

VERBOTEN: FORBIDDEN HOMESCHOOLING IN GERMANY AND ITS CONFLICT WITH INTERNATIONAL RELIGIOUS FREEDOM

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ABSTRACT

Germany maintains strict compulsory education laws that prevent families from educating their children at home. Germany strictly enforces these laws, with little regard to the families' incentives to remove their children from the public schools. For example, these laws contain no exemption for families interested in homeschooling for religious purposes. The absence of such an exemption seems to contradict the internationally recognized right to religious freedom, a right concretely granted through three international treaties that Germany has both signed and ratified.

Several decisions by the European Court of Human Rights (ECHR) give little to no credence to religious freedom within a homeschooling rights context. These decisions reflect a government's preference to restrict homeschooling, justified primarily by a need to "stamp out parallel societies."

This Note suggests that Germany's compulsory education laws, which originate from Adolf Hitler's Third Reich, are overly broad, brutally enforced, and they restrict a family's ability to practice their religion through homeschooling. The Note proposes an alternative framework that the ECHR could employ to evaluate the both the legitimacy of such laws and the petitions by homeschooling families. This framework allows for courts to account for both a potentially reasonable law and weigh it against the religious interests of a family. Incorporating an approach will promote consistency, reliability, and objective analysis by a reviewing court, and will ultimately ensure an appropriate balance between religious liberty and state interests in ensuring an educated body of citizens.

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INTRODUCTION

On August 29, 2013, the German Wunderlich family experienced a jolting break from their traditional morning routine.¹ At 8:00 a.m. that Thursday morning, a swarm of twenty state officials broke down the Wunderlich's house door with a battering ram and took into custody all four of their children, each under the age of fifteen.² A police officer shoved Dirk Wunderlich's, the father, into a chair, and refused to allow him to make an initial phone call.³ The officer physically restrained Mr. Wunderlich because the judicial order authorizing the removal of the children also permitted the army of state officials to use force.⁴ The German government separated this family and imposed criminal charges on the parents for homeschooling, an act in violation of Germany's strict compulsory education laws.⁵

As more families around the globe become dissatisfied with their government-run school systems, the Wunderlich story is not uncommon.⁶ In 2006, five German families sought to remove their children from school temporarily because of certain required sex education classes that conflicted with their religious worldviews.⁷ The European Court of Human Rights (ECHR) denied their petition.⁸ That same year, the Konrad family petitioned before the ECHR requesting that the state exempt them from their region's compulsory education statute so that they could educate their children in conformity with their religious and moral beliefs.⁹ The

¹ *Verboten Values: Home Schooling in Germany and the Future of Freedom*, THE FEDERALIST (Sept. 18, 2013) <http://thefederalist.com/2013/09/18/verboten-values-2/>.

² *Id.*

³ Billy Hallowell, 'Brutal and Vicious': Armed German Police Storm Homeschooling Family's House and Forcibly Seize Children, *Report Claims*, THE BLAZE (Aug. 30, 2013, 3:25 PM), <http://www.theblaze.com/stories/2013/08/30/brutal-and-vicious-armed-german-police-storm-homeschooling-familys-house-and-forcibly-seize-children-report-claims/>.

⁴ *Id.*

⁵ *See Wunderlichs Regain Freedom to Leave But Vow to Stay and Fight*, HOME SCH. LEGAL DEF. ASS'N, <http://www.hslda.org/hs/international/Germany/201408280.asp> (last visited Aug. 28, 2014).

⁶ For example, families in China have recently expressed serious dissatisfaction with their government-run public school systems. China maintains strict compulsory education laws, but thousands of families seek to homeschool due to rampant bullying, teacher-student abuse, and ineffective academic preparation. *See, e.g.*, Lilian Lin, *Homeschooling Becomes More Popular in China*, WALL STREET JOURNAL (Aug. 27, 2013), <http://blogs.wsj.com/chinarealtime/2013/08/27/homeschooling-becomes-more-popular-in-china/?mod=e2tw>; Karen Lee, *Legal Loophole Opens Up Chance for Homeschooling*, S. CHINA MORNING POST (Jan. 7, 2014), <http://www.scmp.com/news/hong-kong/article/1399191/legal-loophole-opens-chance-homeschooling>.

⁷ *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 514–16.

⁸ *See id.*

⁹ *See Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 437–38 (2006).

ECHR denied their petition.¹⁰ In 2013, the Romeike family sought legal shelter in the United States in fear that the German government would separate them for trying to homeschool, even when homeschooling for religious purposes.¹¹ Germany denied their request for an exemption and the Sixth Circuit denied their claim for asylum.¹²

This Note proposes that the German laws at issue in the aforementioned cases conflict with the internationally recognized right to religious freedom. This freedom encompasses parents' rights to homeschool their children. This Note explores the issue of religious freedom and its extension to the right to homeschool in six main parts. In Part I, it begins by exploring the general concept of religious freedom and its significance to society. Part II examines both the nature of international religious freedom and its relation to Germany's compulsory educational legal system. Part III accounts for a domestic perspective in *Romeike v. Holder*, noting language in the American system that supplements this threat to religious freedom. Part IV discusses homeschooling: what it is, why it is done, and why its nature comports with international religious freedom. Part V explains two ECHR cases involving both homeschooling and religious freedom. Part VI argues that the ECHR used a faulty approach in analyzing those cases, and presents the correct alternative analysis.

I. RELIGIOUS FREEDOM: ITS NATURE AND SIGNIFICANCE TO CIVIL SOCIETY

Certain activities exist strictly in a religious context: prayer, church attendance, tithing, giving to the poor, and the taking of communion—to name a few within the Christian faith.¹³ Because a Christian's relationship with God is the driving force behind these activities, to restrict the performance of these activities is to infringe on one's freedom of religion.¹⁴

The freedom of religion is the liberty to act in accordance with one's religious convictions and thus with the choices they make as a result of

¹⁰ *Id.* at 444.

¹¹ *Romeike v. Holder*, 718 F.3d 528, 530 (6th Cir. 2013).

¹² *Id.*

¹³ These activities are not performed by a Christian by "obligation," *per se*, but because of their direct connection to the Christian faith, which involves the development of a relationship with Jesus Christ. See Silvio Ferrari, *Religion and the Development of Civil Society*, 4 INT'L J. RELIGIOUS FREEDOM 29, 31–32 (2011) (noting the unique "communitarian dimension" of Christianity as a religion, a dimension enveloping both the human and his deity). See generally *Romans* 12:12; *Hebrews* 10:24–25; *Malachi* 3:8–10; *Proverbs* 22:9; *Luke* 22:17–20 (New International).

¹⁴ See Ferrari, *supra* note 13, at 32–33.

those convictions.¹⁵ One may externally discern these convictions by focusing on the religious texts, longstanding traditions, or rules imposed by a legitimate institution or its representative.¹⁶ When a person acts because of his religious beliefs, the state has very little leeway in restricting the activity.¹⁷

Because one of the cores of civil society is freedom, and religious liberty is an important manifestation of freedom, restricting the activity presents a detriment to society.¹⁸ Civil society is important because of the “social capital” it creates through the proliferation of certain virtues among its members: commitment, responsibility, and trust.¹⁹ Each of these ideals enables citizens to contribute to the “common good of society.”²⁰ The state furthers the ability of citizens to pursue these values by not interfering with their practices.²¹ In other words, by restraining itself in its regulatory power to a certain extent, it may permit citizens to contribute to the common good.

This describes the nature of civil society and freedom in general. What does religion, and therefore religious freedom, specifically offer to encourage individuals to contribute to society’s common good? Speaking primarily of monotheistic religions, people are convinced that behaving in a responsible and dedicated way reflects a mindset where their Creator primarily holds them accountable.²² This accountability contains a “commitment to build the common good, through personal responsibility and a relation of trust with other persons [that] is generated by

¹⁵ Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 J. L. & RELIGION 124, 128 (2014).

