



Freedom of Education and the Era of the Rights of the Child: Can They Coexist?

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“Freedom of Education and the Era of the Rights of the Child: Can They Coexist?”

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Abstract

In this thesis, I perform a comparative case study on the status of freedom of education and related parental rights in the era of the rights of the child. The aim of this case study is to provide insight into whether freedom of education and the right of the child to an education can effectively coexist. This thesis begins by clarifying the history of these rights and their implications in international laws and treaties. The thesis then turns to answering the question: Can governments effectively mediate between freedom of education and the right of the child to an education when these rights come into conflict, or does the right of the child to a certain level of elementary education necessarily delegitimize or, to a lesser extent, limit the freedom of parents to choose how their children are educated?

In order to answer this question, this thesis performs a comparative case study of the legal and political status of these rights in three nations: Germany, the United States, and Brazil. This case study evaluates and compares education policies in the three test nations. The data utilized in this thesis includes legal, historical, judicial, and policy documents from the test nations. In addition, this thesis utilizes scholarly research and philosophical writings on the topics of freedom of education, parental rights, and freedom of education.

Freedom of education and the right of the child to an education are both important rights that are affirmed in the Universal Declaration of Human Rights, and both rights ought to be protected in national and international laws. This case study finds that

freedom of education, parental rights, and the child's right to receive an education can effectively coexist. As is the case with many other rights (for example, privacy and security), these rights may sometimes come into conflict. Nevertheless, these conflicts do not invalidate the importance of either right or the duty of individual nations to protect both rights. Law and treaties that protect freedom of education do not preclude the possibility that governments should step in if parents wantonly neglect their duty to educate their child. Governments can and should put monitoring policies in place to ensure that the child's right to an education is protected. Likewise, laws protecting the right of the child to an education do not necessitate a government monopoly over education at the expense of parental rights and freedom of education.

Dedication

To my husband, Josh, who has been endlessly patient as I worked on this thesis over long years, months, and weekends.

And to my children, Winston, Ella, and baby #3 on the way, who always wished me luck and gave me kisses when I left to study and write.

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Chapter I

Defining Freedom of Education and the Right to an Education

What is “freedom of education?” What is “the right to an education?” What are the legal and philosophical ramifications of these rights? There is a long history of philosophical, legal, and political debate regarding the implication of these rights, and the debate is far from over. Myriad scholars hold divergent views regarding the meaning of these rights. As such, it’s important to set the groundwork for this study by considering and defining these rights according to recent history and modern international law, and clarifying which definitions of freedom of education and the right to an education are utilized in this thesis .While there are too many views on freedom of education and the right to an education to consider all their nuances within the confines of this study, I would be remiss to fail to mention a few common views.

In its most basic form, freedom of education is defined in this study as the right of parents to direct the education of their children. This “direction” can take many forms, and it has been limited and expanded in a variety of ways throughout history. I will begin by discussing a few common definitions and philosophies surrounding freedom of education.

According to a restrictive understanding of freedom of education, the right merely requires that the government allow parents to opt their children out of individual lessons or courses that they object to due to their sincerely held religious beliefs. For example: Jewish parents could opt their child out of cooking classes if the lessons involved food

that is not Kosher, Southern Baptist parents could opt their child out of P.E. if the lessons that week involved dancing, and conservative Christian parents could opt their child out of sex-education classes if the lessons involved discussions that are contrary to their views on sex and marriage. Under this view, parents have no prior right to choose how, where, or with which curriculum their child is educated, and a government monopoly over education is acceptable. “Freedom” of choice in education only exists inasmuch as parents are free to opt out of specific lessons.

According to an opposing, more libertarian approach to freedom of education, the right necessitates that parents have (if they desire) complete freedom from government oversight and involvement in education. According to this view, parents can elect to completely avoid government oversight or monitoring of their children’s education. In fact, they can freely choose *not* to educate their children for any reason. This view has come under fire in recent years, especially as children’s autonomous rights, including their right to an education, have gained steam.

Is there a modern definition of freedom of education that falls somewhere between these two extremes? Is there an alternative philosophy that allows parents to freely choose how to educate their children, but also holds them accountable for ensuring that their children *are* educated and prepared for life in society, and according to which the government is tasked with stepping in or monitoring when parents wantonly neglect this responsibility? There is. The definition of “freedom of education” that I utilize in this thesis will fall into this space between these two extremes.

Freedom of education, as presented in this thesis, requires that parents have a prior right to decide how their children are educated, as the Universal Declaration of

Human Rights suggests.¹ But it does not require that the government be completely uninvolved with ensuring that children are educated and prepared for successful lives in society, and for holding parents accountable if they fail to fulfill this duty. Similarly, the child's right to education² is not understood in this study as a mandate for a government monopoly of education or onerously restrictive education policies. While the government can and should play a role in ensuring that children are educated and prepared for life in society, the government does not need to enforce a monopoly over education —at the expense of freedom of education — in order to ensure that the child's right to an education is protected. This definition, and the philosophy that undergirds it, are largely supported by the history of these rights and their current understanding according to international rights documents and treaties.

¹ “Universal Declaration of Human Rights.” (United Nations, December 10, 1948), Article 26, Section 3. Accessed April 3, 2019. <https://www.un.org/en/universal-declaration-human-rights/>.

² “Universal Declaration of Human Rights.” Article 26, Section 1.

Chapter II

A Short History of Freedom of Education and the Right to an Education

Educational freedom and the right to an education both have storied histories in the international human rights realm. The Universal Declaration of Human Rights (UDHR), widely considered the seminal work of the modern human rights era, protects both of these rights. Article 26, Section 1 of the Universal Declaration of Human Rights protects “the right to education.”³ And Article 26, Section 3 declares that, “Parents have a prior right to choose the kind of education that shall be given to their children.”⁴ Nevertheless, at some level, these two rights—the right to an education and freedom of education—can (and have) come into conflict. This conflict leads to the core question of this thesis: Can the right to education be protected while freedom of education is allowed to flourish? Myriad scholars over the centuries have noted and debated the intersection and possible contradiction between these values and rights,⁵ and they have come to a variety of conclusions regarding their prioritization.

Nineteenth Century: Philosophical Debates

In the nineteenth century, utilitarian English philosopher John Stuart Mill made an argument in favor of freedom of education in his essay *On Liberty*. Mill’s libertarian

³ “Universal Declaration of Human Rights.” Article 26, Section 1.

⁴ “Universal Declaration of Human Rights,” Article 26, Section 3.

⁵ Adam Swift, *How Not to Be a Hypocrite: School Choice for the Morally Perplexed Parent* (London: Routledge, 2003).

philosophy is not intrinsically opposed to state-mandated compulsory education (the right to an education),⁶ but his philosophy is at variance with a government monopoly over the education system. Mills opposes policies that mandate government-run schools, or that require all schools to teach the same curriculum, and he supports policies that encourage a variety of private options.

Mill believed that a government monopoly over education would limit society in its variance of thought, thereby harming democratic wellbeing, free thought, and the future of society. Instead of encouraging a government monopoly over education, Mill argued that the government should “leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer class of children, and defraying the entire school expenses of those who have no one else to pay for them.”⁷ In summary, those who purely adhere to Mill’s libertarian philosophy argue that the state should step in to provide education only when guardians are unable, or fail to, independently provide those opportunities.

In his philosophy of education, Mill delineates a difference that is central to understanding the definition of freedom of education used in this thesis: the difference between mandatory education in state-run schools and mandatory education according to prior parental preference and choice. Mill points out: “The objections which are urged with reason against State education, do not apply to the *enforcement of education* by the State, but to the State’s taking upon itself to direct that education; which is a totally

⁶ John Stuart Mill, *On Liberty* (Gutenberg, EBook #34901, 2011), 201.

⁷ Mill, *On Liberty*, 201. Emphasis added.

different thing.”⁸ Mill firmly believed in and defended the right of children to an education, and he understood that the state should protect the child’s right to an education (what he here refers to as “enforcement of education”).

Nevertheless, Mill also wanted freedom of thought to flourish, and he therefore supported freedom of education and prior parental choice in education. Mill’s philosophy of education allows for the government to ensure that children are being educated, without necessitating that the government take it upon themselves to directly provide that education in every instance. In “The Legitimacy of Using the Harm Principle in Cases of Religious Freedom Within Education,” political scientist Georgia du Plessis explains, “Mill in his work *On Liberty* (1859) states that the state should not provide education itself on more than a small scale. He asks the question as to how different religions and parties will agree on what is to be taught and such authority by the state will only try to mould people to be exactly like another.”⁹ She goes on to explain that “Mill attempts to strike the right balance between parental and state authority by requiring parents to satisfy the educational needs of the child and society, while allowing parents to retain authority over many aspects of education.”¹⁰

Of course, Mill’s philosophy of education was not unilaterally accepted. In the mid-nineteenth century, education reformer Horace Mann championed widespread government-run schools as a necessary public good. He encouraged legal reform in favor

⁸ Mill, *On Liberty*, 201.

