



25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 110 / 2012

Series B

Human Rights, Democracy; Internet / intellectual property, Globalization

Thomas Schirrmacher

Compulsory Education — in
Schools Only? Divergent
Developments in Germany

URN: urn:nbn:de:hebis:30:3-249685

This paper series has been produced using texts submitted by authors until April 2012.
No responsibility is assumed for the content of abstracts.

Conference Organizers:

Professor Dr. Dr. h.c. Ulfrid Neumann,
Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe
University, Frankfurt/Main; Speaker of
the Cluster of Excellence “The Formation
of Normative Orders”
Professor Dr. Lorenz Schulz M.A., Goethe
University, Frankfurt/Main

Edited by:

Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Thomas Schirrmacher, Ph.D., Th.D., Bonn / Germany

Compulsory Education — in Schools Only?

Divergent Developments in Germany

Abstract: Germany is the focus of this paper, owing to the fact that since 1938 it has had the strictest laws on compulsory schooling worldwide. As a result, homeschooling in Germany has become virtually impossible. There are interesting divergences between policy and practice in the German setting, both in the country's educational history and present educational problems. The Länder (federal states) have the responsibility for education, and they are taking a much stricter line against homeschoolers than a decade ago, especially by depriving parents of the custody of their homeschooled children at an early stage. The laws relied upon, however, were never intended to deal with such educational matters; they were designed to punish parents who abuse or neglect their children. The present, highly questionable legal action succeeds only because of the consent of state schools, state social welfare offices, and courts. The same laws are not used against the parents of the approximately 250,000 teens who are truant. The functioning of the legal and sociological machinery in Germany is being employed aggressively to stamp out homeschooling, while at the same time it ignores the crucial issue of parents who allow their children to skip school—thus depriving them of an adequate education at home or elsewhere. At the same time, the number of specialists in law and education, as well as politicians and governmental experts who argue in favor of homeschooling is growing, and media reports on homeschooling are much more positive than they were a decade ago.

Keywords: Germany, homeschooling, compulsory education, truancy, religious freedom, educational freedom, parental autonomy, persecution

“Neither a government nor a party can take away the right of parents to choose an alternative form of education for their children. This is found in human rights declarations.”¹

—Kristin Clemet, Minister of Education, Norway

I. Introduction

Compulsory schooling presents “by far the most comprehensive and most intensive invasion by the state in the personal, private sphere in the entirety of its citizens.”² For this reason, one could

¹ Quote under the photo of the Minister of Education: Tor Weibye, “Ingen regjering kan fjerne foreldre retten,” *Dagen* (Bergen, Norway), March 15, 2005: http://www.dagen.no/show_art.cgi?art=7299 (accessed July 2011).

expect that this happens with great caution, in a considered manner, and for the given situation only after thorough investigation. However, many are no longer at all consciously aware of what an invasion in the life of a family takes place at this point. If this invasion is desired, then it is naturally not a problem. However, if it is rejected or basically placed into question, the State cannot simply act as if it were sending demands for payments of fines to traffic offenders.

Although legal in most states in the western world, conducting homeschooling in the Federal Republic of Germany has been practically impossible to date. While in all countries neighboring Germany there are families found who are either tolerated or permitted by the authorities to instruct their children at home, in Germany this occurs illegally, in a few cases undetected, or through continuous confrontation with the authorities and courts.

The head of the Institute of Educational Research at the University of Oslo, Professor of Education Christian W. Beck, sees the increasing prevalence of homeschooling in Europe as an automatic consequence of globalization.³ Many homeschooling parents have spent time abroad, have married foreigners, grew up overseas, or regularly read foreign language literature. The internet also does its part. For these reasons, according to Beck, all European countries with the exception of Germany have become attuned to homeschooling. Instead of prohibitions, there are clear rules so State oversight remains ensured.

Nevertheless, the number of voices in Germany calling for the approval of homeschooling as an alternative to the institutionalized form of schooling in State or private schools has recently been growing.

In 2006, I published my research paper on homeschooling in Germany, written for the department of education of the University of Bonn.⁴ At that time, the two editors were still not in favor of homeschooling. Both have changed their minds and argue in favor of a State-controlled

² Thomas Oppermann, *Kulturverwaltungsrecht* (Tübingen: Mohr, 1969), 191. See also Eggert Winter, who quotes approvingly in “Schulpflicht und Schulzwang: Überlegungen zur Strafwürdigkeit der Verletzung der Schulbesuchspflicht,” *Recht der Jugend und des Bildungswesens* 26 (1978), 411.

³ Christian W. Beck, “Home Education—Globalisation Otherwise?” Paper presented at the British Educational Research Association conference in Manchester, UK, September 15–18, 2004, <http://folk.uio.no/cbeck/Home%20Education%20globalisation%202.htm>. Compare also: Beck, “Home Schooling and Future Education in Norway,” *European Education* 34, no. 2 (2002), 26–36 and Beck and Marta Straume, *Hjemmeundervisning—starten på en ny utdanningsrevolusjon?* (Oslo/Vallset: Opplandske Bokforlag, 2004). For further publications by Beck on the topic, see <http://folk.uio.no/cbeck/Untitled1.htm> and <http://folk.uio.no/cbeck/OTHjemmeside.htm>.

⁴ See Thomas Schirrmacher, “Bildungspflicht statt Schulzwang,” in: Ralph Fischer and Volker Ladenthin (eds.), *Homeschooling—Tradition und Perspektive* (Ergon: Würzburg, 2006), 199–284; also published in book form as *Bildungspflicht statt Schulzwang: Staatsrecht und Elternrecht angesichts der Diskussion um den Hausunterricht* (Bonn: VKW & Nürnberg: VTR, 2006).

homeschooling, especially for students that do not fit normal classroom education, e.g. the highly gifted or those with ADHD.