¹⁶ Determining what constitutes religion can be a tricky feat. One scholar suggests three categories of “religion” that may help to determine whether the religious practice is legitimate for the purposes of the ideology in question: religion as belief, religion as identity, and religion as a way of life. For the purposes of this Note, a parent’s choice to homeschool their children likely falls within the third category: religion as a way of life. T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 200–205 (2003) (“In this facet, religion is associated with actions, rituals, customs, and traditions that may distinguish the believer from adherents of other religions. For example, religion as a way of life may motivate people to live in monasteries or religious communities, or to observe many rituals, including praying five times a day, eschewing the eating of pork, or circumcising males.”).

¹⁷ See, e.g., American Convention on Human Rights, art. 12, Nov. 22, 1969, 1144 U.N.T.S. 143 (providing that the “[f]reedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.”).

¹⁸ See Ferrari, *supra* note 13, at 29, 32–33.

¹⁹ *Id.* at 30 (citing ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 88–89 (1994)).

²⁰ *Id.*

²¹ See *id.* at 30–31.

²² See *id.* at 31.

recognition of the truth that has been given by God to human beings.”²³

While homeschooling is not only practiced by Christians, this Note focuses on the Christian faith due to its wide prevalence within the homeschooling communities.²⁴ Christianity is a unique monotheistic religion because it is one of the few that focuses on a loving relationship between a single all-powerful deity and humans as the deity’s creation.²⁵ This definition is important because relationships contain an element of *choice*, an element also inherent within the concept of liberty.²⁶ According to Christianity, a legitimate religious experience—the relationship with God—thrives only within a domain of freedom.²⁷ As one scholar explains,

According to Christian doctrine[,] nobody – the state, the community and even the family – can take the place of the individual in deciding a matter of conscience: therefore every person must be completely free to choose his religion (and also to change or abandon it), because an authentic religious experience cannot exist outside a state of liberty.²⁸

This explanation of the Christian faith and its relationship to a Christian’s interaction with the state becomes important in the discussion of the general choice to homeschool since, as the following sections point out, religious fundamentalists dominate that particular community.

II. LAWS IN CONFLICT: THE UDHR, ICESCR, AND ICCPR VS. GERMANY’S COMPULSORY EDUCATION LAWS

The international community has recognized the significance of religious freedom to society, and this section describes the practical manifestations of this recognition in three main international documents. This section then proceeds to explain how Germany’s education laws oppose the protections granted by these documents.

²³ *Id.*

²⁴ Robert Kunzman, *Homeschooling and Religious Fundamentalism*, 3 INT’L ELECTRONIC J. ELEMENTARY EDUC. 17, 19–20 (2010).

²⁵ In his text comparing the various worldviews that influence how we view ourselves, others, and reality, James Sire explains the uniqueness of Christian theism regarding the longing for a relationship with a higher power. See JAMES W. SIRE, *THE UNIVERSE NEXT DOOR* 28, 32–34 (5th ed. 2009) (“How does God fulfill our ultimate longing? He does so in many ways: by being the perfect fit for our very nature, by satisfying our longing for interpersonal relationship . . . by being in his infinite love the cause of our hope for salvation.”).

²⁶ See Ferrari, *supra* note 13, at 32 (noting that the communitarian dimension of Christianity “is based on a personal assent that questions the responsibility of each individual. In other words, persons are not born Christian but become Christian, and they become so not because they are members of a community, a people or a family, but because of a personal choice.”).

²⁷ *Id.*

²⁸ *Id.*

The Universal Declaration of Human Rights (UDHR),²⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),³⁰ and the International Covenant on Civil and Political Rights (ICCPR)³¹ may maintain support for parents who choose to homeschool for religious reasons.³² This support follows a three-step sequence. First, the UDHR declares that parents have a right to select the type of education their children receive.³³ Second, the ICCPR expresses the right more specifically by pronouncing the basis for it.³⁴ Finally, the ICESCR incorporates the “minimum educational standards” clause into the ICCPR’s declared right.³⁵

Germany has signed and ratified both the ICCPR and the ICESCR.³⁶ Nevertheless, Germany has compulsory education laws that conflict with the rights granted to parents under both of these treaties.³⁷ The German government enforces these laws so strictly that it is practically impossible for a family to homeschool for religious reasons.³⁸ Germany’s compulsory education provisions consist of its federal constitution, the individual state constitutions, the acts enacted by the states pursuant to their constitutions, the regional authorities’ enforcements of these acts, and the school administrative authorities.³⁹ The Federal German Constitution (the “Grundgesetz”), or Basic Law, provides the foundation for the government’s control over education, and ultimately for the high regulation of homeschooling.⁴⁰ Despite this centralized control, the

²⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26, ¶¶ 2–3 (Dec. 10, 1948) [hereinafter UDHR].

³⁰ International Covenant on Economic, Social and Cultural Rights, art. 13, ¶ 3, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

³¹ International Covenant on Civil and Political Rights art. 18, ¶ 4, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

³² Michael P. Donnelly, *Religious Freedom in Education: Real Pluralism and Real Democracy Require Real Choices for Parents*, 4 INT’L J. RELIGIOUS FREEDOM 61, 65–66 (2011).

³³ UDHR, *supra* note 29 (“Parents have a prior right to choose the kind of education that shall be given to their children.”).

³⁴ ICCPR, *supra* note 31, art. 18.

³⁵ ICESCR, *supra* note 30.

³⁶ ICCPR, *supra* note 31, at 172; ICESCR, *supra* note 30, at 4.

³⁷ See Aaron T. Martin, Note, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT’L & COMP. L. 225, 225–26, 239–42 (2010) (quoting H.R. 850, 149th Leg., 2d Sess. (Ga. 2009)).

³⁸ See *id.* at 225–232.

³⁹ Eur. Org. Reg’l Ext’l Pub. Fin. Audit Inst., *Seminar on the Audit of Schools Karlsruhe*, Report on the Situation in Germany 7–8 (Jun. 10, 2005), http://www.eurorai.org/PDF/pdf%20seminar%20Karlsruhe/Karlsruhe-Situation%20in%20DEUTSCHLAND-definitiv_EN.pdf.

⁴⁰ GRUNDGESETZ [GG] [BASIC LAW] art. 7, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

individual states (the Länder)⁴¹ enact their own education laws within their own territories.⁴² One example of this is the Schools Act of the Federal Land of North Rhine-Westphalia, the act at issue in the *Dojan* case, discussed below.⁴³

Each of the Länder also have individual constitutions regulating education. For example, the Constitution of the Land of Baden-Württemberg bluntly states, “[s]chooling is compulsory.”⁴⁴ The Constitution of the Land of Hessen states “[s]chooling is compulsory. The school system is matter of the state.”⁴⁵ The Länder manage their own regional authorities (the Bezirksregierung/Oberschulamt) and lower-level school authorities (the Schulamt) to enforce their state laws.⁴⁶ The laws of the Länder may have an exception from the general compulsory education provisions, but the authorities grant these exceptions under their own discretion, with no apparent standard to use as a criterion.⁴⁷ For example, the Baden-Württemberg School Act provides, “[a]lternative tuition instead of primary-school attendance may only be granted in exceptional circumstances by the school supervisory authority.”⁴⁸ The Grundgesetz removes the autonomy of parents to educate their children and places that directly in the hands of the state.⁴⁹

Despite the administrative authority of the Länder, the Basic Law’s leniency for parental rights is broad at first blush.⁵⁰ While some articles seem to allow for private education (following state approval) and the aforementioned provision entrusts parents with the responsibility to raise

⁴¹ *Id.* at pmb1. (listing the individual German states: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia).

⁴² Martin, *supra* note 37, at 234–35.

⁴³ See *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 515–16, 521–22.

⁴⁴ Franz Reimer, *School Attendance as a Civic Duty v. Home Education as a Human Right*, 3 INT’L ELEC. J. ELEMENTARY EDUC. 5, 8 (2010) (citing Constitution of the Land of Baden-Württemberg, art. 14, § 1).

⁴⁵ *Id.* (citing Constitution of the Land of Hessen, art. 56, § 1 (“Es besteht allgemeine Schulpflicht. Das Schulwesen ist Sache des Staates.”)).

⁴⁶ Directorate General for Education and Culture, *National Summary Sheets on Education Systems in Europe and Ongoing Reforms 1* (2007), http://www.tickle-project.eu/project/documents/education_systems/Germany_Education%20System_EN.pdf.