⁹ Georgia du Plessis, “The Legitimacy of Using the Harm Principle in Cases of Religious Freedom Within Education,” *Human Rights Review* (2016): 357. Published online June 17, 2016. <https://link-springer-com.ezp-prod1.hul.harvard.edu/content/pdf/10.1007/s12142-016-0415-5.pdf>.

¹⁰ Georgia du Plessis, “The Legitimacy of Using the Harm Principle,” 357.

of state-sponsored education, including government-run schools supported by local taxes. His philosophy is widely known as the “common school movement.” In his 1848 Report to the Secretary of the Massachusetts State Board of Education, Mann suggests, “nothing but Universal Education can counter-work [the] tendency to the domination of capital and the servility of labor.”¹¹ Contrary to Mill’s belief that education can and should often be provided outside of government schools, Mann favors attendance at government schools as a necessary prerequisite for the progress and wellbeing of society.

Towards the end of the nineteenth century, education reformer John Dewey likewise championed progressive public education. For Dewey, the purpose of education encompassed more than merely the transfer of knowledge. He viewed education as a means of sharing social experiences and ensuring social wellbeing.¹² In *Democracy and Education*, Dewey introduces his philosophy of education. He states: “Beings who are born not only unaware of, but quite indifferent to, the aims and habits of the social group have to be rendered cognizant of them and actively interested. Education, and education alone, spans the gap.”¹³ Thus, for Dewey, education should be mandatory and largely government-run and funded. Dewey firmly believed that the social aspects of schooling

¹¹ Horace Mann, “Twelfth Annual Report to the Secretary of the Massachusetts State Board of Education,” (Genius.com, published 1848). Accessed May 1, 2019. <https://genius.com/Horace-mann-twelfth-annual-report-to-the-secretary-of-the-massachusetts-state-board-of-education-1848-annotated>.

¹² Alberto M. Piedra, “The Tragedy of American Education: The Role of John Dewey,” (The Institute of World Politics, February 1, 2019). Accessed March 29, 2019. https://www.iwp.edu/news_publications/detail/the-tragedy-of-american-education-the-role-of-john-dewey.

¹³ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (London: Macmillan, 1923), 3.

were paramount, and these ends could not be appropriately addressed outside of the public schoolhouse experience. Dewey argued that “public schooling” is required to mold children into the kind of citizens a “modern democracy” needs.¹⁴ Dewey’s philosophy of education left a lasting mark on education policies, both in the United States and abroad, and the contributions of Dewey and Mann pushed society in the direction of widespread government-run education. Nevertheless, parental rights and freedom of education were still protected in many nations and, perhaps more importantly, in international documents and treaties.

Twentieth and Twenty-First Centuries: International Treaties

The education philosophies of Mill, Dewey, and others encouraged a wave of activism in favor of mandatory, government-run education towards the end of the twentieth century. During this period, the child’s right to an education gradually became a commonly accepted human right. Nevertheless, the popularity of public education and the acceptance of the right to an education did not delegitimize freedom of education in human rights treaties and documents. In fact, international human rights documents and national laws still widely protected freedom of education throughout the twentieth and twenty-first centuries.

The landmark Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, included protections for both the right to an education and freedom of education. Article 26, Section 1 states: “Everyone has the

¹⁴ James R. Otteson, “Freedom of Religion and Public Schooling,” *Independent Review* 4, no. 4 (Spring 2000): 611. Accessed April 3, 2019. http://www.independent.org/pdf/tir/tir_04_4_otteson.pdf.

right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”¹⁵ In regards to freedom of education, Article 26, Section 3, states: “Parents have a prior right to choose the kind of education that shall be given to their children.”¹⁶ Although the Universal Declaration of Human Rights is not technically a binding international treaty, it set the stage for human rights treaties, international law, and popular opinion throughout the twentieth century.

Nearly twenty years later, the International Covenant on Economic, Social, and Cultural Rights similarly suggested that freedom of education and the right to an education were both important rights that can and should coexist. Article 13, Section 1 states: “The States Parties to the present Covenant recognize the right of everyone to education.”¹⁷ In regards to freedom of education, Article 13, Section 4 states: this article should not “be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”¹⁸ Thus, while the right to an education became ingrained in international agreements, freedom of education was also maintained.

¹⁵ Universal Declaration of Human Rights, Article 13, Section 1.

¹⁶ Universal Declaration of Human Rights, Article 13, Section 4.

¹⁷ “International Covenant on Economic, Social and Cultural Rights,” United Nations Human Rights Office of the High Commissioner, 16 December 1966. Accessed April 2, 2019. <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

¹⁸ “International Covenant on Economic, Social and Cultural Rights.”

More recently, human rights scholars have defended both the child's right to an education and freedom of education. In "The Protection of the Right to Education by International Law," Klaus-Dieter Beiter makes an argument in favor of the right to an education and the enforcement of this right in international law. As such, his philosophy of education and human rights largely favors government-run education institutions. Nevertheless, Beiter recognizes that parents—not the state—ought to remain the primary decision makers when it comes to their children's education. He states: "Traditionally, education has been the duty of the child's parents. In modern times, with the rise of systems of education, the role of parents has diminished. It remains important, though, in the context of determining the *type* and *content* of education the child will receive."¹⁹ One can see threads of John Stuart Mill's philosophy of education in Beiter's writings. Beiter believes that parental oversight of education is important to preserve "a pluralistic democratic society, which would be jeopardized by a state monopoly on education."²⁰ Even in the midst of the era of the rights of the child, freedom of education and the parent's right to choose how their child is educated are maintained by scholars—even scholars who overwhelmingly favor and defend the benefits of government-run systems of education.

A recent publication by the United Nations Children Fund (UNICEF), the arm of the United Nations that is primarily concerned with the rights of children, similarly gave

¹⁹ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights*, International Studies in Human Rights, vol. 82 (Leiden: Martinus Nijhoff, 2006): page 21. Emphasis added.

²⁰ Beiter, *The Protection of the Right to Education*, 21.

a nod to the continued relevance of freedom of education, even in the age of the Convention on the Rights of the Child. In a recent report titled “A Human Rights-Based Approach to Education,” UNICEF stated that the “UN Convention on the Rights of the Child . . . insists that children’s best interests must be a primary consideration in all matters affecting them.”²¹ In other words, “the Convention affects the right of parents to freedom of choice in their child’s education; parental rights to choose their children’s education are not absolute.”²² The report goes on to clarify, “The parent’s right to educational choice may end when it begins to negatively affect the child’s right to learn.”²³ Despite these limits, prior parental choice in education (i.e. freedom of education) remains an important right. UNICEF states, “The rationale behind parental choice is not to legitimize a denial of their child’s rights. Rather, it is to prevent any state monopoly of education and to protect educational pluralism.”²⁴ Mill’s defense of pluralism in education lives on — even amongst the most stringent defenders of the right to an education.

In a publication titled “The Right to Education—Law and Policy Review Guidelines,” The United Nations Education, Scientific and Cultural Organization (UNESCO) similarly confirms the importance of “Ensuring free choice of education without interference from the State or third parties, subject to conformity with ‘minimum

²¹ “A Human Rights-Based Approach to Education,” (United Nations Children’s Fund, Published 2007). Accessed 1/12/2020. 21. https://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf.

²² A Human Rights-Based Approach to Education,” 21.

²³ A Human Rights-Based Approach to Education,” 21.

²⁴ A Human Rights-Based Approach to Education,” 21.

educational standards.”²⁵ Later, in the review standards, the UNESCO report explicitly rates nations on whether parental choice is taken into consideration in education policies, and whether legislation is in place that “expressly recognizes the right of parents or legal guardians to choose schools for their children other than those established by the public authorities, which conform to the minimum educational standards laid down or approved by the State?”²⁶ In summary, even UNICEF and UNESCO—international institutions that undeniably favor the child’s right to an education—recognize the important of maintaining freedom of prior parental choice in education.

The Resurgence of Home Education

The recent resurgence and recognition of home education in many developed nations is a relevant facet of this discussion. Towards the end of the twentieth century and the beginning of the twenty-first century, home education began to become an increasingly popular option in several nations. In 2013, a report from the Digest of Education Statistics suggested that the number of homeschooled children in the United States alone increased by 61.8% between 2003 and 2012.²⁷ As of 2012, nearly two

²⁵ “The Right to Education: Law and Policy Review Guidelines,” (United Nations Educational, Scientific and Cultural Organization, 2014): page 13. Accessed April 19, 2019. https://unesdoc.unesco.org/in/documentViewer.xhtml?v=2.1.196&id=p::usmarcdef_0000228491&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_81ae0399-3a8d-4ddf-a312-16c1e0924a34%3F_%3D228491eng.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000228491/PDF/228491eng.pdf#%5B%7B%22num%22%3A33%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2Cnull%2Cnull%2C0%5D.