Also, since 2006, more academic studies in favor of homeschooling have been published in Germany than in all the preceding years combined.

Sociologist and educational scientist Ralph Fischer of Bonn, who for years has observed the setting for homeschooling in Germany, has submitted a comprehensive portrait of homeschooling in Germany from historical sources and from the present. The work introduces comprehensively supportive facilities such as distance learning schools and advocacy groups, and it traces the national and international historical development of schooling at home. In addition to that, examples of theoretical approaches on education at home from the last 200 years were cataloged, whereby important thinkers such as the educationists Johann Friedrich Herbart and Berthold Otto, the theologian and Danish national poet Nikolai Grundtvig, or the essayist Hans Magnus Enzensberger have a chance to speak and are subjected to critique from the point of view of educational science.⁵

Fischer's doctoral supervisor, Bonn Professor for Educational Science Volker Ladenthin, has assembled assessments and contributions in the public media in a collected volume⁶ in which he advocates homeschooling and discusses reasonable ways for the State to oversee homeschooling.

After comprehensive studies on homeschooling in Switzerland, Hanniel Strebel, an economist and theologian, has put forth an educational and theological justification for homeschooling in Switzerland.⁷

In a 2009 report, Dortmund educational scientist Franco Rest answered the question of whether children need a period of several hours every day in a room with a class/group of other similar-aged children in order to socialize healthily with a 'rather not.' "Such a time period with 20 to 25 similar aged individuals could even have considerable and serious damages as a consequence," writes Rest in the study, above all in the case of especially sensitive children.⁸ For that reason, he is for the legalization of State-controlled nonschool learning.⁹

⁵ Ralph Fischer, *Homeschooling in der Bundesrepublik Deutschland: Eine erziehungswissenschaftliche Annäherung. Pädagogik in Europa in Geschichte und Gegenwart 1* (Bonn: VKW, 2009).

⁶ Volker Ladenthin, *Homeschooling—Fragen und Antworten: Häusliche Bildung im Spannungsfeld zwischen Schulpflicht und Elternrecht. Pädagogik in Europa in Geschichte und Gegenwart 2* (Bonn: VKW, 2010).

⁷ Hanniel Strebel, *Home Education—Verteidigung eines alternativen Bildungskonzepts und Lebensstils unter besonderer Berücksichtigung der Schweiz* (VKW: Bonn, 2011).

⁸ Birgitta vom Lehn, "Das fliehende Klassenzimmer," *Welt am Sonntag* April 5, 2009:

http://www.welt.de/wams_print/article3505082/Das-fliehende-Klassenzimmer.html. See also Dr. Franco Rest, "Brauchen Kinder den täglichen mehrstündigen Aufenthalt in einem Raum mit einer Klasse / Gruppe anderer

A 2008 dissertation written at Marburg University by social scientist Thomas Spiegler, who teaches in Friedensau, was honored by the Society for Sociology in 2010.¹⁰ Using the methods of social science, he for the first time empirically investigated what becomes of German homeschoolers and has been unable to determine any sort of threatening scenarios or disadvantages.

Spiegler, who has been interviewed by large daily newspapers,¹¹ holds lectures on the topic at numerous universities and at scholarly symposia in Germany,¹² and has put out an impressive list of essays in professional journals since 2005 up to the present time.¹³ Spiegler's results match the results of similar studies in other countries.¹⁴

While I have been writing these lines, one of the largest German daily newspapers, and perhaps the most intellectually oriented one, has published a positive article about homeschooling.¹⁵ The newspaper simply interviewed a 22-year-old controller for an industrial company who completed her German general qualification studies for university entrance (German: *Abitur*) with a grade point average of 1.8 (based on a German scale where 1.0 is the highest possible grade and 6.0 the lowest) and went on to study business administration. She not only reports on her own positive experiences but also on those of her siblings.

How can it otherwise be explained that the Germany Railways' (Die Deutsche Bahn) *Mobil* magazine printed a longer excerpt from the work of Canadian author David Gilmour? Gilmour has written a book about the idea of taking his school-tired son out of school and rhapsodizes

Gleichaltriger, um sich gesund zu sozialisieren?" Gutachten 2009: http://www.netzwerk-bildungsfreiheit.de/pdf/Gutachten%20Prof_Rest%20Sozialisation.pdf.

⁹ Rest, "‘Bildungspflicht’ als ‘Schulzwang’ und die Liquidation des Elternrechts in Deutschland," Lecture (2008). See also "Homeschooling—Häuslicher Unterricht: Ein Schritt zur Anpassung des Deutschen Erziehungs- und Bildungswesens an die Menschenrechte," Lecture (2008), http://www.homeschooling.de/sites/default/files/documents/vortrag_rest.pdf.

¹⁰ Thomas Spiegler, *Home Education in Deutschland: Hintergründe – Praxis – Entwicklung*, (Wiesbaden: VS Verlag für Sozialwiss, 2008).

¹¹ E.g., "Erfolgreich lernen ohne Schule," Interview with Thomas Spiegler, *Welt am Sonntag* February 3, 2008: http://www.welt.de/wams_print/article1626933/Erfolgreich_lernen_ohne_Schule.html.

¹² See http://www.thh-friedensau.de/dozentenseiten/spiegler/035_Vortraege/index.html.

¹³ See http://www.thh-friedensau.de/dozentenseiten/spiegler/030_Publikationen/index.html.