⁴⁷ See *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 440 (2006) (citing the Baden-Württemberg School Act, § 72(4)). These circumstances seem to manifest where the child faces “undue hardship” from being in the school. *Id.* at 444.

⁴⁸ See *id.* (citing the Baden-Württemberg School Act, § 76(1)).

⁴⁹ See Martin, *supra* note 37, at 237 (citing SECRETARIAT OF THE STANDING CONFERENCE OF THE MINISTERS OF EDUCATION AND CULTURAL AFFAIRS OF THE LÄNDER IN THE FEDERAL REPUBLIC OF GERMANY, THE EDUCATION SYSTEM IN THE FEDERAL REPUBLIC OF GERMANY 2007, at 68 (2009)) [hereinafter SECRETARIAT].

⁵⁰ See GRUNDGESETZ [GG] [BASIC LAW] art. 7.

their children, Article 7(1) gives the state full power over education.⁵¹ Article 7(1) states, “[t]he entire educational system shall be under the supervision of the state.”⁵² The Basic Law grants the Federal government control of certain policy areas such as higher education admissibility standards, financial aid, regulations on legal/medical profession requirements, and youth welfare.⁵³ The relevant federal mandate here requires public school attendance for nine years, beginning when the student is six years old.⁵⁴ Thus, there is a tension between the Basic Law and federal mandate.⁵⁵ When referring to the term “education,” the Basic Law more accurately refers to the child’s “upbringing,” encompassing “the full development of the child’s character and person, rather than to rote learning.”⁵⁶

Germany’s Civil Code goes a step further and establishes the role of the state as a constructive parent in certain circumstances.⁵⁷ According to the Civil Code, “[w]here the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish or are not able to avert the danger, the family court must take the measures necessary to avert the danger.”⁵⁸

As the section on the *Konrad* and *Dojan* cases will demonstrate later, some parents have (unsuccessfully) protested the enforcement of these laws before the ECHR.⁵⁹ The ECHR analysis in these cases faintly echo the rationale for Hitler’s anti-private education laws during the Third Reich: the stamping out of parallel societies and the steady elimination of religious pluralism.⁶⁰ As one observer noted, the foundational ideology of the Grundgesetz is that “parents who choose and desire to primarily educate their children based on their religious convictions through homeschooling somehow threatens the culture of pluralism because taking children away from others risks the creation of adults who might

⁵¹ *Id.* at art. 7, ¶ 1.

⁵² *Id.*

⁵³ Martin, *supra* note 37, at 235–36 (citing SECRETARIAT, *supra* note 49, at 33).

⁵⁴ Harold W. Stevenson & Roberta Nerison-Low, *To Sum It Up: Case Studies of Education in Germany, Japan, and the United States*, NAT’L INST. ON STUDENT ACHIEVEMENT, CURRICULUM, AND ASSESSMENT, at 15 (2002), <http://files.eric.ed.gov/fulltext/ED463240.pdf>.

⁵⁵ See Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 EVALUATION & RES. EDUC. 179, 185–86 (2003).

⁵⁶ Martin, *supra* note 37, at 239.

⁵⁷ See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], as amended, § 1666, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5804.

⁵⁸ *Id.*

⁵⁹ *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 518; *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 438 (2006).

⁶⁰ See *Konrad*, 2007 Eur. Ct. H.R. at 441–43; WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 231–33, 235, 237, 248, 252 (1960).

form groups that would challenge pluralistic society.”⁶¹

III. ROMEIKE V. HOLDER: DANGEROUS IMPLICATIONS FOR INTERNATIONAL RELIGIOUS FREEDOM

The previous section discussed Germany’s compulsory education provisions, and this section explains their application in a domestic opinion that threatens support for international religious freedom. *Romeike* is the first of three cases discussed in their entirety within this Note. *Romeike* is not an ECHR case; it is a domestic case involving a question of asylum status and was decided by the Sixth Circuit in 2013.⁶² *Romeike* is important to this Note’s discussion on international religious freedom for two reasons. First, it introduces a discussion over the question of how to ascertain whether a government’s action against a religious activity qualifies it as religious persecution. Second, it reveals the undervaluing of religious freedom as a right, especially when compared to others. These two issues will be explained in further detail following the description of the case itself.

The facts of *Romeike* are relatively straightforward. As previously explained, Germany’s national and legal laws preclude families from homeschooling, and the German Romeike family faced criminal prosecution for trying to homeschool.⁶³ Germany imposed heavy fines on the family for violating the law and forcibly attempted to place the Romeike children back in the public schools.⁶⁴ In response to these enforcements of the law, the Romeikes sought asylum in the U.S.⁶⁵ After a series of appeals, the Sixth Circuit ultimately denied the Romeike’s claim.⁶⁶

The Sixth Circuit conceded that the U.S. Constitution defends the parent’s right to determine how to raise and educate their children.⁶⁷ According to the court, this does not mean that when another country’s law violates the Constitution, religious persecution exists for the purposes of an asylum claim.⁶⁸ While this holding falls within the area of asylum law, its language may pose a serious problem for those asserting that

⁶¹ Hee Eun Lee, Comment, *Strange Bedfellows? China, Germany, and Religious Liberty*, 10 REGENT J. INT’L L. 151, 155 (2014).

⁶² *Id.* at 530.

⁶³ *Id.* at 531–33.

⁶⁴ *Id.* at 530.

⁶⁵ *Id.*

⁶⁶ *Id.* at 535.

⁶⁷ *Id.* at 534.

⁶⁸ *Id.*; see also 8 U.S.C. § 1101(a)(42)(A) (2012) (noting that the relevant asylum law requires that the asylum seeker demonstrate a “well-founded fear of persecution on account of . . . religion . . . [or] membership in a particular social group”).

international religious freedom protects the right to homeschool.⁶⁹

The problem is that the court never answered the question of whether the Romeikes faced persecution in general.⁷⁰ It did not necessarily have to, since the Sixth Circuit only needed to determine whether the actions of the government and the Romeikes' religious affiliations placed them within a special category that would legitimize their asylum claim.⁷¹ As the court explained:

The question is not whether Germany's policy violates the American Constitution, whether it violates the parameters of an international treaty or whether Germany's law is a good idea. It is whether the Romeikes have established the prerequisites of an asylum claim—a well-founded fear of persecution on account of a protected ground.⁷²

The Homeschool Legal Defense Association (HSLDA), a national organization dedicated to protecting homeschooling rights and one that helped defend the Romeikes before the Sixth Circuit, recoiled at the language in *Romeike*, calling the ruling a “dangerous conclusion.”⁷³ To the HSLDA, the holding threatens the development of an international religious liberty framework that would protect homeschooling.⁷⁴ Commenting on the case, the HSLDA states:

If our government contends that Germany did not violate the principles of religious freedom when it banned homeschooling in order to gain philosophical control over children, then it implies that it would not violate religious freedom or parental rights if the United States decided to ban homeschooling for the same purpose.⁷⁵

⁶⁹ *Homeschooling Family Granted Political Asylum*, HOME SCH. LEGAL DEF. ASS'N (Jan. 26, 2010), <http://www.hslda.org/hs/international/Germany/201001260.asp> (“In his ruling, [Judge] Burman said that the scariest thing about this case was the motivation of the government. He noted it appeared that rather than being concerned about the welfare of the children, the government was trying to stamp out parallel societies—something the Judge called ‘odd’ and just plain ‘silly.’ In his order the Judge expressed concern that while Germany is a democratic country and is an ally, he noted that this particular policy of persecuting homeschoolers is ‘repellent to everything we believe as Americans.’”).

⁷⁰ *Romeike v. Holder*, 718 F.3d 528, 530–32 (6th Cir. 2013) (noting that “[a]s the Board of Immigration Appeals permissibly found, the German authorities have not singled out the Romeikes in particular or homeschoolers in general for persecution.”).

⁷¹ *Id.* at 530, 534–35.

⁷² *Id.* at 535.

⁷³ Michael Farris, *Dangerous Policy Lurks Behind Romeike Triumph*, HOME SCH. LEGAL DEF. ASS'N (Mar. 11, 2014), www.hslda.org/hs/international/Germany/201403110.asp.