²⁶ “The Right to Education: Law and Policy Review Guidelines,” 29.

²⁷ Thomas D. Snyder and Sally A. Dillow, “Digest of Education Statistics 2013,” (National Center for Education Statistics, Institute of Education Sciences, May 2015): page 124. Accessed April 3, 2019, <https://nces.ed.gov/pubs2015/2015011.pdf>.

million students were being homeschooled in the United States alone,²⁸ and all signs point towards continued growth in the home education movement. Home education is also growing in popularity in other countries, including Australia, Canada, France, Hungary, Japan, Kenya, Russia, Mexico, South Korea, Thailand, and the United Kingdom.²⁹

An important question many people ask is whether the resurgence of home education is linked to any noticeable changes (positive or negative) in education results among students who are educated using this system. It is difficult to find widespread global research regarding home education outcomes, but research from the United States indicates that home education is a successful and viable alternative to public and private education. According to researcher Brian Ray,

Homeschoolers are still achieving well beyond their public school counterparts—no matter what their family background, socioeconomic level, or style of homeschooling. In the study, homeschoolers scored 34–39 percentile points higher than the norm on standardized achievement tests. The homeschool national average ranged from the 84th percentile for Language, Math, and Social Studies to the 89th percentile for Reading.³⁰

These results varied little based on factors like parental education level, student gender, family income, and teacher-certification of parents.³¹ In fact, outcomes were surprisingly

²⁸ Snyder and Dillow, “Digest of Education Statistics 2013.”

²⁹ Brian D. Ray, “Research Facts on Homeschooling,” (National Home Education Research, January 7 2019): page 3. Accessed April 12, 2019. <https://www.nheri.org/research-facts-on-homeschooling/>.

³⁰ Brian D. Ray, “Homeschool Progress Report 2009: Academic achievement and demographics,” (Home School Legal Defense Association, 2009): page 3. Accessed January 18, 2020. https://hsllda.org/content/docs/study/ray2009/2009_Ray_StudyFINAL.pdf.

³¹ Brian D. Ray, “Homeschool Progress Report 2009,” 4.

lower (albeit by a small percentile) for home educated students whose parents held teacher certifications.³²

At the outset, it is important to distinguish between home education as a deliberately chosen education system that serves as an alternative to government-run or private education models, and the historical prevalence of children who were loosely educated at home for pragmatic reasons. As Milton Gaither explains in “The History of Home Education,” it is important to distinguish “between homeschooling as a deliberately chosen alternative to institutional schools on the one hand, and, on the other, the pragmatic use of the home to educate children.”³³ The pragmatic use of the home to educate has long occurred, even from ancient times, and has been central to the history of human societies. Gaither labels this practice “domestic education,” and treats it as an entirely different model from modern home education. This thesis will similarly treat the two as different models of education. The former will be referred to as “home education” or “homeschooling,” while the latter will be referred to as “domestic education.”

Illiteracy in the Modern Age

Another relevant facet of this discussion is the root cause of continued illiteracy around the globe.³⁴ While global literacy rates continue to rise, there remain legitimate

³² Brian D. Ray, “Homeschool Progress Report 2009,” 3.

³³ Milton Gaither, “The History of Homeschooling,” in *The Wiley Handbook of Home Education* (Hoboken, NJ: John Wiley & Sons, 2017), 7.

³⁴ “Literacy Rates Continue to Rise from One Generation to the Next,” UNESCO Institute for Statistics, Fact Sheet No. 45 (September 2017), 1. Accessed January 18, 2020. http://uis.unesco.org/sites/default/files/documents/fs45-literacy-rates-continue-rise-generation-to-next-en-2017_0.pdf.

human rights concerns regarding the right to education in many nations.³⁵ Despite these concerns, available evidence indicates that low literacy rates in developing countries are largely due to a lack of funding, resources, infrastructure, and a myriad of cultural factors, not due to the prevalence of modern home education or the availability of private education options.³⁶ Research regarding the root cause of illiteracy in these nations, especially in comparison with developed nations, reveals that freedom of education, as defined in this thesis, is not to blame when the right to education is not being adequately protected.

If freedom of education is not to blame for persistent illiteracy rates in developing countries, why is choice in education still restricted in many nations? Are historical and cultural factors mainly at play, or is it some other combination of legal and political factors? To answer this question, this study will turn to analyzing three sample nations that defend freedom of education and the right to an education in different ways: Germany, the United States, and Brazil. This study will briefly look at the historical and cultural background of education policies in each country, then turn to looking at the legal landscape regarding the right to an education and freedom of education, and modern political movements regarding these rights.

³⁵ Jennifer O'Neill, "Worst Places for Education around the World," *Global Citizen*, (August 3, 2019). Accessed May 1, 2019. <https://www.globalcitizen.org/en/content/worst-schools-world/>. The bottom ten nations in regard to the right to education and literacy are located in Africa: Niger, Eritrea, Burkina Faso, Chad, Guinea, Sierra Leone, Mali, Djibouti, Sudan, and Ethiopia.

³⁶ O'Neill, "Worst Places for Education around the World."

Chapter III

Comparative Case Study: Germany

This analysis overview of Germany's education system provides a unique contribution to this study. While Germany excels at ensuring compulsory school attendance, their education system does not always ensure that freedom of choice is protected for parents or students. We will begin by surveying a short history of Germany's overarching education system, and then turn to looking at how the right to education and choice in education are protected and infringed in their modern education policies.

History and Cultural Makeup

Needless to say, Germany experienced its fair share of cultural and political turmoil over the last century. As such, many of their legal standards and educational policies were interrupted and started from scratch throughout the twentieth century. Generally speaking, education policies from the Weimar Republic and Nazi Germany are entirely separate from the modern legal regime, apart from, to an extent, the role they played in influencing the cultural undertones that undergird the modern legal regime.

In 1949, Germany split into West Germany (or the Federal Republic of Germany, controlled by France, the United States, and the United Kingdom), and soviet East Germany. West Germany immediately set about implementing a decentralized system of education. The Länder (states) cooperated in the Kultusministerkonferenz (KMK), or the

“Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany,” in an effort to modernize and standardize education policies.³⁷ The modern education regime continued to develop after the “Unification Treaty of 1990 (Einigungsvertrag) between the Federal Republic of Germany and the German Democratic Republic required the five Länder in eastern Germany to lay the legislative foundations for the reorganisation of education by 30 June 1991.”³⁸ This transitional period led to a newly unified Germany introducing a common legal structure for their education system that involved basic federal laws (the “Basic Law”) alongside the self-coordination of the Länder (states).

Legal Landscape

Germany’s education laws are largely unique compared to our other two test nations (the United States and Brazil), but one notable similarity to the education system in the United States is the diffusion of education policies to the states (Länder). As in the United States, responsibility for education policies is largely determined by the federal structure of the states.³⁹ Unless the Basic Law (Grundgesetz) awards legislative powers to the Federation, the Länder have the right to legislate and change education policies as

³⁷ “Political, Social and Economic Background and Trends,” (Eurydice, an official EU website, December 26, 2019). Accessed February 2, 2020. https://eacea.ec.europa.eu/national-policies/eurydice/content/political-social-and-economic-background-and-trends-31_en.

³⁸ “Political, Social and Economic Background and Trends.”

³⁹ “Germany: Organisation and Governance.” EuryDice, an official website of the European Union. 12/26/2019. https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-and-governance-31_en.

they see fit. As such, education policies vary from state to state. Nevertheless, there are many similarities across the Federation, which I will focus on in this thesis.

In Germany, compulsory education begins in Grade 1 (usually at age 6), and primary school attendance policies are relatively consistent across the Federation. Primary schools are known as “Grundschule,” and Students in grades 1 to 4 (1 to 6 in Berlin and Brandenburg) are required to attend Grundschule. Enforcement of compulsory primary school attendance contributes to high literacy rates in Germany, consistently staying at 99% of the population.⁴⁰

In the German education system, students are sorted into different education tracks at a young age.⁴¹ This track division has a huge impact on the student’s life and career trajectory, both during and after their schooling years. For instance, only students in one track, the Gymnasium, are typically allowed to participate in the tertiary education system in Germany. Steffen Schindler and David Reimer explain, “After 4th grade at the age of 10 (in some federal states 6th grade/age 12) students are allocated to three different secondary education tracks.”⁴² Only students who qualify for the Gymnasium track typically continue on to get their upper secondary degree (Abitur), which is a prerequisite for accessing university education.⁴³ Who decides which track students are

⁴⁰ “Germany Literacy Rate 1990-2020,” Macro Trends. Accessed December 20, 2019. <https://www.macrotrends.net/countries/DEU/germany/literacy-rate>.