¹⁴ Most of these are discussed in my book. Of late, there are two Canadian studies worthy of recommendation: Deani A. Neven Van Pelt et al, *Fifteen Years Later: Home-Educated Canadian Adults* (Vancouver: Canadian Centre for Home Education, 2009): http://www.hslda.ca/cche_research/2009Study.pdf; and Patrick Basham et al, *Home Schooling: From the Extreme to the Mainstream* October 2007: <http://www.fraserinstitute.org/research-news/display.aspx?id=13089>. See also Alan Thomas, *Bildung zu Hause* (Leipzig: Tologo, 2007, also at Google Books), an investigation of 100 families in England and Australia—incidentally with a preface by Prof. Dr. Wolfgang Hinte, acting director of the Institut für Stadtteilbezogene Soziale Arbeit und Beratung (ISSAB, an institute addressing neighborhood-based social work and counseling) at the University of Duisburg-Essen.

¹⁵ Katrin Hummel, "Wir mussten uns verstecken: Eine Homeschoolerin erzählt," *Frankfurt Allgemeine Zeitung* June 20, 2011: <http://www.faz.net/artikel/C31206/eine-homeschoolerin-erzaehlt-wir-mussten-uns-verstecken-30387786.html>; see also Thomas (note 14), "Bildung zu Hause."

about the school-free time (*Unser allerbestes Jahr*, Fischer Publishing, 2009; title translation: *Our Best Year of All*). The French author André Stern, 38, belabors a school-free zone in a book (. . . *und ich war nie in der Schule*, Zabert Sandmann, 2009). Patrick Meinhardt, the education spokesman for the FDP parliamentary faction, sees it similarly. “I would like not to prevent homeschooling and can imagine that instruction at home is doable if it is subject to state control and if the qualification of the people to whom the child relates most closely is ensured . . .” In any event, Meinhardt pleads for drawing homeschooling out of illegality: “I see great opportunities to do much within a controlled context.”¹⁶

It is at this point that research and politics have to start: What becomes of homeschoolers, and how do these individuals view homeschooling later as adults? Instead of empirical facts, many would rather begin with scare tactics that depict what allegedly has to happen—without any proof and as if negative appearances are not found in the public education system. Or they play on fears of what would happen if fundamentalist Muslims were to conduct homeschooling—as if this trend actually existed. Additionally, they speak as if we otherwise prohibit everything which such fundamentalists could derive benefit from and as if it would be better if these same people would instead open private schools.

A good example for the tactics to create panic instead of using the results of empirical investigations is the president of the German Teachers’ Association, who conceals that in the process he is carrying on partisan lobbying efforts. “In any case, Josef Kraus holds Rest’s argumentation for ‘not comprehensible.’” The president of the German Teachers’ Association in fact fears a ‘cementing of class-specific socialization’: “Imagine that fundamentalist Islamic parents were to conduct homeschooling. There would then be many children, above all girls, who would no longer learn a word of German.”

The parliamentary CDU faction also sees it this way. Their spokesman for education policy, Stefan Müller, has said, “If we were even just to allow homeschooling to a limited extent, our integration efforts would be counteracted.”¹⁷

In addition to the above works authored by professors, there are continually other academic theses being produced with results that are favorable for homeschooling.¹⁸ Besides that, there are naturally legal opinions from ongoing proceedings that are to be mentioned.¹⁹

¹⁶ Birgitta vom Lehn, “Das fliehende Klassenzimmer,” *Welt Online* April 4, 2009: http://www.welt.de/wams_print/article3505082/Das-fliehende-Klassenzimmer.html.

¹⁷ *Ibid.*

¹⁸ E.g., B. Stefan Schönenberger, “Homeschooling auf dem Prüfstand,” Masterarbeit an der Pädagogischen

II. Paragraph 1666 is Misused

Completely in contrast to all of the above are intensified efforts from the side of the authorities and courts over the last 10 years against homeschooling. Regardless of how one assesses it, homeschooling and missing students are exclusively assessed against the legal situation, not against any educational or other measures. Against this assessment, the homeschoolers, who study hard after all, are worse off than truants.

Thomas Spiegler correctly asks whether education can be a legal offense.²⁰ If it only were to stay at the level of a misdemeanor! In the meantime it is Paragraph 1666a of the Civil Law Code which has evolved into the standard procedure against homeschoolers, though never created for this purpose.

The usual application of Paragraph 1666a (1) and (2) in the Civil Law Code, which addresses cases where parents do not send their children to school (or force them to attend school), and which should be used in order to take custody of the children away from the parents, is in my view completely inappropriate in the case of providing school instruction at home.²¹ It actually refers to parents who neglect the well-being of their children and for whom (1) other measures do not come into question or (2) where other measures remain unsuccessful. The child's well-being falls completely out of view. This is due to the fact that the situation practically exclusively has to do with intact families, and except for homeschooling, as a general rule, no other form of neglect can and is charged against the parents. Should it, however, serve the well-being of the child and the pedagogical mandate of the State for the child to be picked up by the police and thenceforth for months—or even for years—to be placed in a home without contact with parents? That children in good health have to be repeatedly subjected to psychological and psychiatric reviewers and—mostly with wrong motives—interrogated about their parents? That the children, against their declared will, are forced into what is for them an unknown school—again often under police force—and have to experience their parents going to jail? All for the well-being of the child? No. Rather for the well-being of the system!

Hochschule Zentralschweiz (Luzern, 2010): <http://edudoc.ch/record/82085/files/MA-Homeschooling.pdf>. See also Alexander Klaehr, "Über die Zusammenhänge von Herrschaft und Bildung,"

Bachelor-Arbeit (Potsdam: Universität Potsdam, 2008):

http://opus.kobv.de/ubp/volltexte/2008/2445/pdf/klaehr_bachelor.pdf.

¹⁹ Johannes Goldbecher, "Homeschooling in Deutschland," Rechtsgutachten (2007):

http://www.homeschooling.de/sites/default/files/documents/vortrag_rest.pdf.

²⁰ Thomas Spiegler, "Kann Ordnungswidrigkeit Bildung sein? Das Spannungsfeld zwischen Home Education und Schulpflicht in Deutschland aus soziologischer Perspektive," *Recht der Jugend und des Bildungswesens* 53, no. 1 (2005): 71–82.