⁷⁴ *See id.*

⁷⁵ *Id.*

The HSLDA believes *Romeike* lowers the standard for what qualifies as religious persecution.⁷⁶ This case reflects the “societal barriers” that religious-asylum seekers face.⁷⁷ They face these barriers because of (1) secular legal advocates and adjudicators do not understand those who actively practice religion and use religious to guide important life decisions, and, relatedly, (2) the secular legal community’s diminished sensitivity to persecution.⁷⁸ Alleged persecution on the basis of torture or even political activism presents a concrete, visible, and practical disturbance to a social order, whereas religious persecution seems less likely to send chills down the spine of one responsible for granting a claimant legal refuge.⁷⁹ As one scholar explained, “too often adjudicators and judges ignore that the personal fear of persecution is judged by a reasonableness standard of the applicant herself, not a secular judge or even a United States citizen.”⁸⁰ This hesitancy to accord religious asylum seekers this protection manifests in the U.S. in several ways: a difficulty demonstrating the sincerity of the claim,⁸¹ an inability to show actual persecution because of a lack of physical violence,⁸² or the focus on changed country conditions over the attitudes of a country’s population toward a religious group and the personal mind of the refugee.⁸³

IV. HOMESCHOOLING: ITS NATURE AND RELEVANCE WITHIN THE RELIGIOUS FREEDOM CONTEXT

Up to this point, three issues have been discussed: the *Romeike* case, religious freedom, and Germany’s restrictions on homeschooling. This section discusses the nature of homeschooling and how it is intimately linked with religious and moral freedom, and thus supported by the treaties that undercut Germany’s compulsory education laws.

⁷⁶ *See id.*

⁷⁷ Craig B. Mousin, *Standing With the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU. L. REV. 541, 554–55 (2003).

⁷⁸ *See id.* at 556–57.

⁷⁹ *See id.* at 573–75.

⁸⁰ *Id.* at 578; *see also* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) (“When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.”).

⁸¹ Tuan N. Samahon, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211, 2226–27 (2000).

⁸² Mousin, *supra* note 77, at 575–76; *see also* Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 88–89, 110 (2000) (demonstrating that from the cases surveyed, none ruled in favor of granting an applicant asylum based on past persecution absent a finding of physical harm).

⁸³ Mousin, *supra* note 77, at 583–84, 586–87.

“Homeschooling is . . . a distinct educational practice that takes place in the home or private associations.”⁸⁴ This educational practice varies depending on the structure and beliefs of the homeschooling family. Some parents employ the “Unit Studies” method, taking a rigid approach to how and what their child learns by relying on a strict hour-by-hour schedule of activities.⁸⁵ Other parents participate in or place their children in homeschool co-ops; either by taking on a teaching role for a specific subject based on their own levels of expertise, or by relying on other homeschooling parents to teach their children a subject within a more formal classroom environment.⁸⁶ The distant opposite end of this spectrum consists of parents who strongly favor independent study and adopt a strong *laissez-faire* approach to instruction, also referred to as a method of “unschooling.”⁸⁷

This definition of homeschooling is not intended to be rigid or exclusive; homeschooling practices vary from family to family. Each of them, however, has one common similarity, which pertains to why parents choose to homeschool their children. The majority of families who homeschool adopt a common form of “religious fundamentalism” and pursue an educational environment conducive to proliferating these principles in an academic way.⁸⁸ Despite a sizable portion of homeschoolers falling under the religious fundamentalist umbrella, more religious groups have been pursuing the homeschooling route, arguably for the purpose of controlling the ideology behind what children learn.⁸⁹

Put bluntly and basically, the core motivation behind homeschooling involves control.⁹⁰ In fact, the primary cause in the rise of homeschooling in the 1920s involved the religious community’s displeasure with the government’s approval of teaching Darwinian evolution in public schools instead of creationist science.⁹¹ Fundamentalist homeschoolers’ dissatisfaction with the secularization of education influenced this community to pursue an institutional and academic separation from their

⁸⁴ Kunzman, *supra* note 24, at 26.

⁸⁵ SHERRI LINSENBACH, *THE EVERYTHING HOMESCHOOLING BOOK: TAKE CHARGE OF YOUR CHILD’S EDUCATION* 59 (2003).

⁸⁶ JOSEPH MURPHY, *HOMESCHOOLING IN AMERICA: CAPTURING AND ASSESSING THE MOVEMENT* 115 (2012).

⁸⁷ LINSENBACH, *supra* note 85, at 58.

⁸⁸ Kunzman, *supra* note 24, at 18.

⁸⁹ *Id.* at 18, 20.

⁹⁰ Michael P. Donnelly, *A Global Perspective on Freedom in Education Through the Eyes of the Homeschool Movement*, 7 U. ST. THOMAS J.L. & PUB. POL’Y 51, 55–56 (2012) (“We define ‘homeschooling’ as the elective practice whereby parents control their child’s education. While there may be certain state controls present in an actual homeschooling environment, the bottom line is that the parent, not the state, is in charge and responsible for providing the child’s education.”).

⁹¹ See Kunzman, *supra* note 24, at 18.

cultural counterparts.⁹² In the current age, however, homeschoolers actively engage with their community and utilize what were formerly considered to be “secular tools” (*i.e.*, the media) to promote their religious agenda.⁹³

In spite of this merge, homeschooling parents see certain elements of modern society as an assault on their attempt to properly fulfill the Scriptural instruction in Proverbs 22:6 and Deuteronomy 6:6–7.⁹⁴ Proverbs 22:6 instructs parents to train a child up in the way he should go, so that when he is older he will not depart from it.⁹⁵ Deuteronomy 6:6–7 states, “[t]hese commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up.”⁹⁶ A child is a gift from God and taking care of the child is one of the parents’ primary obligations.⁹⁷ Accounting for the Old Testamentary instructions, they are passionately resolute to ensure that their children understand the Truth, from having a creationist influenced biology lesson to acknowledging the religious heritage of the United States in a history textbook.⁹⁸

In the eyes of religious homeschoolers, religion and academia should not be separated.⁹⁹ Indeed, “[f]or religious conservatives, the intellectual life only finds meaning when it aligns with religious truth.”¹⁰⁰ From a quantitative viewpoint, domestic surveys indicate that religion is a

⁹² *Id.* at 18–20.

⁹³ *See id.* at 19, 21.

⁹⁴ *See id.* at 22–23.

⁹⁵ *Proverbs* 22:6.

⁹⁶ *Deuteronomy* 6:6–7 (New International).

⁹⁷ *See* Kunzman, *supra* note 24, at 23.

⁹⁸ *See id.* at 23–24; *cf.* Leslie Maitland Werner, *Education; Religion Lack in Texts Cited*, N.Y. TIMES (June 3, 1986), <http://www.nytimes.com/1986/06/03/science/education-religion-lack-in-texts-cited.html> (explaining that in the 1980s, public schools were notorious for omitting references to religion in textbooks, even if the religious references were historically accurate and pertinent to the material).

⁹⁹ Kunzman, *supra* note 24, at 23–24.

