

# ProblematISING home education: challenging 'parental rights' and 'socialisation'

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*In the UK, home education, or home-schooling, is an issue that has attracted little public, governmental or academic attention. Yet the number of children who are home educated is steadily increasing and the phenomenon has been referred to as a 'quiet revolution'. This paper neither celebrates nor denigrates home educators; its aim, rather, is to identify and critically examine the two dominant discourses that define the way in which the issue is currently understood. First, the legal discourse of parental rights, which forms the basis of the legal framework and, secondly, a child psychology/common-sense discourse of 'socialisation', within which school attendance is perceived as necessary for healthy child development. Drawing on historical sources, doctrinal human rights and child psychology and informed by post-structural and feminist perspectives, this article suggests that both discourses function as alternative methods of governance and that the conflicting 'rights claims' of parents and children obscure public interests and fundamental questions about the purpose of education.*

'When I was seven, a big thing happened. A lady came to talk to my mother from the town school, wanting to know when I was going to enrol in the first grade. *The law on this wasn't clear, but it was the normal thing to do.*'

Eva Hoffman<sup>1</sup>

'To deprive a child of the experience of school life would, in itself, be a denial of children's rights and a failure to discharge parental responsibility.'

Andrew Bainham<sup>2</sup>

'The state school has always been the domain of a distant administration ... a single glance tells one that, like madhouses and reformatories, they have been erected for the custody and disciplining of people.'

Hans Magnus Enzensberger<sup>3</sup>

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1. *The Secret* (London: Secker and Warburg, 2001) p 17 (emphasis added).

2. *Children: the modern law* (Bristol: Family Law, 2nd edn, 1999) p 542.

3. *Political Crumbs* (London: Verso, 1990, translation, first published as *Politische Brosamen* (Frankfurt am Main: Suhrkamp Verlag, 1982) ch 7, 'A Plea for the Home Tutor: A Little Bit of Educational Policy', p 100.

In the UK, home education, or home schooling,<sup>4</sup> is an obscure issue that has attracted little academic, government or public attention.<sup>5</sup> There are no national statistics recording the number of children home educated and the legal framework, and the central role of local education authorities (LEAs) within it, has remained effectively unchanged for over 130 years. Moreover, while a child's right to education<sup>6</sup> and, although to a lesser extent, the compulsory nature of education and the absence of children's rights *in* education,<sup>7</sup> have been the focus of much concern, the existence or legitimacy of a child's right to attend school, as distinct from a right to education, has been largely overlooked.<sup>8</sup> In a context of increased concern about educational standards, growing recognition of 'children's rights', 30 years of almost continual and radical education legislation (with an extensive diminishing of the powers of LEAs<sup>9</sup>) and more broadly at a time when the family and education and the category of 'childhood' itself, are perceived as key sites of governance for the future well being of society,<sup>10</sup> the 'silence' about this issue is perhaps surprising. To a certain extent it can be explained by the fact that it is an issue that affects only a small number of children; recent cautious estimates suggest that up to 14,000 children are currently home educated.<sup>11</sup> However, issues which affect similar numbers of children, for example, school exclusions, teenage

4. Home education in the context of this article refers to children of compulsory 'school age' educated at home as a result of parental choice. It should not, therefore, be confused with home tuition, which refers to education within the home provided by local education authorities.

5. The following texts refer to the issue but with little or no commentary: A Ruff *Education Law* (London: Butterworths, 2002) p 252; K Poole, J Coleman and P Liell *Butterworths Education Law* (London: Butterworths, 1997) p 11; N Harris *Law and Education: Regulation, Consumerism and the Educational System* (London: Sweet & Maxwell, 1993) p 209; Bainham, above n 2, p 542. The exception is the work of A Petrie who writes in support of parent's rights: 'Home Educators and the Law within Europe' (1995) 41(3-4) *Int Rev Education* 285; 'Home education and the law' (1998) 10(2-3) *Education and the Law* 123; 'Home Education in Europe and the implementation of changes to the law' (2001) 47(5) *Int Rev Education* 477.

6. See, for example, S Hart, C Cohen, M Erickson et al (eds) *Children's Rights in Education* (London: Jessica Kingsley Publishers, 2001).

7. T Jeffs 'Children's Rights in a new ERA?' in B Franklin (ed) *The Handbook of Children's Rights* (London: Routledge, 1996); D Monk 'Children's rights in education – making sense of contradictions' (2002) 14(1) *CFLQ* 45.