²¹ See Renata Leuffen, *Natürlich ohne Schule leben* (Bonn: Kid-Verlag, 1993), 6.

One does not have to be in favor of homeschooling in order to recognize a misuse of § 1666a and to reject such a criminalization of keenly culturally minded parents. In my view, the removal of custody rights, prison, fines, and police coercion associated with forcing children who are well-instructed to go to school is not in proportion to the spirit of the law, but rather a brutish and brawny display of State power.

Just so that no one misunderstands: not everything parents do for a better future for their children is to be endorsed. However, I am of the opinion that one should deal with this natural parental instinct with more reverence. Parents who want something different are not to be placed on the same level as parents who are violent and let their children get into a bad state and who are rightly punished.

Given the threat of the removal of custody and the experience that children are actually suddenly placed in homes and forced from there to go to school, many parents have moved to the neighboring countries of Austria or the Netherlands. Children achieve their school degrees there without any problems and then have an apprenticeship or go on to study. As an alternative, they emigrate to Canada or to the USA—recently there was a celebrated case where a German family for this reason was granted asylum in the USA.²² The case in Germany is that homeschooled children want homeschooling and are not forced to do it, which would not practically be possible anyway, and when placed in homes, they do not see their parents for months or for years. It is, by the way, not the worst and the dumbest who leave Germany, as it is when the loss of religious minorities or very independent portions of a population hurt more than help a country.

When looking across Europe and worldwide—apart from some dictatorships—Germany is an anomaly with its absolute prohibition of any form of home instruction, enforced by penalty.²³ Just to add some supplementary information, Germany's dominating behavior over private

²² "Homeschooling Family Granted Political Asylum," *Home School Legal Defense Association* January 26, 2010: <http://www.hslda.org/hs/international/Germany/201001260.asp>. See also Tristana Moore, "Give me your tired, your poor, your homeschoolers," *TIME* March 8, 2010: <http://www.time.com/time/magazine/article/0,9171,1968099,00.html>.

²³ This is documented in detail by Amanda J. Petrie, "Home Educators and the Law within Europe," *International Review of Education—Internationale Zeitschrift für Erziehungswissenschaft* 41, no. 3/4 (1995): 285–296. See also "Home Education in Europe and the Implementation of Changes to the Law," *International Review of Education* 47, no. 5 (2001): 477–500. [Both essays are found in a German translation under: Thomas Schirrmacher (ed.), *Wenn Kinder zu Hause zur Schule gehen: Dokumentation* (Nürnberg: VTR, 2004.)] The British secular educational researcher Amanda J. Petrie is the leading authority for Europe in this area; compare Petrie, "Home Education and the Local Education Authority" (University of Liverpool, 1992) and "Home Education and the Law," *Education and the Law* 10 (1998): 123–135. See also "The Prevalence of Home Education in England," Report to the Department for Education and Employment (London, 1999). Compare also Cynthia Guttmann, "European Disunity," *Unesco Courier* (June 2000), 15: <http://unesdoc.unesco.org/images/0011/001199/119966e.pdf>.

schools has had the consequence that Germany has the lowest percentage of private schools of all free countries on earth.²⁴

The international OECD (Organisation for Economic Co-operation and Development) considers home instruction to be part of the normal educational offerings in Europe and worldwide, as found in the OECD's German language version of free school choice and private school pleadings published by the German Federal Ministry of Education.²⁵ It is astonishing that this is forbidden in Germany in contrast to the rest of Europe. This report shows above all how isolated Germany is with its uniform school system, while worldwide the education of children and adolescents is being increasingly decentralized, privatized, and pluralized.

1. Responding Educationally

One often reacts to publicly known truants in a very engaged and sacrificial manner, with special educational programs and not with threats and reprisals.²⁶

Why can there not be just as much flexibility and creativity with homeschoolers? Attempts are made to make education palatable to the pupils affected by using programs, since one knows that permanent reprisals do not work²⁷ and that one can hardly have children taken to school by the police every day and, in the best case, guarded there. However, why act contrary to the actual legal situation and offer truants expensive (and sensible!) social-pedagogical programs, while in the case of supporters of home educational instruction no exceptions come to mind?

One should go and read what a basic advocate of State-coerced school attendance, Wilhelm Habermalz, wrote in the magazine entitled *Recht der Jugend und des Bildungswesens* (*The Right of Youth and of the Educational System*), which up until now had always been against schooling at home.²⁸ He writes: "It is in fact nowadays hardly justifiable to speak of an educational reason

²⁴ OECD, "Freie Schulwahl im internationalen Vergleich," *Bildungsforschung internationaler Organisationen* 14 (Frankfurt: Peter Lang, 1996), 96–102 (published by the German Institute for International Education [Deutsches Institut für internationale Bildung] on behalf of the Federal Ministry of Education [Bundesministerium für Bildung]).

²⁵ _____, *School: A Matter of Choice* (Paris: OECD, 1994). See also OECD, "Freie Schulwahl ...Vergleich."

²⁶ Compare dissertation by Kirsten Puhr, *Lernangebote für schulverweigernde Kinder und Jugendliche: Pädagogische Probleme unter dem Anspruch von Schulpflicht und Bildungsrecht* (Hamburg: Kovach, 2003), 107. See also Christoph Ehmann and Hermann Rademacker (eds.), *Schulversäumnisse und sozialer Ausschluss* (Bielefeld: Deutsches Institut für Erwachsenenbildung, 2003), 59–106. A shorter, excellent overview of such measures is found in Maria Schreiber-Kittl, "Konzepte und Maßnahmen gegen Schulverweigerung," *Recht der Jugend und des Bildungswesens* 49, no. 2 (2001): 225–238.