¹⁰⁰ *Id.* at 23.

significant motivator behind the decision to homeschool.¹⁰¹ These communities recognize that education consists of select persons who decide both the style and substance in communicating various subjects to the youth of a state.¹⁰² Recognizing that these individuals have worldviews contrary to theirs, exposing children to ideas that cloud the truth and hinder a parent's ability to "train up a child in the way he should go" troubles the homeschooling family.¹⁰³ Many religious parents view public schools as affirmatively antagonistic to their religious convictions, which form a crucial part of how and what their child learns in his development.¹⁰⁴

This antagonism is affirmed by some international educational law experts, who contend that regulations restricting parents' right to guide their child's education as unjust and contrary to the nature of a free society, because the right is a fundamental one.¹⁰⁵ These experts argue that these free societies ultimately *need* homeschooling to "check" public education systems, systems which proliferate the idea that children are devices utilized by a state to promote its interests instead of individuals with various interpretations of self-fulfillment.¹⁰⁶

V. KONRAD AND DOJAN: HOMESCHOOLING CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

The following two ECHR cases demonstrate the difficulties faced by German families seeking to homeschool for religious purposes. This

¹⁰¹ See Maralee Mayberry, *Characteristics and Attitudes of Families Who Homeschool*, 21 *EDUC. & URB. SOC'Y* 32, 37 (1988) (indicating that 65% of those surveyed choose to homeschool for religious reasons); Deborah Grubb, *Homeschooling: Who and Why?*, *ERIC INST. OF EDUC. SCIS.* 6–7 (Nov. 6, 1998), <http://files.eric.ed.gov/fulltext/ED427138.pdf> (not that the paper presented at the annual meeting of the Mid-South Educational Research Association indicating that 75% of surveyed Kentucky homeschoolers homeschool due to a desire to include religious teachings); Stacey Bielick, et. al., *Homeschooling in the United States: 1999*, *NAT'L CTR. FOR EDUC. STATISTICS* (2001) (noting that religion was one of the top four reasons parents chose to homeschool, as 38.4% of those surveyed named religion as their guiding preference); Michael Planty, et al., *The Condition of Education 2009*, *NAT'L CTR. FOR EDUC. STATISTICS* (2009) (stating that 36% of those surveyed cited religious reasons as the most important reason for homeschooling).

¹⁰² See Kunzman, *supra* note 24, at 22, 24.

¹⁰³ *Proverbs 22:6* (King James); see also Kunzman, *supra* note 24, at 22–23.

¹⁰⁴ BRUCE N. SHORTT, *THE HARSH TRUTH ABOUT PUBLIC SCHOOLS* 13 (2004).

¹⁰⁵ 1 CHARLES L. GLENN & JAN DE GROOF, *BALANCING FREEDOM, AUTONOMY, AND ACCOUNTABILITY IN EDUCATION* 1 (2005).

¹⁰⁶ Perry L. Glanzer, *Saving Democratic Education from Itself: Why We Need Homeschooling*, 88 *PEABODY J. EDUC.* 342, 352 (2013); see also PAUL E. LITTLE, *KNOW WHAT YOU BELIEVE* 109 (Marie Little ed., InterVarsity Press 2008) (This is especially important in light of the views held by religious fundamentalists who homeschool because of their worldviews: "[T]he Bible teaches that each of us is a personality created by God purposefully in his own image. It teaches that we have eternal significance in God's eyes and that our souls are worth more than the whole world.").

discussion will present the cases' factual backgrounds and a description of the analysis used by each court. The first case, *Konrad v. Germany*, involved a family who sought to remove their children from school long-term,¹⁰⁷ and the second case, *Dojan v. Germany*, involved a group of families who sought a temporary exemption from the compulsory education law.¹⁰⁸ Each case will be discussed in turn.

In *Konrad*, Mr. and Mrs. Konrad refused to send their children to public school for religious reasons.¹⁰⁹ In addition to the secularly influenced approaches to classes directed by the schools, they disapproved of several characteristics of the curricula: "sex education, the appearance of mythical creatures such as witches and dwarfs in fairytales during school lessons and the increasing physical and psychological violence between pupils at school."¹¹⁰ The Konrads claimed that the compulsory education laws within their jurisdiction, specifically the Baden-Württemberg School Act, violated their religious and parental rights.¹¹¹

The ECHR ruled in *Konrad* that the state's duty to provide a particular, uniform method of educating its citizens supersedes the family's presumably constitutional right to educate.¹¹² The Court's rationale in this ruling consisted of three main contentions. First, parents cannot preclude public education from their children solely because of their religious convictions.¹¹³ Second, the German government had "carefully reasoned" justifications for its regulation: societal integration and experiential learning.¹¹⁴ According to the Court, it was rational for the German government to assume that homeschooling could not meet these justifications as efficiently as public schooling.¹¹⁵ Third, the Court responded to the Konrads' claim that they were being discriminated against because of their religious beliefs.¹¹⁶ In holding that the state did not discriminate against the Konrads, the Court explained that the state may engage in religious discrimination if it pursues a "legitimate aim" and there is a "reasonable relationship of proportionality" between the aim and the means employed to reach it.¹¹⁷ The Court also discussed a "margin of appreciation."¹¹⁸ A margin of appreciation means that the Court often

¹⁰⁷ See generally *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 437–38 (2006).

¹⁰⁸ See generally *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 514–15.

¹⁰⁹ *Konrad*, 2007 Eur. Ct. H. R. at 437.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 440–41.

¹¹² *Id.* at 442–43.

¹¹³ *Id.* at 442.

¹¹⁴ *Id.* at 436, 438, 442.

¹¹⁵ *Id.* at 436.

¹¹⁶ *Id.* at 444.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 436, 442, 444.

defers to the state in deciding when discrimination actually exists.¹¹⁹

While the complaint in *Konrad* was limited to one family, the applicants in the *Dojan* case consisted of five sets of parents (“the claimants”) with children enrolled in a German public school.¹²⁰ The school forced all the enrolled students to attend both mandatory sex education classes and a theater workshop on sexual abuse.¹²¹ After examining the texts for these classes, the claimants found that they conflicted with their moral views as members of the Christian Evangelical Baptist Church.¹²² The claimants viewed the books as pornographic and noted that they contained language favoring fornication, an act contrary to their religious obligation to remain chaste until marriage.¹²³ Aside from their general ideological views on the content of the classes, the claimants argued that their children were not prepared to receive the type of sex education explained in the textbooks.¹²⁴

The claimants in *Dojan* viewed these mandatory classes as violations of their freedom of conscience, freedom of religion, and right to educate their children.¹²⁵ They asked if their children could be exempt from the classes, relying on Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.¹²⁶ Because the school denied this request, the claimants simply refused to send their children to school during the sex education class period.¹²⁷ The government then fined the claimants for not complying with Germany’s compulsory education laws.¹²⁸ The claimants finally complained that the state had discriminated against them because they were Christians, noting that Muslims had been exempted from past sex education requirements for religious reasons.¹²⁹

The ECHR ultimately ruled that the families’ claims in *Dojan* were “manifestly ill-founded.”¹³⁰ Its ruling suggested that the second sentence of Article 2 of the Convention, requiring the state to respect the religious

¹¹⁹ *Id.*

¹²⁰ *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 511, 520.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 518.

¹²⁶ *Id.* at 512; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. II, ¶ 1, May 2, 2002, 5 E.T.S. 5, 6 [hereinafter Article 2 Protocol].

¹²⁷ *Dojan*, 2011-V Eur. Ct. H.R. at 511.

¹²⁸ *Id.*

¹²⁹ *Id.* at 512.

¹³⁰ *Id.* at 513.

and moral convictions of parents, did not support the claimants' case.¹³¹ The Court argued this in four ways.¹³² First, Article 2 focused on protecting pluralism in education, and permitting homeschooling would obstruct the government's ability to meet that goal.¹³³ According to the Court, the classes and theater workshop were substantively objective enough to meet this pluralism criterion.¹³⁴ Second, many of the subjects taught in school, and specifically in the sex education classes, had the same ideological intricacies as the religiously influenced issues taught by a student's parents.¹³⁵ Third, the parents were free to re-educate their children after the activities' completion.¹³⁶ Finally, the Court addressed whether imprisoning one couple for its noncompliance was too severe.¹³⁷ The Court said that the couple's incarceration was justified because it was not a result of noncompliance with the educational requirements, but rather with the initial sentence, which was a fine of seventy-five Euros.¹³⁸

VI. APPLYING THE HOMESCHOOLING ISSUE TO THE LAW: THE LEGAL TEST FOR MORAL AND RELIGIOUS FREEDOM

Article 18 of the ICCPR provides that one has the right to live in accordance with their religious or moral commitments.¹³⁹ This right is conditional in the sense that it does not permit anyone to engage in any form of religiously motivated conduct.¹⁴⁰ Rather, the government must meet certain requirements in order to restrict religiously motivated activity.¹⁴¹ In both of the above cases, the ECHR did not assess the claimants' petition from this lens.

