly, M. (2007). Homeschooling: pluralistic freedom, not parallel society. Retrieved from: http://www.hslda.org/hs/international/Germany/200709190.asp

Donnelly, M. (2012). Homeschooling. In Glenn, C & De Groof, J., (Eds.), *Balancing freedom, autonomy and accountability in education*. Nijmegan, Netherlands. Wolf Legal Publishers.

Dothan, S., (2011). Judicial tactics in the european court of human rights. *Chicago public law and legal theory working paper no. 358*.

Dworkin, R. (2008). *Is Democracy Possible Here?: Principles for a New Political Debate*. Princeton, N.J.: Princeton University Press.

Dzehtsiarou, Kanstantin, (2015). *European consensus and the legitimacy of the European Court of Human Rights*, Cambridge, England. Cambridge University Press. Retrieved from http://www.law.uchicago.edu/files/file/358-sd-judicial.pdf

Eichner, M. (2005) Dependency and the Liberal Polity: On Martha Fineman's the autonomy myth. *California Law Review Vol 93:4.* 93 Cal. L. Rev. 1285. Available at: http://scholarship.law.berkeley.edu/californialawreview/vol93/iss4/6

Farris, M. (2013). Tolerance and liberty: Answering the academic left's challenge to homeschooling freedom*. Peabody Journal of Education*, 88:3, 393-406.

Glanzer, P. L. (2013). Saving democratic education from itself: why we need homeschooling. *Peabody Journal of Education, 88:3*, 342-354.

Greer, S. (2000). *The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights.* Strasbourg: Council of Europe

Greer, S. (2006). *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge.

Gutmann, A. (1999). *Democratic education*. Princeton, NJ: Princeton University Press.

Hadeed, H. (1991). Homeschooling movement participation: a theoretical framework. *Homeschool researcher*, seven (two), 1-9.

Katz, Michael K. (2009). Is there a right to education? A philosophical analysis through U.S. lenses. In Katz, M., Verducci, S., & Biesta, G (Eds.), *Education, Democracy and the Moral Life.* Springer.

Kumm, M. (2007). What do you have in virtue of having a constitutional right? on the place and limits of the proportionality requirement. In Paulsen, G. Pavlakos, (Eds.), *Law, Rights, Discourse: Themes Of The Work Of Robert Alexy,* New York University Law School, Public Law Research Paper No. 06-41. Available at SSRN: http://ssrn.com/abstract=952034

Konrad, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], April 29, 2003, 1 BvR 436/03 (F.R.G.).

Heimbach, D. (2005, Oct-Nov). Deconstructing the family, the religion and society report, *The Howard Center For Family Religion and Society, Vol 22 No 7*. http://profam.org/pub/rs/rs_2207.htm

Illinois Supreme Court*, People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).

Kavanaugh, A., (2009). *Constitutional Review under the UK Human Rights Act*, Cambridge, England. Cambridge University Press.

Mitra, S. (2015). Minimally invasive education: pedagogy for development in a connected world. In Rothermel, P., (Ed.), *International perspectives on home education: do we still need schools*, Palgrave Macmilan.

Moller, K. (2012). Proportionality: challenging the critics, *I-CON Vol. 10 No 3*, 709-731, 713. http://www.corteidh.or.cr/tablas/r30064.pdf

Moller, K. (2012). *The Global Model of Constitutional Rights.* Oxford, England. Oxford University Press.

Moller, K. (2013). Balancing as reasoning and the problems of legally unaided adjudication: a rejoinder to Francisco Urbina *Int J Constitutional Law (2014) 12(1): 222-225.*

Monk, D. (2015). Home Education: A Human Right? In Rothermel, P., (Ed.), *International perspectives on home education: do we still need schools*, Palgrave Macmillan.

Mowbray, A. (2012). C*ases and materials on the European Convention on Human Rights.* 3d ed. Oxford, England. Oxford University Press.

Murphy, J. (2012). *Homeschooling in America: capturing and assessing the movement*. Thousand Oaks, CA: Corwin Press.

Noel, A., Stark, P., and Redford, J. (2013). Parent and Family Involvement in Education, From the National Household Education Surveys Program of 2012 (NCES 2013-028), National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC. https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2013028rev

OSCE, (2015). OSCE Representative warns about possible negative impact of recent ruling by European Court of Human Rights on free expression, free media. Retrieved from http://www.osce.org/fom/164836

Raz, J. (2015) Human Rights in the Emerging World Order. In Cruft, R., Liao, M., and Renzo, M. (Eds.), *Philosophical foundations of human rights*, (pp 217-31). Oxford, England Oxford University Press.

Ross, C. (2010). Fundamentalist challenges to core democratic values: exit and homeschooling. *William and Mary Bill of Rights Journal*, 18, 991-1014.

United States Supreme Court (1973). *San Antonio School District v. Rodriguez.* 411 U.S. 1 (1973). https://supreme.justia.com/cases/federal/us/411/1/

United States Supreme Court (1979). *Parham, commissioner, department of human resources of georgia, et al. V. J. R. Et al.*

Schaum, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], October 15, 2014, 2 BvR 920/14 (F.R.G.).

Shulman, J. (2014). T*he constitutional parent: rights, responsibilities, and the enfranchisement of the child.* New Haven, CT and London, England: Yale University Press.

Smith, J. M. (March 2, 2015) H.R. 1153 Offers Asylum for Homeschoolers, http://www.hslda.org/legal/cases/romeike.asp

Spiegler, T. (2015). Home education versus compulsory schooling in Germany: the contribution of Robert K. Merton's typology of adaption to an understanding of the movement and the debate about its legitimacy, In Rothermel, P., (Ed.), *International perspectives on home education: do we still need schools*, Palgrave Macmilan.

Tsakyrakis, S.(2010). Proportionality: an assault on human rights?: a rejoinder to Madhav Khosla, *International Journal of Constitutional Law 8(2)*: 307-310.

Tsakyrakis, S. (2009). Proportionality: an assault on human rights*, International Journal of Constitutional Law 7(3)*: 468-493.

U.S. Department of Education, National Center for Education Statistics, Parent and Family Involvement in Education Survey of the National Household Education Surveys Program (PFI-NHES:2003, 2007, and 2012). (This table was prepared November 2014.) https://nces.ed.gov/programs/digest/d13/tables/dt13_206.10.asp?current=yes

Verdirame, G., (2014). Rescuing Human Rights from Proportionality (January 11, 2014). In Cruft, Liao, Renzo (Eds.) *Philosophical Foundations of Human Rights (Oxford University Press, 2014);* King's College London Law School Research Paper No. 2014-14. Available at SSRN: http://ssrn.com/abstract=2377755 or http://dx.doi.org/10.2139/ssrn.2377755

Vernor Munoz, (Mar. 9, 2007). "Report of the Special Rapporteur on the right to education, Addendum: Mission to Germany," *U.N. Human Rights Council, Fourth Session, A/HRC/4/29/Add.3*.

Waldron, J, (2013). Human rights: a critique of the Raz/Rawls approach. *New York University Public Law and Legal Theory Working Papers*. Paper 405. http://lsr.nellco.org/nyu_plltwp/405

West, R. (2009). The harms of homeschooling. *Philosophy & Public Policy Quarterly*, University of Maryland Volume 29, 2009.

Yuracko, K. (2008). Education off the grid: constitutional constraints on homeschooling, *96 Cal. L. Rev. 123* (2008). http://scholarship.law.berkeley.edu/californialawreview/vol96/iss1/3