²⁷ Compare for instance Lutz R. Reuter and Xinke Zhang, "Zur Schulpflicht von Minderheiten- und Zuwandererkindern im deutschen Schulwesen," *Beiträge aus dem Bereich Pädagogik* (Hamburg: Universität der Bundeswehr, 1997), 33.

²⁸ Wilhelm Habermalz, "Geldbuße und Schulzwang—die andere Seite der Schulpflicht: Über das Instrumentarium des Staates zur Durchsetzung der Schulpflicht," *Recht der Jugend und des Bildungswesens* 49, no. 2 (2001): 218–

for the State using police force to get delinquent pupils to go to school.”²⁹ This has little purpose, since from experience this has to be repeated daily. He summarizes: “The rules for implementing compulsory education are on the whole highly ‘in need of overhaul.’ There are in part legal misgivings that can be raised—for instance the threat of punishment against the school-aged—and the use thereof is to some extent dispensed with. This is due to the fact that its result is ineffective—such as, for example, compelling students to go to school.”³⁰

German compulsory school attendance means an unnecessary criminalization of parents and children. The State should solve educational problems educationally, not with court judgments, prison sentences, and deploying police.³¹ There are enough educational studies which hold compulsory school attendance to be the wrong way to go.³² In conversation or in podium discussions on the radio or television, I have repeatedly observed that professors of education and other experts who speak out against homeschooling are still of the opinion that penalties, the police, and prison are not the solution for dealing with homeschoolers and only injure the children involved.

Representatives of State compulsory school attendance mostly argue with an alleged superior form of education. I cannot understand what having screaming children wrested from their parents and forcibly taken in a police car to a school from which they would run at the first opportunity should have to do with education and the well-being of a child. It in fact does not have to do with education or the well-being of children but is rather about power, control, and worldview.

2. *The Many True Truants*

The State should deal with the many true truants who do not have an educational future instead of targeting the very few homeschooled children. And it should ask itself what it is doing wrong that leads so many to skip school, since in the meantime it is not only the lazy and criminal who are missing, but also many who are mobbed, who fear violence, who have a school phobia diagnosed

224.

²⁹ Ibid, 218.

³⁰ Ibid, 224.

³¹ The possible measures are listed in: Habermalz (note 28), “Geldbuße und Schulzwang.”

³² Siegfried Lamnek, *Wider den Schulzwang: Ein sekundäranalytischer Beitrag zur Delinquenz und Kriminalisierung Jugendlicher* (München, 1985). See also Wolfgang Sachs, *Schulzwang und soziale Kontrolle: Argumente für eine Entschulung des Lernens* (Dissertation, Frankfurt: University of Tübingen, 1976).

by doctors, who are not keeping up in school, or who as highly gifted or as those plagued with learning difficulties do not receive sufficient personal encouragement.³³

Raimund Pousset, who wants to do away with compulsory education in order to retain the State school system, points to the failure of the State school system that above all goes back to the absolutism of supra-regional authorities and State coercion in the local school. About 4 million functional analphabets, 90,000 school-leavers annually with no degree, street children and foreigners who have never been registered, 250,000 repeaters annually,³⁴ and, above, all the gigantic market for private tutoring with over € 1 billion in revenues, and a de facto introduction of school fees³⁵ show that compulsory education under penalty of law does not deliver what it promises and that our neighboring countries do better without this coercion.

According to an estimate by Spiegel, there are in Germany about 250,000 school-age children who practically continually skip school.³⁶ The most thorough investigation made of the topic dates to 2003. It documents how the Ministry of Education does not collect a number of truants that can be taken seriously and that most schools likewise do not have reliable numbers!³⁷ Authors have come to the following conclusion: “What has been missing up to now is the general recognition of a need for political action on educational policy.”³⁸ We in Germany are reaching peaks in Europe, whereby in Europe the percentage of truants is lower the more local administration and school self-determination prevail and the weaker central State school oversight is.³⁹

All of these children do not receive education at home. The courts and the police would have a lot to do if these children were all forced into schools, and it is certain that the crime rate would actually sink if all these children were in school. According to the legal requirements, the authorities should be sending parents notices for fines of tens of thousands of Euros.

According to statements made by the Federal Ministry of Education and the German Federal Statistical Office, out of all school-leavers in 1998 who were at the end of their period of compulsory education, 9% or 83,000 did not receive a school degree, and of those two-thirds

³³ Compare the excellent compilation in: Maria Schreiber-Kittl, “Alles Versager? Schulverweigerung im Urteil von Experten,” Arbeitspapier (München/Leipzig: Deutsches Jugendinstitut, 2001).

³⁴ Raimund Pousset, *Schafft die Schulpflicht ab!* (Frankfurt: Eichborn, 2000), 32–35.

³⁵ *Ibid.*, 32.

³⁶ *Der Spiegel* 20 (2002), 140–141.

³⁷ See the excerpts from a document by the Education Minister in: Ehmman and Rademacker, *Schulversäumnisse und sozialer Ausschluss*, 71–72. The authors are advocates of compulsory school attendance. They present the investigations of recent years, which sought to capture the rate of truants.

³⁸ *Ibid.*, 16.

³⁹ *Ibid.*, 107–119.

were boys.⁴⁰ Up to 1997 the rate was at 8.8% (approximately 79,000) and by 2000 rose to 9.2% (86,600).⁴¹ “About one-third of school-leavers from general education schools without a secondary education degree achieve this at a later time at a vocational school.”⁴² This means that about 60,000 adolescents annually who will never achieve a school degree in their life.

However, those who get into trouble with the authorities, the justice system, and the police are not the 250,000 truants and their parents or legal guardians, and are not those responsible for the fact that annually there are 60,000 children who will never receive a school degree. Rather, it is people who do not neglect their children, despite the fact that one does not have to worry about the education of these children—at least this is the global experience with homeschoolers.