⁴¹ Steffen Schindler and David Reimer, “Differentiation and Social Selectivity in German Higher Education,” *Higher Education* 61, no. 3 (03, 2011): 261-275. doi:<http://dx.doi.org.ezp-prod1.hul.harvard.edu/10.1007/s10734-010-9376-9>. <http://search.proquest.com.ezp-prod1.hul.harvard.edu/docview/877842187?accountid=11311>.

⁴² Schindler and Reimer, “Differentiation and Social Selectivity in German Higher Education.”

⁴³ Schindler and Reimer, “Differentiation and Social Selectivity in German Higher Education.”

assigned to? The allocation is largely determined by teachers and other school staff. This early allocation, and the limits it places on the opportunities afforded to many students, is a topic of concern for many German parents. As such, parents and policy-makers have expressed concerns about the hierarchical aspects of this track system.⁴⁴

In practice, this system limits access to higher education to less than half the population. In 2007, for example, only “47% of a birth cohort obtained an upper secondary certificate and were thus eligible for higher education.”⁴⁵ In many states, parents have their hands tied behind their backs when it comes to government-approved alternatives for their children. If your child fails to receive a recommendation for Gymnasium, you are often forced to choose between the other tracks (Hauptschule or Realschule), which will rarely allow your child to pursue post-secondary education in Germany.

In 2006, Isabelle de Pommereau, a German news correspondent, pointed out: “perhaps nowhere in the industrialized world does the school success of children depend so much on the social background of their parents. Germany's rigorous tracking of pupils into three different school paths, determining as early as age 9 whether they will end up at a university or learn a trade, puts children of immigrants and lower social backgrounds at a disadvantage.”⁴⁶ Pommereau continues, “The latest PISA study released last fall

⁴⁴ Louisa Schaefer, “Germany’s school system 101: Prepare for the mind-boggling,” DW, (February 2, 2019). Accessed January 19, 2020. <https://www.dw.com/en/germanys-school-system-101-prepare-for-the-mind-boggling/a-47210753>.

⁴⁵ Schindler and Reimer, “Differentiation and Social Selectivity in German Higher Education.”

⁴⁶ Isabelle de Pommereau, “Private schools take off in Germany,” *Christian Science Monitor*, January 30, 2006. Accessed February 14, 2020. <https://www.csmonitor.com/2006/0130/p07s02-woeu.html>.

shows that children of professors are four times more likely to go to a ‘gymnasium’ - the university-track high school - than children of car repairmen.”⁴⁷

In 2006, a United Nations Special Rapporteur on education critiqued the lack of choice and mobility in Germany’s school system. The report states, “One of the main causes of this exclusion [of marginalized students] is the system of classification, which is carried out at a very early age and following criteria that are neither clear nor uniform. The resulting evaluation depends to a large extent on the particular regulations in force in each Land and on the teachers, who are not always properly trained to carry out this task.”⁴⁸ The Special Rapporteur therefore suggests that safeguards be put in place to ensure “the participate of parents of schoolchildren” in “decisions relating to the placement of their children in educational centres and to the choice of the modes of education.”⁴⁹ Germany has not yet re-evaluated their education model according to the Special Rapporteur’s recommendation. These continued limits on student success have encouraged an increasing number of German parents to consider alternative education options, but private options are often expensive, restricted by the Basic Law, or academically undesirable.

In 2000, the Programme for International Student Assessment (PISA) reported that Germany’s education system wasn’t living up to regional standards: “Results from

⁴⁷ Isabelle de Pommereau, “Private schools take off in Germany.”

⁴⁸ “Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’ Report of the Special Rapporteur on the right to education, Vernor Muñoz,” United Nations General Assembly (March 9, 2007), 22. A/HRC/4/29/Add.3. Accessed February 2, 2020. https://hslsda.org/content/hs/international/germany/Munoz_Mission_on_Germany.pdf.

⁴⁹ “Implementation of General Assembly Resolution 60/251,” 22.

31 countries were released at the time, and German students' scores in reading, mathematics and science were lower than the OECD average."⁵⁰ In addition to concerns about Germany's caste-like education system, this lackluster PISA performance led many parents to question Germany's education system and seek alternatives outside of government-run schools.

Thanks in large part to these concerns, private schools in Germany have increased in popularity in recent years, but they are still a minority choice. Manfred Weiss, of the German Institute for International Educational Research, explains: "The educational system in the Federal Republic of Germany can be characterised as a mixed system in which both private and public production and private and public financing exist side by side. Although the right to establish private schools is constitutionally guaranteed and considerable public subsidies are granted to many privately run institutions, non-state education is traditionally less important than in most other Western countries."⁵¹ In fact, despite widespread international legal and philosophical support for freedom of education, this right is not vigorously protected in Germany's laws and common practices, especially compared to other developed nations, both in Europe and globally.

⁵⁰ "Germany's PISA Shock," (Organisation for Economic Co-operation and Development). Accessed December 12, 2019. <https://www.oecd.org/about/impact/germanypisashock.htm>.

⁵¹ Manfred Weiss, "The Financing of Private Schools in the Federal Republic of Germany," *Compare: A Journal of Comparative and International Education* 16, no. 2 (December 30, 1985): 149. <https://www-tandfonline-com.ezp-prod1.hul.harvard.edu/doi/abs/10.1080/0305792860160202#aHR0cHM6Ly93d3ctdGFuZGZvbmxpbmUtY29tLmV6cC1wcm9kMS5odWwuaGFydmFyZC5lZHUvZG9pL3BkZi8xMC4xMDgwLzAzMDU3OTI4NjAxNjAyMDI/bmVlZEFjY2Vzc2l0cnVlQEBA>==.

In Germany, school attendance is compulsory and private schools are often strictly controlled and vetted by both federal and state policies. Article 7, Paragraph 4 of the Basic Law loosely protects the right to establish private schools. It states:

The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the Länder. Such approval shall be given when private schools are 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. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.⁵²

Unfortunately, private elementary (primary) schools are not granted any such protection.

Article 7, Paragraph 5 of the Basic Law states:

A private elementary school shall be approved only if the education authority finds that it serves a special educational interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.⁵³

A legal summary from the European Union confirms: “Privately-maintained primary schools are therefore the exception; in almost all cases they are either denominational primary schools, Freie Waldorfschulen (Rudolf Steiner schools), reformist schools and schools with a bilingual and international profile or primary schools with an integrated boarding facility.”⁵⁴

⁵² “Basic Law for the Federal Republic of Germany,” Deutscher Bundestag (amended May 23, 2019), 17. Accessed February 2, 2020. <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

⁵³ “Basic Law for the Federal Republic of Germany,” 17.

⁵⁴ “Organisation of Private Education,” EuryDice, an official website of the European Union. December 26, 2019. https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-private-education-31_en.

Is there truly freedom of choice in education if private schools are restricted to such a strict degree? Why are parents only allowed to choose private primary schools that serve a “special” or “denominational” interest? While Germany claims to respect and uphold freedom of choice in education, and some of their laws lean in that direction, these restrictive private education laws have caused concern for members of the international human rights community.

Furthermore, while private education is allowed in some instances, home education is entirely illegal in Germany, except for rare and strict exceptions, “for severe illnesses, the children of diplomats, and in rare instances for working children, such as child actors.”⁵⁵ Germany’s laws restricting parents’ ability to home educate their children have experienced legal and judicial pushback in recent years. Several families have attempted to home educate their children despite laws forbidding the practice and have challenged the legislation that makes home education illegal. Since 2013, the Wunderlich family has been fighting for their right to home educate their four children. In August 2013, the Wunderlich children were seized by German authorities because they were being homeschooled. The children were returned three weeks later, after interviews and tests revealed that their situation was not abusive, but, five years later, the Wunderlich’s legal battle is still ongoing. Most recently, their case to homeschool was heard at the European Court of Human Rights. In the Fall of 2018, the Court ruled that German authorities did not infringe the Wunderlich’s freedom of education, and that the state had

⁵⁵ Andrea Grunau and Elizabeth Schumacher, “European Court Rules against German Homeschooling Family,” *Deutsche Welle*, October 1, 2019. Accessed April 12, 2019, <https://p.dw.com/p/3BIOb>.

acted properly to enforce the children's right to an education.⁵⁶ The Wunderlichs' plan to appeal their case to the Grand Chamber of the European Court of Human Rights.⁵⁷ This case has the potential to affect home education rights and policies in Germany and across Europe.

In 2006, the United Nations Special Rapporteur on Education noted the lack of freedom to home educate in Germany. The report states:

Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school.⁵⁸

Therefore, the Special Rapporteur went on to suggest: "That the necessary measures should be adopted to ensure that the home schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate, bearing in mind the best interests of the child."⁵⁹ Despite the Special Rapporteur's suggestion that Germany ought to create a system for legalizing and supervising home education in Germany, the restrictions have remained in place. The

⁵⁶ Grunau and Schumacher, "European Court Rules against German Homeschooling Family."

⁵⁷ "German Homeschoolers Appeal to Top European Court," ADF International, April 8, 2019. Accessed April 15, 2019. <https://adfinternational.org/news/german-homeschoolers-appeal-to-top-european-court/>.