8. An exception to this is Bainham, above n 2.

9. P Meredith 'The Fall and Rise of Local Education Authorities' (1998) XX(I) *Liverpool LR* 41.

10. N Rose *Governing the Soul* (London: Routledge, 1989); A Prout 'Children's Participation: Control and Self-Realisation in British Late Modernity' (2000) 14(4) *Children and Society* 304; C Jenks *Childhood* (London: Routledge, 1996); H Hendrick *Child Welfare* (Bristol: The Policy Press, 2003).

11. R Garner 'Rising number of parents decide they can do a better job than the education system', *Independent*, 28 January 2002. These figures are provided by Home Education UK – a leading charity in this area. In 1995 LEA records suggested that the figure was 8,000 (0.09 percent) – double the number in 1988. However some suggest that the figure may be as high as 84,000 – see S Cook 'Home Front', *Guardian Education*, 10 December 2002 – as not all families that home educate are known to either LEAs or home education support groups.

pregnancies and the education of 'looked after' children, have attracted a vast amount of media, government and public attention.<sup>12</sup> Consequently, the relative silence surrounding home education can not be explained by numbers alone and, arguably, more accurately reflects the fact that it is currently not perceived by government as a social or educational 'problem' – either in terms of the educational and social developmental well being of home educated children or in terms of broader public interests. Moreover, the absence of any national figures serves to reinforce this view; for surveillance and the accumulation of knowledge of a subject does not construct a problem but, rather, reflects already problematised issues. As Hunter argues in the context of the history of education:

'the role of social statistics is not so much to represent reality as to problematize it, to call into question, to hold it up for inspection in the light of what it might be, to picture its reconstruction around certain norms of life and social well being – norms derived of course from the social, economic and political objectives of government.'<sup>13</sup>

The official position of the Department for Education and Skills regarding home education is summarised in the following statement:

'the law allows parents to educate their children at home instead of sending them to school if they fulfil certain conditions. Parents should bear in mind however that at school children are taught by trained professionals, and that it is important children learn how to interact with others.'<sup>14</sup>

Underlying this 'matter of fact' statement are two discourses which dominate the way in which home education as a social practice is perceived and constructed. First, that it is a parental right and, secondly, that school attendance is considered preferable. The aim of this article is not to arbitrate between these two claims; it does not attempt to establish or prove that home education is a harm that requires and legitimises the state overriding the parental right nor, conversely, does it celebrate uncritically the civil and political rights of home educators. Consequently, this article does not discuss the many different reasons which motivate parents to opt for home education.<sup>15</sup> Rather, the aim here is to examine critically the contingent basis of *both* the parental right to home educate and the popular and widely held claims regarding the 'socialisation' benefits of schooling. In other words, the aim is not to establish the 'truth' of home education, but to explore the competing 'truths' about home education.

12. The number of permanent exclusions in 1997 was estimated to be around 14,000: Social Exclusion Unit *Truancy and School Exclusion Report* (1998). The number of teenagers becoming pregnant in 1997 was 90,000; the number of under-16s becoming pregnant (ie those of school age and below the age of consent) was 7,700; and of these only 3,700 resulted in births: Social Exclusion Unit *Teenage Pregnancy* (1999) p 12.

13. I Hunter 'Assembling the school' in A Barry, T Osborne and N Rose (eds) *Foucault and political reason: Liberalism, neo-liberalism and rationalities of government* (London: UCL Press, 1996) p 154.

14. *Educating Children at Home*, available at [www.dfes.gov.uk/parents](http://www.dfes.gov.uk/parents).

15. See Petrie (1995), above n 5; The Advisory Centre for Education *Home Education* (London: ACE, 1996) p 4. It is important, however, to recognise that parents who home educate are a far from monolithic group.