III. Freedom of Religion Also Belongs within the Realm of Education

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions” (Article 2 of the European Convention on Human Rights).

Only in Germany is the area of education almost completely removed from the area of religious freedom.⁴³ The right parents have to not only raise their children but also to determine and shape their religion, in fact does not count in the area of schooling in Germany. Indeed, even if it is the children themselves who for religious reasons refuse certain things, their conscience is not protected in the school. In all of Europe and in all democratic countries on earth, the sphere of school is a space in which the religion and conscience of parents and children should be and are taken into account.

In the generally simple Protocol entitled “Enforcement of certain rights and freedoms” as attached to the European Convention on Human Rights, which is legally binding for Germany, of the Council of Europe dated March 20, 1952, one reads in Article 2, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching

⁴⁰ German Federal Ministry of Education (BMBF), *Grund- und Strukturdaten*, BMBF Publik 1999/2000, 80. See also German Federal Statistics Office (ed.), *Datenreport 2002/Schriftenreihe 376* (Bonn: Bundeszentrale für politische Bildung, 2002), 62.

⁴¹ *Ibid.*, 61–62.

⁴² *Ibid.*, 62. A listing according to German federal states, cities, and administrative districts for the year 2001 can be found at www.apoll-online.de/bildungsdaten.html.

⁴³ Compare to the situation in the USA: Rosemary Salomone, “Home Schooling and Religious Freedom,” *Education Week* no. 8, October 20, 2004: 52, 41.

in conformity with their own religions and philosophical convictions.” In Germany, this European human right is de facto treated as if it were nothing.

1. Make Exceptions!

One could, without a change to the law for exceptions, already allow homeschooling. In each case, around the wording that sets general compulsory school attendance, all state constitutions and compulsory education laws state that only the educational authorities may allow exceptions. Representatively, one can quote § 76, Paragraph 1, Sentence 1 of the education act of Baden-Wuerttemberg, which says that it is mandatory for children to attend school, “as long as their upbringing and instruction in another form has not sufficiently been provided for.” For grammar school, § 76, Paragraph 1, Sentence 2 applies more closely: “In the place of attendance at a grammar school, other types of instruction may only be allowed in special cases by the educational authorities.” Without this exemption clause, things just do not work. Otherwise, one would have to force seriously ill and mentally handicapped children to attend school, and do likewise with German children living overseas, pregnant teenagers, or children with a school phobia.

In most locations in Germany—and mostly purposely not made publicly known—educational instruction at home is tolerated or permitted. I have in any event a number of acquaintances for whom this is the case, among them welfare recipients as well as professors. In short: Even if it is theoretically settled that the school authorities have the right to force all children into school, they *do not have to* do that. They can make exceptions. In several hundred cases in Germany, it is, in my opinion, more reasonable to allow exceptions and to check whether the children actually are learning at home than to conduct an educational battle geared toward media attention.

By the way, Lower Saxony is very generous with such exceptions and for that reason has never had a homeschooling case that was controversial and made good press copy. Lower Saxony’s § 63, Paragraph 5 of the Education Act states: “Private instruction may only be allowed to school-aged children throughout the first six grades in the place of school attendance in exceptional cases.” In addition there is the following waiver: “Fulfillment of compulsory education by private instruction (§ 63, Paragraph 5). The fulfillment of the obligation to attend school is only permitted in exceptional cases in the first six school grades and is only to be

granted if the instruction fulfills requirements that are placed upon the corresponding type of school . . .”⁴⁴

a) Homeschooling as an Alternative for Special Cases

Homeschooling is an alternative for many children who could only fulfill the compulsory school attendance requirement with difficulty. The State has to make an astonishing number of exceptions to compulsory schooling, whereby at this point the federal states all proceed very differently. Many homeschooling cases begin unwillingly with such difficult situations. “Many pupils are instructed in their parents’ home for practical reasons—also as an interim solution,” declares Thomas Spiegler of the University of Marburg, who is working on a doctoral dissertation on the topic of home education in Germany . . . Children with fear of school, psychosomatic disorders, and those who have experienced mobbing can learn stress-free at home. However, it also does less talented and highly gifted children good to have a free choice regarding their pace of learning. A child who at the age of three is playing chess and gives his first piano concert at the age of six can almost be mentally destroyed with regular lessons, according to the reported experience of a mother . . .”⁴⁵

It is a known fact that there have always been exceptions for the long-term ill.⁴⁶ Why, however, stop school teachers from giving regular instruction and not involve the parents, etc. where they desire this? Would not instruction at home be a better alternative for a number of ADHD children, the handicapped, children with learning difficulties, etc. than a special school? What is to be done with children overseas, with children whose parents are continually traveling in connection with their careers, the children of showmen and circus artists? What is to be done with highly gifted children or children with a school phobia? The State either exercises coercion or has to provide costly alternatives. In our neighboring countries, homeschooling is always an

⁴⁴ Quoted from the Ministry’s website on law relating to school: www.schule.de/2241001/0035074.htm (accessed April 1, 2005).

⁴⁵ Lioba Schafnitzel, “Nie wieder in die Schule! Hausunterricht: Erfolgreich, aber in Deutschland verboten,” *Nürnberger Zeitung* April 29, 2004: www.hausunterricht.org/html/nz-konferenz.html.