⁵⁸ "Implementation of General Assembly Resolution 60/251," 16.

⁵⁹ "Implementation of General Assembly Resolution 60/251," 23.

Wunderlich's case, and similar cases across Germany, reveal that the debate over freedom of education and the right to an education is still ongoing and pertinent.

Summary

Germany's education system is far from a complete failure. In fact, it has several redeeming traits, including their consistently high literacy rates. Nevertheless, concerns remain regarding the system's ability to navigate between freedom of choice in education and the child's right to an education. While compulsory education may have a place in ensuring that the child's right to education is upheld, the Germany government risks infringing on freedom of education when they strictly enforce attendance at state-approved schools and make it extremely difficult (sometimes impossible) to open private schools and illegal to home or distance educate. This restrictive system is notably different from the more libertarian-leaning education system in the United States, which will be discussed next.

Chapter IV

Comparative Case Study: The United States

Education policies in the United States differ from the policies in Germany in many ways, especially in regard to freedom of education. The education systems in both countries are decentralized to the states, but the legal similarities don't extend much further than that. Where Germany enforces relatively restrictive policies regarding private education and home education, the United States has implemented rather libertarian education policies in this regard. This freedom is evidenced by the large number of students who are being home educated and private schooled in the United States.⁶⁰ Nevertheless, while home education and private education are popular options today, they have not always been popular, or even legal.

History

American legal precedents have historically favored liberty in many areas, and education is not an exception to that generalization. During America's early years, "no one would have suggested that educating one's children at home required government approval or that homeschooling might not be legal."⁶¹ Thus, in the seventeenth and eighteenth centuries, school attendance was not compulsory, and most children were educated at home or at local community schools (the oft-romanticized "one room

⁶⁰ Snyder and Dillow, "Digest of Education Statistics 2013," 124.

⁶¹ Antony Barone Kolenc, "Legal Issues in Homeschooling," in *The Wiley Handbook of Home Education*, (Hoboken, NJ: John Wiley & Sons, 2017), 59

schoolhouse”). Early American history is replete with examples of domestic and academic education at home, including historical figures such as George Washington, James Madison, Benjamin Franklin, Abraham Lincoln, Mark Twain, Andrew Carnegie, and Thomas Edison, among others.⁶²

It was not until the late nineteenth century that the states began passing compulsory education laws, which required “children to attend school or else be considered truant.”⁶³ During this time period, some parents and communities started private religious schools to educate according to their individual convictions, while others defaulted to the public education system. Due to these legal changes and the widespread availability of public schooling, “nearly all American chose institutional schooling over home in the nineteenth and early twentieth centuries.”⁶⁴

Home education as a formal alternative to institutionalized education, did not experience a renaissance until the mid-to-late twentieth century. Milton Gaither explains that there were “three broad contextual changes” that set the stage for this resurgence: “the growth of the postwar suburbs and the anti-institutional ideologies they helped establish, the Civil Rights and women’s movements, which popularized organized protest against the established order, and the polarization of the electorate into right and left wings in the late 1960s and 1970s, both of which were skeptical about established institutions like government schools.”⁶⁵ Homeschooling as an alternative to the

⁶² Barone Kolenc, “Legal Issues in Homeschooling.” 60.

⁶³ Barone Kolenc, “Legal Issues in Homeschooling.” 60.

⁶⁴ Gaither, “The History of Homeschooling,” 11.

⁶⁵ Gaither, “The History of Homeschooling,” 11

institutionalized public school system began as a mainly underground venture, led by progressive and liberal educators like John Holt.⁶⁶ But in the late twentieth century, the founding of the Home School Legal Defense Association (HSLDA), and the simultaneous increase in religion-based homeschoolers, changed the tactics and trajectory of the home education movement.⁶⁷ Home educators began defending their right to educate their children according to their religious beliefs and free of government interference.

Historically, private schools in the United States have faced less legal interference than home educators. States have periodically attempted to restrict or control private schools, but legal precedent has nonetheless remained firmly on the side of the freedom of parents to choose to privately educate their children. In *Pierce v. Society of Sisters* (1925), the Supreme Court of the United States unanimously sided with the right of parents to choose a private education for their children. The Court's decision stated, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."⁶⁸ The decision also declared, "the child is not a mere creature of the State."⁶⁹ Thus, while the Court did not deny the government's right to enforce standards of education (even "acknowledging the 'power of the state' to place

⁶⁶ Barone Kolenc, "Legal Issues in Homeschooling," 60.

⁶⁷ Barone Kolenc, "Legal Issues in Homeschooling," 61.

⁶⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

⁶⁹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

‘reasonable regulations’ on a child’s education”),⁷⁰ it did make a strong statement and set legal precedent firmly in favor of parental choice in education.

Legal Landscape

What is the current legal landscape regarding the child’s right to education and freedom of choice in education in the United States? Current home education policies vary state to state, but no US state outlaws home education. Instead, states employ a variety of legal to track and regulate home education, some more strict than others. Across the United States, “Parents possess a fundamental right to homeschool their children, subject to reasonable state regulation.”⁷¹ According to the Home School Legal Defense Association, a handful of states have passed “no homeschool-specific rules,”⁷² while fourteen states are classified as “low-regulation,” and merely require that parents declare their intention to home educate to the school district.⁷³ Meanwhile, about 20 states and the District of Columbia “require both notification and some method of assessing progress, such as standardized testing or a teacher evaluation.”⁷⁴ This leaves “a handful of high-regulation states” that require “not only notice or test scores, but also compliance with more onerous restrictions such as curriculum approval, teacher certification, and required instruction times.”⁷⁵

⁷⁰ Barone Kolenc, “Legal Issues in Homeschooling,” 65.

⁷¹ Barone Kolenc, “Legal Issues in Homeschooling,” 73.

⁷² Qtd. in Antony Barone Kolenc, “Legal Issues in Homeschooling,” in *The Wiley Handbook of Home Education*,” 74.

⁷³ Barone Kolenc, “Legal Issues in Homeschooling,” 74.

⁷⁴ Barone Kolenc, “Legal Issues in Homeschooling,” 74.

⁷⁵ Barone Kolenc, “Legal Issues in Homeschooling,” 74.

In other words, most states still abide by John Stuart Mill’s philosophy of education, which supports the “*enforcement of education* by the State,” while also opposing the State’s taking upon itself to direct that education in every instance, and defending freedom of parental choice in education.⁷⁶ In lieu of summarizing the laws from all 50 states, this study will look at one state from each “level” of protection to see how these state education policies often look in practice.

In Virginia, a “medium-regulation” state, the right to home educate is protected as long as parents abide by certain prerequisites. The Code of Virginia Title 22.1-254.1 (A) states:

instruction of children by their parents is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a high school diploma; (ii) is a teacher of qualifications prescribed by the Board of Education; (iii) provides the child with a program of study or curriculum which may be delivered through a correspondence course or distance learning program or in any other manner; or (iv) provides evidence that he is able to provide an adequate education for the child.⁷⁷

The code goes on to explain that parents who elect to home educate:

in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum, limited to a list of subjects to be studied during the coming year, and evidence of having met one of the criteria for providing home instruction as required by subsection A.⁷⁸

⁷⁶ Mill, *On Liberty*, 201. Emphasis added.

⁷⁷ “Code of Virginia, § 22.1-254.1. Declaration of policy; requirements for home instruction of children.” Subsection A. (Virginia Law, copyright 2020). Accessed February 15, 2020, <https://law.lis.virginia.gov/vacode/22.1-254.1/>.

⁷⁸ Code of Virginia, § 22.1-254.1. Declaration of policy; requirements for home instruction of children,” Subsection B.

Finally, home educating parents must

provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score in or above the fourth stanine on any nationally normed standardized achievement test, or an equivalent score on the ACT, SAT, or PSAT test or (ii) an evaluation or assessment which the division superintendent determines to indicate that the child is achieving an adequate level of educational growth and progress, including but not limited to (a) an evaluation letter from a person licensed to teach in any state, or a person with a master's degree or higher in an academic discipline, having knowledge of the child's academic progress, stating that the child is achieving an adequate level of educational growth and progress or (b) a report card or transcript from an institution of higher education, college distance learning program, or home-education correspondence school.⁷⁹

In summary: parents must generally hold a high school diploma or equivalent prerequisite, provide the division superintendent with a statement of intent to home educate and a description of the curriculum they will use, and follow-up at the end of the year with evidence that their child passed a standardized test or a teacher evaluation. In this way, Virginia attempts to protect freedom of education and the right to home educate, while also protecting the child's right to an education.