In examining the parental right, reference is made to legal sources, in particular the decision of the European Commission for Human Rights in *Leuffen v Germany*<sup>16</sup> which upheld a ban on home education. In relation to socialisation, the focus shifts to popular culture and child psychology. In order to explain how the 'legal' discourse of parental rights conflicts but at the same time coexists with the 'common sense/expert' discourse about socialisation, both are explored from a historical perspective. Locating both the parental right to home educate and the child's rights to school life in a historical context challenges the individualistic and universal basis of these claims and reveals how both discourses mask broader public interests. Refusing to accept uncritically the claims of either provides an alternative framework for assessing the implications of and political responses to future developments in this area. By foregrounding the ahistorical basis implicit in both the parental right and 'socialisation' claims, the method adopted here is one described by the critical theorist Mitchell Dean as a 'problematising activity', for it, 'establishes an analysis of the trajectory of the historical forms of truth and knowledge' and 'has the effect of the disturbance of narratives ... finding questions where others had located answers'.<sup>17</sup>

## A RIGHT TO HOME EDUCATE?

The existence of a parental 'right' to home educate, the statutory basis of which is explained in detail below, is firmly established in domestic law. Commentaries that address this issue offer unqualified support; but more frequently the validity of the parental 'right' is simply not debated.<sup>18</sup> Instead, the case law and the few legal commentaries which refer to home education focus either on the content of the educational provision which home educators should provide or on the powers of LEAs to monitor the provision.<sup>19</sup> Important issues are at stake here: for example, the extent to which, if at all, home educators should be required to comply with the National Curriculum and whether or not LEAs have the power to enter the home to inspect facilities. With regard to the National Curriculum, Bainham and Harris have argued that the existence of a prescribed and fairly comprehensive national curriculum could make it difficult for LEAs to reach the conclusion that home education is 'suitable'.<sup>20</sup>

16. *Leuffen v Federal Republic of Germany* (1992) Application No 00019844/92.

17. M Dean *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (London: Routledge, 1994) p 4.

18. Petrie (1995), above n 5; Petrie (1998), above n 5, at 134; P Rothermel and A Fiddy 'The law on home-education' (2001–02) 181 *ChildRight* 19; A Thomas *Educating Children at Home* (London: Cassell, 1998).

19. *Bevan v Shears* [1911] 2 KB 936, 80 LJKB 1325 (suitability of education); *Baker v Earl* [1960] Crim LR 363 (failure to comply with School Attendance Order); *R v Surrey Quarter Sessions Appeals Committee, ex p Tweedie* [1963] Crim LR 639 (LEA right to monitor provision); *Phillips v Brown* (unreported, 20 June 1980, transcript no 424/78) (LEA right to make inquiries); *Harrison v Stevenson* (unreported, 1981, no 729/81) (suitability of method of learning); *H v United Kingdom* (1984) Application No 10233/83 DR 105 (LEA right to monitor provision); *R v Gwent County Council, ex p Perry* (1985) 129 SJ 737, CA (lawful form of inspection).

20. Bainham, above n 2, p 542. Harris, above n 5, p 209.

Yet while some LEAs may indeed use the National Curriculum as a basis for assessing the suitability of the education provided by parents, there is no statutory basis for this and indeed some parents opt for home education precisely to avoid the lack of flexibility or specific aspects of the National Curriculum. The significant point here, however, is that while emphasising or extending the conditions attached to the 'right' to home educate might serve to restrict the number of parents who are able to exercise their 'right', the legitimacy of the basic right remains unquestioned.<sup>21</sup> However, a closer examination of the domestic legal provisions and their historical foundations and of human rights law and comparative perspectives suggest that this 'right' is more complex and significantly less fundamental than it might appear.

### Historical perspectives and the current law

The current statutory basis for the 'right' to home educate is s 7 of the Education Act 1996. This provision requires that:

'The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—

(a) to his age, ability and aptitude, and

(b) to any special educational needs he may have,  
either by regular attendance at school or otherwise.'

This provision imposes an absolute duty on parents to provide suitable education for their child and then provides them with a right to choose how to comply with this duty; in other words the right to home educate is not absolute. Moreover, subsequent provisions make clear that it is for the LEAs and not the parents to determine what is or is not a 'suitable' education.<sup>22</sup> It is the final two words, 'or otherwise', that establish the lawfulness of home education as they construct a crucial distinction between *education* and *school attendance*, and ensure that only the former is compulsory. However, the expression, 'or otherwise', is not defined by statute and in practice refers not simply to home education but to a variety of non-school environments, such as hospitals and pupil referral units and to home tuition provided by LEAs. Collectively these alternatives to school-based education are commonly referred to as 'education otherwise'. There is, therefore, no explicit statutory reference to a parental right to home educate and from this it has been implied that the reference to 'education otherwise' does not primarily refer to home education and that, in effect, home educators have simply, '*taken advantage* of statutory provisions'.<sup>23</sup> However, the association of 'education otherwise' with home education is not new.