⁴⁶ Compare as available examples printed coincidentally—all ministries of education provide information: The Minister of Education of North Rhine Westphalia [Kultusminister des Landes Nordrhein-Westfalen] (ed.), *Richtlinien für die Schule für Kranke (Sonderschule) und für den Hausunterricht in Nordrhein-Westfalen* (October 24, 1984); *Die Schule in Nordrhein-Westfalen* 6601 (Köln: Greven, 1985), 8; *Handreichung Krankenhaus- und Hausunterricht* (Kultusministerium Rheinland-Pfalz: Mainz, 1990), 54; *Bildungswege in Nordrhein-Westfalen—Sonderschulen: Schule für Blinde, für Sehbehinderte, für Gehörlose, für Schwerhörige, für Körperbehinderte, für Sprachbehinderte, für Erziehungshilfe, für Lernbehinderte, für Geistigbehinderte, Krankenhausschule und Hausunterricht* (Düsseldorf: Der Kultusminister des Landes Nordrhein-Westfalen, 1981) 45.

alternative in such cases. Homeschooling is always an alternative if parents want to give their children an individual choice that a large system has difficulty offering.

For example, it has been demonstrated that schooling at home presents a very good solution for ADHD children and children with similar problems.⁴⁷ Here in Germany, the enormous effort on the part of parents is appreciated very little. Rather, the problem is heaped upon overburdened teachers who have 30 other children in their class, or the child is sent to a special school where he does not belong.

b) Compulsory School Attendance Is a Child of Absolutism

What in legal German used to be designated compulsory education (*Schulzwang*) and is now referred to as compulsory school attendance is not a child of democracy but rather the child of princely absolutism.

Indeed, this is self-evident for historians, but it is often willingly presented in another way. Let us listen to an advocate of compulsory education as a proxy for practically every presentation of the history of school in Germany: “The installation of a publicly supervised basic school education of youth and the assurance of it through compulsory school and instruction, compulsory school attendance, and punishment find their origins in the welfare state and police maxims of enlightened absolutism. The justification of the State to ultimately threaten and then exercise State power so that the individual is forced to go to school has been justified since that time in different ways, but principally it has rarely been questioned.”⁴⁸

Princes wanted all subjects to be good citizens and youth to be raised to be good soldiers. “For the first time, as far as I can see, the principle of compulsory education is expressed in the Weimar School Regulations of 1619.”⁴⁹ Even though educational instruction at home was nevertheless able to have a niche existence, it is still the case that compulsory education as it developed did not serve the august democratic goals of equality and equal opportunity. Rather, it was a central and controlling element with which the State educated the population in accordance with its principles. “Compulsory school attendance is the child of absolutism.”⁵⁰ For that reason,

⁴⁷ Leonore Colacion Hayes, *Homeschooling the Child with ADD (or other special needs): Your Complete Guide to Successfully Homeschooling the Child with Learning Differences* (Roseville, CA: Prima Publ., 2002).

⁴⁸ Winter (note 2), “Schulpflicht und Schulzwang,” 408–423. Similarly see Leongard Froese, “Bildungspolitische Entwicklungsskizze,” in: Leonhard Froese and Werner Krawietz (ed.), *Deutsche Schulgesetzgebung. Band I: Brandenburg, Preußen und Deutsches Reich bis 1945* (Weinheim: Beltz, 1968), 11–45.

⁴⁹ Friedrich Paulsen, *Das deutsche Bildungswesen in seiner geschichtlichen Entwicklung* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1966), 85.

⁵⁰ Hans Moller, “Die Schulpflicht als Rechtsaltertum,” quoted in Johannes Heimrath (ed.), *Die Entfesselung der*

a direct pathway leads from compulsory education to National Socialism.⁵¹ National Socialism made use of the fact that in any case all children had to learn according to the manner the State prescribed, and thus it merely eliminated or harmonized remaining free alternatives in private and alternative schools as well as in home educational instruction. “Instead of that, general compulsory education, while rolling back private schools and private instruction, opened the way to National Socialism’s giving an ideological attitude to school.”⁵²

Raimund Pousset, who is a passionate teacher in the service of the State, calls the State-run school in Germany a “sluggish school system from the pre-democratic imperial age”⁵³ on the basis of its overall inflexible structure, rigid leadership through greatly remote educational authorities, and the belief that the State alone can guarantee children a future.

In the name of tolerance and integration, homeschoolers are intolerantly forced into school. We pride ourselves in Germany for our tolerance, but in reality we have more laws enforceable by penalties and fewer freedoms in many areas than at the time of the emperors.

c) Compulsory Education in Germany Is Also a Legacy of National Socialism

In Germany, and in spite of all compulsory school attendance laws, educational instruction in the home was always permitted as an exception prior to 1938.⁵⁴

Germany, which always had the strictest such laws since the introduction of compulsory school attendance in Prussia in 1717,⁵⁵ nevertheless did not have a prohibition on private or home educational instruction up to the time of the Weimar Constitution in 1919 and the conclusive Prussian⁵⁶ compulsory school attendance law dating to 1927. Private and home forms of educational instruction were still widespread. In the so-called Constitution of St. Paul’s Church (*Paulskirchenverfassung*), the imperial constitution of March 28, 1849, home educational instruction was still found in the human rights catalog in § 154: “Instruction in the home is

Kreativität: Das Menschenrecht auf Schulvermeidung (Wolfratshausen: Drachen Verlag, 1991), 39.

⁵¹ See also Froese (note 48), “Bildungspolitische Entwicklungsskizze.”

⁵² Moller (see 50), “Die Schulpflicht als Rechtsaltertum,” 40.

⁵³ Pousset (see 34), *Schafft die Schulpflicht ab!*, 41.

⁵⁴ See also Horst Schiffler and Rolf Winkeler, *Tausend Jahre Schule: Eine Kulturgeschichte des Lernens in Bildern* (Stuttgart: Belsler, 1985), 90.

⁵⁵ Compare to compulsory education in German law from the Middle Ages until today by Albrecht Mors, “Die Entwicklung der Schulpflicht in Deutschland,” (Dissertation, Dr. iur.: Tübingen, 1986). See also Ekkehart Stein and Monika Roell, *Handbuch des Schulrechts* (Köln: Heymanns, 1988) 52–53 and often; Hermann Avenarius, *Schulrechtskunde* (Neuwied: Luchterhand, 2000), 311–325.