As an aside, the Code of Virginia also protects the right of students to entirely withdraw from these mandatory reporting guidelines if they are religiously opposed to school attendance. Title 22 of the Code explains, "Any pupil who, together with his parents, by reason of bona fide religious training or belief is conscientiously opposed to attendance at school. For purposes of this subdivision, 'bona fide religious training or belief' does not include essentially political, sociological or philosophical views or a

⁷⁹ Code of Virginia, § 22.1-254.1. Declaration of policy; requirements for home instruction of children," Subsection C.

merely personal moral code.”⁸⁰ For the purposes of this thesis, however, these religious exemptions will be considered a different conflict of rights (freedom of religion conflicting with the right to education). This thesis will not delve into this potential conflict, focusing instead on the potential conflicts between freedom of education and the right to education.

During the 2018-2019 school year, Virginia recorded 36,984 students who were being home educated under normal regulations, and 6,521 families who sought religious exemptions from mandatory reporting.⁸¹ The number of home educated students has more than quadrupled since the earliest recorded numbers in 1994-1995, when there were only 7,856 home educating students and 1,767 students who sought religious exemptions from reporting,⁸² and has more than doubled since the 2002-2003 school year, when there were 16,542 students being home educated and 5,479 students who sought religious exemptions to reporting.⁸³

⁸⁰ “Code of Virginia, § 22.1-254. Compulsory attendance required; excuses and waivers; alternative education program attendance; exemptions from article.” Subsection B(1). <https://law.lis.virginia.gov/vacode/22.1-254/>.

⁸¹ “Home Schooled Students & Religious Exemptions Reports: 2018-2019,” (Virginia Department of Education, January 1, 2019). Accessed February 2, 2020. http://www.doe.virginia.gov/statistics_reports/enrollment/home_school_religious_exempt/index.shtml.

⁸² “Home Schooled Students & Religious Exemptions Reports: Archived 1994-2001,” (Virginia Department of Education, November 19, 2012). Accessed February 2, 2020. http://www.doe.virginia.gov/statistics_reports/enrollment/home_school_religious_exempt/1994_2001.pdf.

⁸³ “Home Schooled Students & Religious Exemptions Reports: 2002-2003,” (Virginia Department of Education, February 3, 2003). Accessed February 2, 2020. http://www.doe.virginia.gov/statistics_reports/enrollment/home_school_religious_exempt/index.shtml.

Virginia allows private schooling, as do all 50 US states. Many families cannot afford to privately educate their children, but there is freedom of choice insofar as families can afford to privately educate their children. Some education policy analysts and human rights advocates have suggested that freedom of education will not be fully realized until all families have equal access to private options. This may require that the government provide vouchers to families who want to privately educate their children, but who cannot afford to do so. This particular facet of this discussion will not be discussed in depth in this thesis.

While Virginia enforces mandatory reporting and standardized testing for home educating families, some US states have more lax reporting laws. Texas is one such state. In Texas, home educating families “are exempt from the compulsory attendance statute because they are considered a type of private school under Section 25.086(a)(1) of the Texas Education Code.”⁸⁴ Private schools in Texas are similarly not regulated by the state, and “The school district also has no authority to approve curricula used by private schools.”⁸⁵

According to the Texas Supreme Court decision that formally legalized home education in Texas (Texas Education Agency v. Leeper 1994), there are only three legal requirements to home educate in Texas. The education must:

- [take place] in a bona fide (good faith, not a sham or subterfuge) manner,
- [using] a curriculum consisting of books, workbooks, other written materials, including that which appears on an electronic screen of either a computer or video tape monitor, or any combination of the preceding from either (1) of a private or parochial school which exists apart from the

⁸⁴ “Requirements to Homeschool in Texas,” Texas Homeschool Coalition, 2019. Accessed February 5, 2020. <https://thsc.org/requirements-to-homeschool-in-texas/>.

⁸⁵ “Requirements to Homeschool in Texas.”

child's home or (2) which has been developed or obtained from any source,

- [and] said curriculum [must be] designed to meet basic education goals of reading, spelling, grammar, mathematics and a study of good citizenship.⁸⁶

Parents must abide by these requirements, therefore making “unschooling” (a movement that rejects formalized schooling in any format) illegal in Texas, but there are no legal requirements for regular reporting or standardized testing like there are in Virginia. Nevertheless, even in Texas’s relatively unregulated legal landscape, there is legal recourse for public servants and government officials who are concerned that a child’s right to education is being infringed. In fact, the Court’s decision in *Leeper* explicitly states:

This judgment does not preclude the Texas Education Agency, the Commissioner of Education or the State Board of Education from suggesting to the public school attendance officers lawful methods, including but not limited to inquiry concerning curricula and standardized test scores, in order to ascertain if there is compliance with the declaration contained in this judgment.⁸⁷

Thus, while Texas’s reporting laws differ significantly from those in Virginia, both states attempt to strike a balance between enforcing the child’s right to education and the parent’s right to freedom of choice in education.

The final state we will discuss is New York. New York’s home education laws fall on the opposite end of the reporting and monitoring spectrum from Texas’s. In fact, New York is often mentioned or cited as an example of especially strict home education policies. In New York, home educating families must 1) Submit a yearly notice of intent, 2) Submit an Individualized Home Instruction Plan (IHIP), which must include “a list of

⁸⁶ “Texas Education Agency Et Al., Petitioners V. Gary W. Leeper Et Ux. Et Al., Respondents,” Supreme Court of Texas NO. D-2022 (1994).

⁸⁷ “Texas Education Agency Et Al., Petitioners V. Gary W. Leeper Et Ux. Et Al., Respondents.”

[their] syllabi, curriculum materials, textbooks, or plan of instruction; dates for submission of quarterly reports; and the name of whoever is giving the instruction,” 3) Follow extensive day, hour, and subject requirements, and 4) File quarterly reports including the “number of hours of instruction during the quarter, a description of the material covered in each subject, and a grade or narrative evaluation in each subject.”⁸⁸ Finally, parents must 5) Assess their child annually. This assessment can take place through a narrative evaluation or a bi-yearly standardized test prior to high school, but it must take place through a yearly state-approved standardized test during high school”⁸⁹

New York leans further in favor of protecting the right of the child to an education at the expense of flexibility in home education than Texas or Virginia. In fact, some parents and advocates of home education have argued that these regulations are needlessly onerous and restrictive.⁹⁰ Nevertheless, New York’s education policies do protect the basic right to home educate and freedom of education to a further extent than the laws in Germany and many other nations.

In regard to private education, education policies vary somewhat state to state. Private education is legal in every state, and the majority of states do not require that a specific curriculum be taught, although they may require that certain subjects be taught

⁸⁸ “Part 100 Regulations, 100.10 Home Instruction,” (New York State Education Department, December 31, 2009). Accessed February 5, 2020. <http://www.p12.nysed.gov/part100/pages/10010.html>

⁸⁹ “Homeschooling under your state law: New York,” Homeschool Legal Defense Association, August 21, 2018. Accessed February 5, 2020. <https://hsllda.org/content/hs101/NY.aspx?>

⁹⁰ Liberty McArtor, “Backed-Up System, Heavy Regulations Cause Turmoil for Homeschooling Parents in New York,” The Stream, February 11, 2017. Accessed January 30, 2020. <https://stream.org/homeschooling-new-york/>.

(similar to the home education policies discussed above). In Virginia, for example, private schools must meet the compulsory attendance laws and meet for at least 180 days a year. They are not, however, required to follow specific teacher certification requirements, use a specific curriculum, or be licensed or accredited by the state.⁹¹ In Texas, accreditation is optional, there are no specific curriculum requirements, and teacher certification and licensing are unregulated. Private schools must, however, meet for the same number of school days as public schools.⁹²

In New York, accreditation, registration, and licensing are optional, but private schools must meet for the same number of days as public schools. However, unlike in Texas and Virginia, teacher certification is required, and “instruction may only be given by a competent teacher.”⁹³ Furthermore, private school curriculums are restricted inasmuch as “Instruction given to a minor elsewhere than in a public school must be substantially equivalent to the instruction given at the local public school,” per N.Y. Edn. Law §3204.2.⁹⁴ There are also laws in place that require private schools to teach on subjects such as alcohol, tobacco, and drug use, health, well-being, and human dignity, and physical education.⁹⁵

⁹¹ “Virginia State Regulations, Private Schools,” U.S. Department of Education, September 23, 2014. Accessed February 16, 2020. <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/virginia.html>.

⁹² “Texas State Regulations, Private Schools,” U.S. Department of Education, January 25, 2017). Accessed February 16, 2020. <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/texas.html>.

⁹³ “New York State Regulations, Private Schools,” U.S. Department of Education, October 6, 2015. Accessed February 16, 2020. <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/newyork.html>.

⁹⁴ “New York State Regulations, Private Schools.”

⁹⁵ “New York State Regulations, Private Schools.”

The common thread between all three of these states, and, in fact, all of the states in the United States, is the relative ease with which private schools can be set up and the lax regulations compared to the strict private school regulations in Germany that were discussed earlier in this thesis. Most notably, private education is legal and popular through all levels of education, including the primary level, regardless of a perceived “need” for an alternative.