Before administering the test and examining the requirement through the lens that the government's restriction must meet certain requirements to be valid, the activities in question need to actually fall under the right to religious freedom. First, a general application of the right should likely involve resolving the benefit of the doubt in favor of one exercising her right to religious freedom.¹⁴² Second, the families in *Dojan* and *Konrad* specifically claimed they had religious justifications for wanting to remove their children from the schools, which were supported

¹³¹ *Id.* at 513, 522–24; Article 2 Protocol, *supra* note 126.

¹³² *Dojan*, 2011-V Eur. Ct. H.R. at 512-513.

¹³³ *Id.*; Article 2 Protocol, *supra* note 126.

¹³⁴ *Id.*

¹³⁵ *Dojan*, 2011-V Eur. Ct. H.R. at 512–13.

¹³⁶ *Id.* at 526.

¹³⁷ *Id.* at 513, 520.

¹³⁸ *Id.* at 511, 520.

¹³⁹ ICCPR, *supra* note 31, art. 18.

¹⁴⁰ *See Perry*, *supra* note 15, at 132.

¹⁴¹ *Id.* at 132–33.

¹⁴² *See id.* at 130–32.

by their membership in a church and active participation in a religious community.¹⁴³

After establishing that the right covers homeschooling, the Court applies the three-part test to the government restriction.¹⁴⁴ A restriction on the international right to religious and moral freedom as expressed by the ICCPR contains three conditions:

1. Legitimacy: The government action, whether a policy that affirmatively restricts certain religious conduct or one that neglects to exempt it, must serve a legitimate objective.¹⁴⁵
2. Least burdensome alternative: the policy must be required to serve the legitimate objective in the sense that the government action serves the purpose significantly better than would any less burdensome government action.¹⁴⁶
3. Proportionality: The objective the government action serves must carry enough weight to justify the burden imposed on those attempting to exercise the right.¹⁴⁷

Each part of the test will be discussed in the following three subsections. Each subsection presents arguments from both parties to a general case where the test would be properly applied: the state (Germany) and the complainants (the homeschooling families). For the sake of this Note's analysis, the restriction by Germany parallels the restriction in *Konrad*, where the parents sought to remove their children from the public schools permanently because of the secular and anti-religious classroom substance.¹⁴⁸

A. Legitimacy

The first issue is whether Germany could meet the first prong of the test requiring a legitimate government objective. Germany could present four main rationales in support of its restrictions on homeschooling in order to meet this prong. First, compelling all children to participate in a uniform educational environment promotes integration.¹⁴⁹ Second, the state wants “to avoid the emergence of parallel societies based on separate

¹⁴³ *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 515–16; *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 435 (2006).

¹⁴⁴ See Perry, *supra* note 15, at 132–33.

¹⁴⁵ Perry, *supra* note 15, at 132; see also Note Verbale Dated 24 August 1984 from the Permanent Representative of the Netherlands to the U.N. Secretary-General, U.N. Doc. E/CN.4/1985/4 (1984), <http://www.refworld.org/pdfid/4672bc122.pdf>, reprinted in 7 HUM. RTS. Q. 3 (1985) (containing the “Siracusa Principles,” from which Perry’s test is articulated).

¹⁴⁶ See Perry, *supra* note 15, at 133.

¹⁴⁷ Perry, *supra* note 15, at 133; see Note Verbale, *supra* note 145, at 4, 9.

¹⁴⁸ See *Konrad*, 2007 Eur. Ct. H.R. at 436.

¹⁴⁹ *Id.*; Martin, *supra* note 37, at 242.

philosophical convictions.”¹⁵⁰ Third, slightly similar to the first rationale, the government has an interest in “integrat[ing] minorities into society,” specifically religious minorities.¹⁵¹ Finally, the government seeks to “guarantee the function of democra[cy]” and proliferate “constitutional basic values” among its citizens.¹⁵²

The homeschooling families affected by Germany’s regulation may have three arguments in response to the “legitimate objective” condition.¹⁵³ First, Germany’s laws reflect a darker past than the ECHR in *Konrad* and even the Sixth Circuit in *Romeike* fail to acknowledge; these anti-homeschooling laws originate from Adolf Hitler’s Third Reich.¹⁵⁴ The Nazis observed that establishing state-sponsored education was necessary to dispense propaganda and acquire support from the people.¹⁵⁵ In maintaining the sovereignty of public education, Hitler sought to create a populace that would consistently comply with the ideologies of the Nazi regime.¹⁵⁶ Hitler commented on the need to control the nation’s youth through academic regulation:

When an opponent declares, “I will not come over to your side,” . . . I calmly say, “Your child belongs to us already . . . What are you? You will pass on. Your descendants, however, now stand in the new camp. In a short time they will know nothing else but this new community.”¹⁵⁷

As these policies engaged, membership in the Hitler youth increased from approximately 108,000 to 7.7 million in only six years.¹⁵⁸ The Third Reich policies operated under the presumption that government can best educate the nation’s youth.¹⁵⁹ Currently, “that presumption remains enshrined in German law through the compulsory attendance laws.”¹⁶⁰ Germany codified its anti-homeschooling position in the *Reichsgrundschulgesetz*, or the Constitution of the Weimar Republic.¹⁶¹ Through this constitution, Germany sought to create an “equality of opportunities” among different German social classes.¹⁶²

¹⁵⁰ Martin, *supra* note 37, at 244 (quoting *Konrad*, 2007 Eur. Ct. H.R. at 436).

¹⁵¹ *Id.*

¹⁵² *Id.* (quoting Spiegler, *supra* note 55, at 181–82).

¹⁵³ See Perry, *supra* note 15, at 132.

¹⁵⁴ See Martin, *supra* note 37, at 226–27.

¹⁵⁵ *Id.* at 229.

¹⁵⁶ *Id.*

¹⁵⁷ SHIRER, *supra* note 60, at 249.

¹⁵⁸ Martin, *supra* note 37, at 229.

¹⁵⁹ *Id.* at 237.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 231.

¹⁶² *Id.*

Second, the homeschooling parents could argue that restricting homeschooling may actually hinder the objectives of increasing diversity and stamping out “parallel societies.”¹⁶³ The state’s argument that the monopolization of education would promote pluralism makes sense to an extent. The argument essentially posits that in order to maintain tolerance, “pluralistic societies must be intolerant of pluralism of education.”¹⁶⁴ When compared to countries like the United States that permit homeschooling (countries founded on tolerance and liberty), such a rule comes across as a bit hard and fast. As an international attorney from the HSLDA argued, “[a]lthough the result in the United States was a patchwork of regulatory schemes representing diverse local views on achieving a balance between the state’s interest in education and the right of parents, all fifty of the United States made it possible for parents to homeschool their children.”¹⁶⁵ Educational systems that obstruct freedom in education deny educational flexibility, parental choice, and are intolerant of educational diversity.¹⁶⁶

Third, the families may argue that the ECHR gives in to a stereotypical, facially incorrect view of homeschooled children by making two claims. The first of these misperceptions is that these children grow up being unable to think for themselves and are restricted to exposure of only one worldview.¹⁶⁷ The second misperception is that the effect of fostering connections primarily between those with similar ideologies (a religious homeschooling community) is inherently bad.¹⁶⁸ In response to the first point, research indicates that this is unlikely to be the case. One education scholar argues that the increased modernization of homeschooling, with the implementation of technology in the classroom (referring to the public and home versions) is providing homeschoolers with “the opportunity for increased communication between members of society with diverse perspectives and beliefs.”¹⁶⁹ The social science research indicates that homeschoolers in the United States do not remain isolated from the outside world, but that the vast majority of them are exposed to other persons in a variety of settings.¹⁷⁰ For example, “[o]n the average, homeschooled students are involved in at least 5.2 activities outside the home, with ninety-eight percent engaged in two or more. This

¹⁶³ See *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 436 (2006).

¹⁶⁴ Donnelly, *supra* note 32, at 73.

¹⁶⁵ *Id.* at 74.

¹⁶⁶ Donnelly, *supra* note 32, at 51 (quoting JOHN W. MONTGOMERY, *HOMESCHOOLING IN AMERICA AND IN EUROPE: A LITMUS TEST OF DEMOCRACY* 75 (2012)).