⁵⁶ Compare Stein and Roell (note 55), *Handbuch des Schulrechts*, 52–53.

subject to no limitation.”⁵⁷ In all the strict Prussian regulations, home educational instruction continued to nonetheless be allowed, e.g., in Prussia’s *General-Land-Schul-Reglement* (General State School Regulations) dated August 12, 1763 (§ 15)⁵⁸ or in the *Schulordnung für die Elementarschulen der Provinz Preußen* (School Regulations for Elementary Schools in the Province of Prussia) dated December 11, 1845 (§ 1)⁵⁹ in the *Kabinettsorder betr. die Schulzucht* (Cabinet Order relating to Child Rearing in School) dated May 14, 1825: “Parents, or their legal representatives who are unable to demonstrate that they are providing for the necessary instruction of children in their house should be admonished via means of compulsion and penalties to send every child who has completed his fifth year of life to school.”⁶⁰

The *Handbook of School Law* correctly summarized: “Strictly speaking, into the 20th century compulsory education was not compulsion to attend a public school but rather only meant compulsory instruction.”⁶¹

Radical German compulsory education was first introduced in this form in 1938 by the National Socialists solely in order to control German youth. For the first time in the law relating to compulsory education in the German Reich (the *Reichsschulpflichtgesetz* or Compulsory Education Law of the Reich) dated July 6, 1938 (amended on May 16, 1941),⁶² it was set down that pupils were allowed by police action to be forced into instruction and that legal guardians could be punished with monetary fines and imprisonment if they did not enforce this with their children. Section 1 reads as follows: “(1) General compulsory education. General compulsory education exists in the German Reich. It ensures education and training in the spirit of National Socialism. All children and adolescents with German nationality who have their home or habitual residence domestically are subject to it.” Even here there is immediate mention of exceptions, since in § 12 it reads as follows: “Compulsory education is fulfilled by attending a school of the German Reich. Any exceptions are decided upon by the educational authorities.” And § 5 reads: “Fulfillment of the people’s compulsory education. (1) All children are obligated to attend elementary school insofar as their upbringing and education is not sufficiently provided for in

⁵⁷ *Deutsche Verfassungen* (München: Wilhelm Goldmann, 1974), 32. State supervision of schools is found in § 153.

⁵⁸ Froese and Krawietz (note 48), *Deutsche Schulgesetzgebung*, 107.

⁵⁹ *Ibid.*, 155.

⁶⁰ *Ibid.*, 152.

⁶¹ Stein and Roell (note 55), *Handbuch des Schulrechts*, 52. Compare Petrie, “Home Educators and the Law within Europe,” 285-287.

⁶² Froese and Krawietz (note 48), *Deutsche Schulgesetzgebung*, 224–226. See also www.verfassungen.de/de/de33-45/schulpflicht38.htm, which makes the differences between the July 6, 1938 and May 16, 1941 versions very clear (accessed May 1, 2005).

another manner. (2) During the first four years of elementary school, another form of instruction in the place of attendance at an elementary school is only permitted in special cases on an exceptional basis” (all the aforementioned items are from the 1938 version).

Decisive for the implementation of “education . . . in the spirit of National Socialism,” however, was § 12: “Compulsory school attendance. Children and adolescents who do not fulfill the obligation to attend an elementary or vocational training school will be forced to attend the school. In this connection the aid of the police can be made use of.” Through the law dated May 16, 1941, § 12 Sentence 1 received the following mitigated version: “Children and adolescents who do not fulfill the obligation to attend an elementary school, secondary school, or vocational training school will be brought to the school by force.”

In short: “Not until the Reich Compulsory Education Law dated July 6, 1938, which for the first time governed compulsory school attendance, were consequences intended for truants . . . “⁶³ The central importance of this law is also expressed in the fact that compulsory mandatory vocational school was for the first time regulated and for the first time employers and apprentices’ employers could be punished if their apprentices, etc., did not go to vocational school.⁶⁴

The National Socialist’s Reich Compulsory Education Law was unfortunately adopted by the federal states and not rolled back. It applied in the federal states in unchanged form for a long time.

In 1975, the failure to fulfill the requirement of compulsory school attendance was downgraded from a criminal offense to a legal infraction, but in tough cases in the city-states, Hessen, Saarland, and Mecklenburg-West Pomerania, the status of a simple legal infraction can be exceeded. From 1938 to 1974, the failure to fulfill the compulsory education requirement was a criminal offense—in Saarland, that is still the case today. Within the framework of sweeping penal reform, in almost all federal states the failure to meet the requirement of compulsory education since the Second Penal Law Reform Act on January 1, 1975, became only a legal infraction.⁶⁵ At that time, what had existed until then as a “violation,” where the extent of the punishment was between a legal infraction and a criminal offense, was abolished, and all federal states had to decide whether they wanted to upgrade or downgrade that “violation.”

⁶³ Habermalz (note 28), “Geldbuße und Schulzwang,” 218.

⁶⁴ See also Mors (note 55), “Die Entwicklung der Schulpflicht in Deutschland,” 261.

⁶⁵ Habermalz (note 28), “Geldbuße und Schulzwang,” 218.

IV. Conclusion

It is in fact the case that homeschoolers are still not treated as if a legal infraction is being dealt with. Rather, it is as if they are criminal offenders where the extent of the punishment is escalated and in the end is de facto still too severe. I do not mean this in the formal juridical sense, but whoever is subjected to a barrage of monetary penalty charge notices, public threats by politicians in the media, proceedings to take away children's custody, having police in one's house, and being imprisoned, truly no longer has the impression of having only committed a legal infraction. In my opinion, people are de facto made into criminals, although penal law reform should have led to a decriminalization.

Address: Dr. Thomas Schirmacher, Friedrichstr. 38, 53111 Bonn / Germany.