Summary

The United States favors relatively low-regulations for private and parochial schools, and it is one of the freest developed nations in terms of home education. Home education is a popular and thriving alternative to public and private education in the United States. Specific relations and policies vary state to state, but Supreme Court precedent ensures that the right to home educate is protected across the nation. Some states, such as Texas, tend to favor a deregulated landscape for home education. Other states, such as New York and Virginia, have implemented stricter subject and reporting requirements in order to protect the right of the child to an education. Nevertheless, in each state parents can be held liable and redirected to alternative forms of education if they fail to educate their children and adequately prepare them for life in society. Even in relatively deregulated Texas, public servants are encouraged to follow up with students and families if they are concerned that the student is not being educated appropriately.

Chapter V

Comparative Case Study: Brazil

Brazil is the largest country in the Latin American region, and it is also a developing nation with a recent interest in improving their education policies. Brazil's education system shares some similarities with both the United States and Germany, but their system is still very much in the process of developing. Therefore, their policies provide insight into how developing systems of education can attempt to protect both freedom of education and the right to an education.

History

Early education in Brazil was driven by Jesuit missionaries who arrived in the sixteenth century and participated in forming Brazilian society and starting schools during the colonial period from 1500-1822.⁹⁶ Despite the Jesuit influence in favor of education, education remained a largely elitist system during this period. In fact, “only 10 percent of the school-age population was enrolled in elementary education when Brazil became independent in 1822.”⁹⁷ After Brazil achieved independence in 1822, public universities were first established towards the beginning of the twentieth century. Throughout the twentieth century, Brazil passed a series of constitutional amendments

⁹⁶ "Education in Brazil." (World Education News + Reviews. November 14, 2019). <https://wenr.wes.org/2019/11/education-in-brazil>.

⁹⁷ "Education in Brazil."

and education policies that “enshrined education as a basic right of all Brazilian citizens” and made education compulsory up to grade eight.⁹⁸ Despite promises of free and compulsory education, educational attainment was still stunted by a lack of resources, overcrowding in schools, and a lack of enforcement throughout the twentieth century. In the mid twentieth century, Brazil “relaxed constraints over the private sector” to relieve some of the pressure on the public system. Since the 1960s, the private sector “converted itself into a demand-driven sector, absorbing the bulk of the demand for access and protecting the public sector from the most disruptive effects of massification.”⁹⁹

Over the last 15 years, Brazil has made a notable and determined effort to improve education policies and outcomes. According to a comprehensive overview of Brazilian education policy, published in 2011 by the World Bank, Brazil “set audacious national goals for attaining OECD levels of quality by 2021.”¹⁰⁰ While there is still work to be done, the 2009 PISA assessment (an international measure of high school students’ learning levels), “confirmed Brazil’s impressive progress in raising educational performance.”¹⁰¹ What education policy reforms did Brazil put in place to achieve these outcomes?

⁹⁸ “Education in Brazil.”

⁹⁹ “Education in Brazil.”

¹⁰⁰ *Achieving World Class Education in Brazil: the next Agenda*, (World Bank, 2011): Executive Summary. Accessed December 15, 2020. <https://ebookcentral-proquest-com.ezp-prod1.hul.harvard.edu/lib/harvard-ebooks/reader.action?docID=841921>.

¹⁰¹ *Achieving World Class Education in Brazil: the next Agenda*, Executive Summary.

Legal Landscape

In 2009, an Amendment to the Brazilian Constitution guaranteed “compulsory and free elementary education from 4 (four) to 17 (seventeen) years of age, including free education for all those who did not have access to it at the normal age.”¹⁰² Furthermore, according to the Constitution, “It is incumbent upon the Public Power to register students in elementary school, make a call to them and ensure, together with their parents or guardians, that they attend school.”¹⁰³ Thus, the government was granted the right to follow up with students who failed to comply with the compulsory schooling mandate. Although it was formally introduced in 2009, compulsory schooling is still not enforced across the nation.¹⁰⁴

Over the last few decades, Brazil has focused on improving the public education system, but the legal status of private options has not been ignored. According to the Constitution, “Education is free to private initiative, provided the following conditions are met: I - compliance with the general rules of national education; [and] II - authorization and quality assessment by the Government.”¹⁰⁵ Furthermore, “Minimum content for basic education will be fixed, in order to ensure common basic training and respect for cultural and artistic, national and regional values.” Thus, while private schools are free to operate, they have to follow the basic regulations and minimum content

¹⁰² “Constituição Federal,” (Brazilian Government, planalto.gov.br): Article. 208(I). Accessed 20 December 2020. http://www.planalto.gov.br/ccivil_03/Constituicao/ConstituicaoCompilado.htm.

¹⁰³ “Constituição Federal,” Article. 208(§ 3).

¹⁰⁴ “Education in Brazil.”

¹⁰⁵ “Constituição Federal,” Article 209.

regulations of the Constitution. Furthermore, according to Article 213 of the Constitution, private options (specifically “community, confessional or philanthropic schools”) can receive public resources provided that they: “I - prove non-profit purpose and invest their financial surpluses in education;” and “II - ensure the allocation of their assets to another community school, philanthropic or confessional, or to the Public Power, in the event of termination of their activities.”¹⁰⁶ Unlike locally run Brazilian private schools, international schools in Brazil usually teach in English, and they typically use foreign curriculums and receive international accreditation for their activities.

Private schools—both Brazilian and international—“tend to outperform public schools in terms of learning outcomes,” but they are also very expensive, which contributes to a disparity in education outcomes for poorer households.¹⁰⁷ Although private options have become increasingly popular in recent years,¹⁰⁸ they still only account for roughly 14% of school attendance in Brazil.¹⁰⁹

Education policies in Brazil are more centralized than the United States or Germany, although the states and local municipalities have gained some independence in recent years.¹¹⁰ Currently, “education is the shared responsibility of the federal, state, and

¹⁰⁶ “Constituição Federal,” Article 209.

¹⁰⁷ “Education in Brazil.”

¹⁰⁸ “Brazil’s Burgeoning Private K-12 Market,” L.E.K. Special Report, 2018. Accessed December 19, 2020. <https://www.lek.com/sites/default/files/insights/pdf-attachments/Brazils-Burgeoning-Private-K-12-Market.pdf>.

¹⁰⁹ “Education in Brazil.”

¹¹⁰ “Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos.” (Brazilian Government, December 20, 1996): Law No. 9,394. http://www.planalto.gov.br/ccivil_03/leis/19394.htm.

municipal governments. The national government sets nation-wide education policies and is responsible for higher education, but primary and secondary education is administered locally by the state and city governments. Local governments have a fair and increasing amount of autonomy within federal guidelines.”¹¹¹ Prior to 2017, for example, the local education sector was forced to follow national curriculum guidelines for at least three-quarters of their time, and only the other quarter could be allotted according to local needs. Since 2017, however, reforms have increased the “percentage of locally tailored courses to 60 percent.”¹¹² Local schools must teach primarily in Portuguese, but they can adapt and use co-official languages when necessary.¹¹³

Home education policies in Brazil are also currently in a state of transition. Brazil’s controversial new President, Jair Bolsonaro, made it a priority to formally legalize home education. Bolsonaro’s appointee for the Ministry of Human Rights, Family, and Women, Damares Alves, has also signaled her support for home education. In a tweet from February 2019, Damares Alves signaled that this “important area of public policy [home education]” would be considered in partnership with the Ministry of Education.¹¹⁴ While formal Constitutional amendments and education

¹¹¹ "Education in Brazil."

¹¹² "Education in Brazil."

¹¹³ "Education in Brazil."

¹¹⁴ Damares Alves. (Twitter, February 18, 2019). Accessed February 12, 2020. https://twitter.com/DamaresAlves/status/1097601542088261635?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1097601542088261635&ref_url=https%3A%2F%2Fandrewcomings.com%2Fin-limbo-an-update-on-the-brazilian-homeschooling-movement%2F.

policies regarding home education are still under consideration, many families currently home educate in Brazil without government interference.

In 2010, a non-profit called ANED (National Association for Home Education) was founded in Brazil to formally lobby for the rights of home educating families. ANED echoes international human rights sentiment and Mill's philosophy of education in their "Who we are" statement. They explain: "we understand that, just as parents have the duty to educate, they also have the right to choose the children's educational modality ... This is based on the Universal Declaration of Human Rights, article 26, and the Brazilian Civil Code, article 1.634."¹¹⁵ The referenced Article 1.634 of the Brazilian Civil Code states: "It is up to both parents, whatever their marital situation, the full exercise of family power, which consists of, as for the children: I - directing them to creation and education."¹¹⁶ Due to the efforts of ANED and other like-minded organizations and politicians, there is currently a bill under consideration in Brazil that would officially recognize home education as a legal alternative to private and public education.¹¹⁷

In the meantime, the lack of official legal guidance regarding home education has led to conflicting experiences for some home educating families. While

¹¹⁵ "Who we are," (ANED, 2019). Accessed 12 February 2020. <https://www.aned.org.br/sobre-nos/quem-somos-aned>.