¹⁶⁷ See Kunzman, *supra* note 24, at 26.

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 26.

¹⁷⁰ Michael H. Romanowski, *Revisiting the Common Myths About Homeschooling*, 79 CLEARING HOUSE 125, 125–26 (2006).

range of activities includes scouting, dance classes, group sports, 4-H, and volunteer work, demonstrating that homeschoolers are not isolated from the outside world.¹⁷¹ Indeed, some research indicates that homeschooled children are actually exposed to a *broader variety* of both people and circumstances than their public schooled counterparts.¹⁷² Not only is their exposure to these situations wider, but the quality of their experiences is enhanced.¹⁷³ Another study found that because homeschoolers are not peer-grouped in school, they are more socially mature with regard to their interactions.¹⁷⁴

Homeschooling does not cause children to be ignorant of patriotism and principles of civic duty, but rather improves their ability to be good citizens.¹⁷⁵ As a whole, the vast majority of homeschooled graduates engage in politics, find American government easy to understand (ninety-six percent), participate in community service activities (eighty-eight percent), are likely to contribute and/or work for a political party, and vote in national and state elections.¹⁷⁶ While given from an American perspective, these conclusions seem to directly contradict the assumption behind the ECHR's decisions in *Konrad* and *Dojan*, where it noted that the elimination of homeschooling was necessary to promote integration and civic respect.¹⁷⁷

B. *Least Burdensome Alternative*

The second part of the test is the least burdensome alternative step. In order to pass this step, the policy must be required to serve the legitimate objective in the sense that there is no easier way to do so.¹⁷⁸ In other words, the question becomes whether the goals of integration, preventing the emergence of parallel societies, and promotion of civic values may be met in another way aside from enforcing the compulsory education laws in ways expressed in *Dojan* and *Konrad*.

Germany might argue that the broad restriction on homeschooling is necessary because the parents should act not as a substitute for the state, since it has a recognized duty to provide an education for its citizens.¹⁷⁹ Rather, parents should only be there to supplement the academic

¹⁷¹ *Id.* at 126.

¹⁷² *Id.*

¹⁷³ *See generally id.*

¹⁷⁴ *Id.* at 126.

¹⁷⁵ *Id.* at 127.

¹⁷⁶ *Id.*

¹⁷⁷ *See generally* *Konrad v. Germany*, 2007 Eur. Ct. H.R. 435, 436, 438 (2006); *Dojan v. Germany*, 2011-V Eur. Ct. H.R. 511, 512, 517.

¹⁷⁸ *Perry*, *supra* note 15, at 133; Note Verbale, *supra* note 145, at 3–5.

¹⁷⁹ *See Dojan*, 2011-V Eur. Ct. H.R., at 518; *Konrad*, 2007 Eur. Ct. H.R. at 442.

provisions of the state.¹⁸⁰ According to some children's rights scholars, "public education should be mandatory and universal. Parental expressive interest could supplement but never supplant the public institutions where the basic and fundamental lesson would be taught and experienced by all American children: we must struggle together to define ourselves both as a collective and as individuals."¹⁸¹ The case for open homeschooling presumes that the parents know what is best for their children and should be their educators despite the child's contrary wishes. How does that state determine that the parent's wish is truly what is best for the child? Instead of defaulting to that presumption, the safest way to protect the child's academic interests and ensure that they are acquiring all the information necessary to promote good citizenship is to apply a restriction against home education across the board.¹⁸²

The families would argue that there are ways for Germany to meet its goals without banning homeschooling completely. The families may offer four examples of homeschooling regulation that states may adopt in order to ensure that children receive a proper civic education and that they fully integrate into society: registration requirements, imposed burdens of proof on parents seeking to homeschool, state-approved curricula, and periodic, state-administered assessments.¹⁸³ Each will be explained in turn before addressing their feasibility in light of the legitimacy and least burdensome alternative steps.

First, the parents could be required to prove that homeschooling is satisfactory.¹⁸⁴ In other words, the burden of proof would rest on them to demonstrate that their curricula, methods of teaching, and the quality of

¹⁸⁰ See *Dojan*, 2011-V Eur. Ct. H.R., at 513; *Konrad*, 2007 Eur. Ct. H.R. at 442–43.

¹⁸¹ KAREN WORTHINGTON & MARTHA ALBERTSON-FINEMAN, WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 237 (2009).

¹⁸² See Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, in MORAL AND POLITICAL EDUCATION, NOMOS XLIII 275, 308 (Stephen Macedo & Yael Tamir eds., 2002) ("A recent case in Virginia raises the question of what the state should do when older children wish to attend public school and their parents wish to homeschool them. Jennifer Sengpiehl had been homeschooled for many years when in her teenage years she began to ask her parents to permit her to attend the local public school. Her parents refused and continued to educate her at home, at which point Jennifer's behavior began to deteriorate. In an attempt to teach her a lesson about obedience, her parents called the police after she had vandalized her bedroom and brandished a knife at her father. The involvement of the police led to a juvenile court date, where unexpectedly the judge ruled that Jennifer should attend a public school. Because the court records of juveniles are sealed, it is impossible to know the details in order to make an informed judgment in Jennifer's case about how continued homeschooling or public schooling would or would not meet the parents', the state's, and the child's interests in education. But the question remains: should we accept as just the prevailing legal presumption that parental preferences about schooling are determinative, absent a showing of negligence or abuse?").

¹⁸³ *Id.* at 304–05.

¹⁸⁴ See *id.* at 304.

academic substance is up to par with educational standards.¹⁸⁵ This regulation makes the legal test a complicated issue, since it already places the burden on the state to show that it meets the requirements within the legal test.¹⁸⁶ Shifting a burden to a complainant claiming a religious freedom exemption from a compulsory education law seems contrary to the nature of the test.¹⁸⁷ The second recommendation addresses the state's interest in encouraging integration and exposure to different ideologies.¹⁸⁸ The state could require curricula used by parents to be from a state-approved list and then perform assessments on the children to ensure that the parents are communicating the principles within the curricula.¹⁸⁹ This second recommendation may nullify the very purpose of homeschooling for which homeschooling is pursued by parents. If the state precludes parents from choosing the academic materials that they believe contribute to the most beneficial approach to their child's education, the element of control that the parents maintain in a homeschooling environment would be virtually nonexistent.¹⁹⁰ This would hardly be a "least burdensome" alternative. Third, the state could mandate that the homeschoolers take special tests to measure the students' academic progress.¹⁹¹ Further, the state may enforce these assessments through state truancy laws and monitor them through an independent homeschooling agency.¹⁹² One example of a flexible approach to this assessment requirement is Ohio's, which may be satisfied in one of three ways: the child takes a nationally normed standardized achievement test; the parent provides teacher-certified narrative indicating the adequacy of the child's instruction; or the child takes an alternative academic assessment approved by the parents and superintendent.¹⁹³ Homeschoolers could argue that this approach severely burdens a parent's freedom to choose how their child is educated because it compels them to conform their teaching style and substance to the state-imposed tests, rather than to their own values and practical expectations.¹⁹⁴ The fourth recommendation could be a registration requirement.¹⁹⁵ Compelling homeschools to register with the

¹⁸⁵ *Id.*

¹⁸⁶ See Perry, *supra* note 15, at 132–33, 137.

¹⁸⁷ See generally Reich, *supra* note 182, at 304.

¹⁸⁸ *Id.* at 300, 304.

¹⁸⁹ *Id.* at 303–04.

¹⁹⁰ See *id.* at 288, 304.

¹⁹¹ See Perry, *supra* note 15, at 133; see also Donnelly, *supra* note 90, at 59.

¹⁹² Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 106 (2002).

¹⁹³ OHIO ADMIN. CODE 3301-34-04 (2013).

¹⁹⁴ Donnelly, *supra* note 90, at 58.