¹¹⁶ "Institui o Código Civil." Section II. Exercising Family Power, Article 1.634 (I). (Brazilian Government, planalto.gov.br). Accessed February 1, 2020. http://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm.

¹¹⁷ "PL 2401/2019, Identificação da Proposição" (Camara Dos Desputados, April 17, 2019). Accessed February 20, 2020. <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2198615>.

many families home educate without government interference, other families have been legally prosecuted for their decision to home educate. The Home School Legal Defense Association describes one such scenario in the experience of the Nunes family in the Brazilian state of Minas Gerais:

After less than a year of pulling their sons, twelve and thirteen years of age at the time, from school and beginning to homeschool them, they were prosecuted with both civil and criminal lawsuits. Despite providing plenty of evidence that their children were receiving an excellent level of education at home, the parents were convicted and sentenced to pay fines and to send their children back to school.¹¹⁸

In addition to a lack of legal clarity for home educating families, Brazil lacks structures to monitor or evaluate students who *are* being home educated. This lack of oversight leads to an increased risk that students may fall through the cracks and lose their right to an education entirely. If Brazil wants to protect both the right to freedom of education and the right to an education—as they claim to—their education policies should provide clarity regarding the legal status of home education and provide structures for monitoring home education when and if it is legalized.

Summary

Brazil's education policies are currently in a state of transition, and the status of freedom of education and the right to an education are not exceptions to this transitional state. While official education policies protect the right to an education, the enforcement of compulsory education is often lax. Students in lower economic strata are still suffering in many parts of Brazil, and Brazil should focus on effectively enforcing their

¹¹⁸ Juliana Starling. "Families Hope for a Homeschool Amendment," HSLDA, July 21, 2012. Accessed February 12, 2020. <https://hsllda.org/content/hs/international/Brazil/201207170.asp>.

compulsory education policies. At the same time, Brazil should provide clarity regarding the status of home education in Brazil. Currently, many families home educate without official government oversight or legalization. The new government, under President Bolsonaro, has promised the official legalization of home education. It remains to be seen whether they will follow through with this promise, and how they will balance between freedom of education and the right to an education under the proposed policies.

Chapter VI

Findings and Further Areas of Study

International human rights literature and historical documents consistently support both freedom of education and the right to an education. Historical lines of thought, leading back to education philosophers like John Mills, suggest that both rights are worthy of legal protection and ought to coexist. According to Mill, the government should not enforce a monopoly over education or force children to only attend schools that teach an approved government curriculum. Doing so would limit society in its variance of thought, thereby harming democratic wellbeing, free thought, and the future of society. Instead, Mill supported parental choice and freedom in education. He argued that the government should “leave to parents to obtain the education where and how they pleased.”¹¹⁹ This philosophy has carried over, to an extent, in modern human rights documents.

Modern human rights movements and documents do, however, often support more government involvement in education than a purely Mill-sian approach.¹²⁰ In fact, human rights documents in the era of the rights of the child tend to favor compulsory

¹¹⁹ Mill, *On Liberty*, 201. Emphasis added.

¹²⁰ In *On Liberty*, Mill argued that the state should step in to provide education only when guardians are unable to, or fail to, independently provide those opportunities, Page 201.

education and government-funded education in most cases. Nevertheless, international human rights documents still recognize the role that choice and parental involvement should play in education. The Universal Declaration of Human Rights defends both “the right to education”¹²¹ and parents’ “prior right to choose the kind of education that shall be given to their children.”¹²² The EU Charter of Fundamental Rights similarly defends the right of parents to “found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions,”¹²³ while also recognizing that “Everyone has the right to education.”¹²⁴ While these international documents and treaties are not necessarily binding on all national governments, they do set the bar for how nations ought to interact with these rights.

Freedom of choice in education and the right to receive an education are both important rights worthy of legal protection. Nevertheless, there remains international inconsistency regarding how these rights are protected in national laws. In our increasingly global world, these inconsistencies cause confusion among parents and have led to legal and judicial disagreements on both the national and international stage.

Germany, the United States, and Brazil are far from exceptions to this inconsistency and confusion. In this comparative case study, it became clear that each

¹²¹ Universal Declaration of Human Rights, Article 26, Section 1.

¹²² Universal Declaration of Human Rights, Article 26, Section 3.

¹²³ “EU Charter of Fundamental Rights, Article 14 - Right to Education.” (European Union Agency for Fundamental Rights, 2000). Accessed February 2, 2020. <https://fra.europa.eu/en/eu-charter/article/14-right-education>.

¹²⁴ “EU Charter of Fundamental Rights, Article 14 - Right to Education.”

country approaches the protection of freedom of education and the right to an education in vastly different ways. Whereas Germany tends to protect the right to an education at the cost of freedom of education, the United States has been accused of sometimes protecting freedom of education and states' rights in education at the cost of children's right to an education.¹²⁵ In Brazil, the country's legal transition to new education policies has caused a lack of clarity regarding the status of *both* rights. The Brazilian constitution technically protects the right to an education,¹²⁶ but the enforcement of this right is subpar compared to many other nations.¹²⁷ Likewise, home education is not technically protected by Brazilian laws, but many families home educate despite a lack of legal oversight.¹²⁸

Beyond the overwhelming support for freedom of education and the right to an education in international human rights documents, are there other reasons that nations ought to be proactive in ensuring the protection of these rights? As noted above—and as the experiences of the Wunderlich family in Germany and the Nunes family in Brazil show—even when home education is illegal, many families try to pursue this educational alternative.¹²⁹ Should parents be dissuaded or legally restricted from making this choice,

¹²⁵ Fred P. Graham, "Court Exempts the Amish From Going to High School." (New York Times, May 16, 1972). Accessed February 20, 2020. <https://www.nytimes.com/1972/05/16/archives/court-exempts-the-amish-from-going-to-high-school-high-court.html>. For example, the Amish community is exempted from compulsory education in the United States.

¹²⁶ "Constituição Federal," Article. 208(I). http://www.planalto.gov.br/ccivil_03/Constituicao/ConstituicaoCompilado.htm. Brazil enforces compulsory education from four to seventeen.

¹²⁷ "Education in Brazil."

¹²⁸ Starling, "Families Hope for a Homeschool Amendment."

¹²⁹ For example, the Nunes family from the Brazilian the state of Minas Geraí or the Wunderlich family from Germany.

or from choosing a private education for their children? Or do available test results indicate that home education and private education are viable and effective alternatives to government-run schools? In the sample nations studied, private schools performed similar to or above the standards of public schools. In fact, in the United States and Brazil, private schools far outperform public schools in terms of student performance by almost every measure.

This may lead to questions about socio-economic equality and fairness for students who cannot afford to attend private schools, but I will put those questions aside for the time being. What is clear is that utilizing private education alternatives does not harm student wellbeing. Furthermore, available evidence regarding home education suggests that it is similarly a viable and successful alternative to public and private education. And if nations are concerned about the well-being of students in the home educated environment, they can implement policies similar to those in Virginia, which mandate standardized testing or teacher evaluations for home educated students. Legal means exist to protect both freedom of education and the right to an education, and many provinces, states, and nations have successfully implemented such laws.

Another oft-discussed facet of the debate regarding choice in education is the government's proposed duty to fund private schools and other alternative education choices. While this thesis will not deal in depth with this particular debate, this proposal provides an interesting avenue for further study. If private schools and home education alternatives outperform public schools, and parents in poorer households want to pursue these private alternatives, should the government give vouchers or otherwise help parents afford these alternatives?

Without the necessary funding to support private options, many families are stuck with the default of sending their children to government-run schools. This seems to run afoul of true choice in education. Germany has attempted to ensure equality of choice in education by capping the amount of money that private schools can charge, but this could contribute to the relatively poor performance of private schools in Germany compared to other nations. Perhaps vouchers for students who cannot otherwise afford private options could be a viable alternative policy to help increase choice for families who do not want to participate in Germany's controversial track system of education.

At the end of the day, there is no "one size fits all" answer to balancing choice and the right to an education, and it is undoubtedly important to maintain national sovereignty over education policies. Nevertheless, there should be some lines that countries are discouraged from crossing when it comes to these human rights. Nations that restrict students and families to the single choice of government-run schools should be reprimanded on the international stage, as the 2006 United Nations Special Rapporteur on Education did in the case of Germany's strict private and home education policies. The Special Rapporteur pointed out that a lack of choice in Germany's education system was harming German students and ran contrary to freedom of choice in education, and they encouraged Germany to pursue laws that allow parents to choose from a variety of alternative education models. Although these international reports and suggestions may not always lead to policy changes, they provide important insight regarding the status of freedom of education and the right to an education in individual nations.

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