¹⁹⁵ Reich, *supra* note 182, at 304.

state could ensure that the children are actually being educated.¹⁹⁶ It may help remove the invisible barrier between the state and its youth.¹⁹⁷ Practically speaking, a registration requirement may help the state: (1) confirm that parents with state vaccination requirements, (2) require that parents do not have a strong history of child abuse or neglect, and (3) employ a method of enforcing the previously mentioned academic assessments.¹⁹⁸

C. Proportionality

This second consideration leads to the final step: the proportionality principle. This step asks one to consider whether the goals in question are sufficiently substantial to warrant the burdens placed on those trying to act for moral or religious purposes. This is arguably the trickiest element to manage in the homeschooling context.¹⁹⁹ Some are “unsure about the most effective way to craft regulations pursuant to meeting the state’s and the child’s interest.”²⁰⁰ Inherently within this uncertainty is the concern regarding the conflict between the religious desires of the parents and secular nature of public schools.²⁰¹

Under this analysis, it is presumed that Germany passes the first step (establishing legitimacy) and the second (being unable to locate a least burdensome alternative). The question becomes whether the ban on homeschooling is proportional to the objectives sought by the government. Germany would argue that the needs of the government are too significant to permit homeschooling to occur in the slightest degree.²⁰² Perhaps the needs of the community (societal integration and progress) ought to trump the rights of the parents in the homeschooling context, presumably because of the long-term societal benefits:

In a liberal democracy, it is inevitable that there will be conflicts among parents, children, and the state’s interests with respect to education. . . . [G]iven the legitimacy of claims by the community to have a say in how its future citizens should be educated; the equally legitimate claims of parents to have a say in how their own children should be educated; the need for children to develop the autonomy that liberalism demands; and the needs of the polity to ensure that children come to possess the civic virtues necessary to perpetuate a healthy liberal

¹⁹⁶ *Id.* at 279, 304.

¹⁹⁷ *See generally id.* at 293–94.

¹⁹⁸ McMullen, *supra* note 192, at 106.

¹⁹⁹ *See* Martin, *supra* note 37, at 267–68. *See generally* Perry, *supra* note 15, at 133.

²⁰⁰ Reich, *supra* note 182, at 305.

²⁰¹ *Id.* at 289.

²⁰² *See* Konrad v. Germany, 2007 Eur. Ct. H.R. 435, 439 (2006).

democracy, none of these interests should be allowed to dominate education in public schools.²⁰³

Permitting homeschooling may be a risky policy move; homeschooling is almost completely private and cannot be adequately monitored or regulated, even with some protections in place.²⁰⁴ Critics of the homeschooling contend that

[H]omeschooling denies democratic accountability and disenfranchises the community from its legitimate interest in education. This denial of the public interest does not only affect the education of home schoolers, but it also erodes the ability of the community to express its interest in education. . . . Certainly, public schools fail often in many areas. But they fail publicly, as public institutions, and, in that, we at least have the potential to address the issue.²⁰⁵

The German homeschooling families could respond to the concern of the state in two main ways. First, they could mention that the presumption behind this concern reflects the state's argument that homeschooling poses a strong risk of children falling through the cracks, since there is no oversight.²⁰⁶ Statistically speaking, the risk of this occurring to homeschoolers is extremely low, especially in proportion to their public schooled counterparts.²⁰⁷ As previously mentioned under the legitimacy analysis, parents expose their homeschooled children to a variety of situations that actually make them *more* prepared to enter society and act autonomously.²⁰⁸ In addition to their social development, homeschooled students have higher rates of self-efficacy and self-esteem than public schooled students, demonstrating that their individual development is of no particularly great concern.²⁰⁹ Homeschoolers engage with their societies, act as excellent citizens, and maintain their civic responsibilities.²¹⁰ Furthermore, homeschoolers in the United States generally have no difficulty entering college and their scores either meet or surpass the national average.²¹¹

Second, the families could argue that the state monopolization over

²⁰³ Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1340 (2007).

²⁰⁴ See Chris Lubienski, *Whither the Common Good? A Critique of Homeschooling*, 75 PEABODY J. EDUC. 207, 213 (2000).

²⁰⁵ *Id.* at 229.

²⁰⁶ See *id.* at 212.

²⁰⁷ See generally Romanowski, *supra* note 170, at 127–28.

²⁰⁸ *Id.* at 126.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 127.

²¹¹ *Id.* at 127–28.

education risks debilitating democratic values. The actions of governments like Germany are viewed as highly destructive to principles of freedom, since democracy requires a freedom for diverse families to select their own values and application of such values.²¹² In fact, “[i]t is difficult to imagine anything more destructive of liberty than a government with the authority to override parental choices concerning the development and values of the next generation – particularly religious or moral values.”²¹³ More specifically, the state monopolization of education may be wielded as a powerful tool to control the populace. Despite the maintenance of a general democratic republic, “massive state involvement with childrearing would invest the government ‘with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.’”²¹⁴

The United States Supreme Court considered these concerns when determining the rights of parents to raise their child. In *Pierce v. Society of Sisters*, the Court clearly expressed the idea that parents have a right to direct their child’s education and mentioned this right’s relation to commonsense principles of liberty:

The fundamental theory of liberty upon which all governments of this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²¹⁵

CONCLUSION

The purpose of this Note has been to discuss the nature of the right to religious and moral freedom in international human rights law and to suggest that homeschooling is an activity protected by the right. First, it examined *Romeike*, a domestic case containing language that negatively implicates a parent’s rights to homeschool his or her child for religious purposes. Second, it explained the nature of religious and moral freedom in general before applying the concepts to the homeschooling. Finally, it discussed and applied the proper test for determining whether a

²¹² Eric A. DeGross, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 126–27 (2009).

²¹³ *Id.* at 126.

²¹⁴ Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 U. MICH. L. REV. 463, 481 (1983) (quoting Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765, 773 (1973)).

²¹⁵ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

government action should be permitted to burden a family trying to homeschool within the right.

One takeaway from the ECHR decisions and the actions of the German government involves the modern designation of religious freedom (and arguably moral freedom) as, in the words of Professor Mary Ann Glendon, “a second-class right.”²¹⁶ The refusal of these governmental bodies to recognize even the possibility that these activities may fall within religious and moral liberty protection is disturbing.²¹⁷ The vitality of religious bodies (which I contend includes homeschooling families) in many ways depends on the defense of the state of their mission, and that without the necessary protections they cannot continue to contribute the social goods for which they are globally recognized.²¹⁸ When governments attempt to abrogate the definition of liberty to preclude religiously influenced activities from protection, they stunt the development of the values the activities promote.²¹⁹

Striking the balance in this regard can be difficult. Professor Jeffrey Shulman explains that stronger tensions exist between parent, child, and state than most might come to admit.²²⁰ He argues that when parents are given “the right to bring up their children as they want to[,] [we] . . . forestall public debate on contentious questions” such as educational regulation, religious mentoring, and third-party visitation. We ought not to “take these questions out of the public domain by keeping the home under constitutional lock and key.”²²¹ Therefore, it may not be best to recognize homeschooling as a right in and of itself. A preliminary step could require the recognition that there are a number of families in the international community seeking to educate their children for religious and moral purposes.²²²

On August 29, 2013, Mr. and Mrs. Wunderlich lost more than their children. They lost their dignity and likely some respect for the German authorities. The laws in that country are shocking. The enforcement of these laws is reprehensible. The legislative history of compulsory education in Germany is dark.²²³ These laws give no deference to a person’s religious beliefs or a parent’s desire to raise his or her children in

²¹⁶ Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom – A Second-Class Right?*, 61 EMORY L.J. 971, 979 (2012).

²¹⁷ *See id.* at 975–76.

²¹⁸ *See id.* at 981.

²¹⁹ *See id.* at 986.

²²⁰ *See* Jeffrey Shulman, *Sacred Trust or Sacred Right?*, in *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 1, 6, 12 (2014).

²²¹ *Id.* at 15.

²²² *See, e.g.*, Konrad v. Germany, 2007 Eur. Ct. H.R. 435, 435, 437 (2006).

²²³ *See* Hallowell, *supra* note 3; Martin, *supra* note 37, at 226, 229–30.

accordance with his or her own ideology.²²⁴ Indeed, acknowledging the importance of religious freedom in society is the first step in striking the right balance between maintaining liberty and ensuring that children receive proper education.²²⁵

²²⁴ See Martin, *supra* note 37, at 237.

²²⁵ See Perry, *supra* note 15, at 132–33.