21. See, however, Bainham, above n 2, p 542.

22. Education Act 1996, s 437(1). Where a child has a special educational need the LEA should take this into account. The case of *DM and KC v Essex County Council and the Special Educational Needs Tribunal* [2003] EWHC 135 (Admin) is of interest here as it held that an LEA in fulfilling its statutory duty to a child could not oblige parents to provide particular educational support.

23. Poole, Coleman and Liell, above n 5, p 11 (emphasis added).

The expression 'or otherwise' was first used in the Education Act 1944 (the 1944 Act). However, its origins can be traced to the Elementary Education Act 1870 (the 1870 Act), which required parents of children aged between 5 and 13 to, 'cause such children to attend school', but provided that a 'reasonable excuse' would be where 'the child is under efficient instruction in *some other manner*'.<sup>24</sup> It is clear from the case law that the expression 'in some other manner' referred to situations where parents chose to educate their children at home.<sup>25</sup> However, in *R v West Riding of Yorkshire Justice, ex p Broadbent* (1910)<sup>26</sup> a local school board – the precursor to LEAs – attempted to challenge the lawfulness of home education. This is the only recorded case in which the 'right' to home educate has been challenged, and it is clear from the facts of the case that it was the right to home educate per se and not the content and form of education that was at stake here, as it was acknowledged by all parties that the children in question were receiving instruction which was more effective and advanced than that which they would receive in the local school. The case concerned the prosecution of a father under the Elementary Education Act 1876 (the 1876 Act) for failing to send his two daughters to the local school. Under the 1876 Act the only statutory defences to non attendance were sickness, 'unavoidable cause' and that the school was not within two miles of the home.<sup>27</sup> Unlike the 1870 Act there was no mention of 'efficient instruction in some other manner'. However, the 1876 Act contained a general provision that stated that definitions under 1876 Act should be interpreted in the same way as those in the earlier 1870 Act. The case came before Chief Justice Alverstone who rejected the argument of the local school board. In his judgment he commented that:

'The case is one of difficulty and the material sections are obscure. I am not certain that it is possible to give very clear reasoning for the construction which I put upon the section we have to consider ... but it would be a very strong thing to wholly deprive the parent of the right to give efficient elementary instruction to his own child ... and I think it would require clearer language than the section contains to deprive him of that right.'<sup>28</sup>

In reaching this conclusion Alverstone CJ relied on two earlier cases which had held that in determining school non-attendance prosecutions it was open for the courts to interpret 'reasonable excuses' in a broad manner and that in doing so they were not limited by the statutory excuses. Neither of the cases related to home education. The first concerned a child who was unable to attend school because she was working to support her family, or, in the words of the judge, 'discharging the honourable duty of helping her parents'.<sup>29</sup> The second concerned a child who was failing to attend school out of his own choice, or

24. Elementary Education Act 1870, s 74(1) (emphasis added).

25. See, for example, *Bevan v Shears* [1911] 2 KB 936, 80 LJB 1325. This and other pre-1944 cases are still cited in discussions of the present law and consequently it is suggested that there is no substantive distinction between the expressions 'in some other manner' and 'or otherwise'. It has not been possible to establish the reason for the change in terminology.

26. *R v West Riding of Yorkshire Justice, ex p Broadbent* [1910] 2 KB 192.

27. These defences have remained largely unchanged, see Education Act 1996, s 444.

28. *R v West Riding of Yorkshire Justice, ex p Broadbent* [1910] 2 KB 192 at 197 (emphasis added).

29. *The London School Board v Duggan* (1884) XIII QBD 176 at 178, per Stephen J.

'wandering' as the case describes it, and where the justices held that 'a labouring man could not be expected to employ a servant to conduct his child to school'.<sup>30</sup>

To a certain extent the decision in *West Ridings* and the provisions of the 1870 Act are of historical interest only. From a doctrinal legal perspective they do not in any way challenge the current lawfulness of home education. However, tracing the right to home educate back to 1870, rather than taking the 1944 Act or the current law as the starting point, does challenge a construction of the right to home educate as a fundamental and universal right. For examining the context in which the right originated and the manner in which it was legitimised by the courts demonstrates the extent to which understandings of home education, schooling, childhood and relationships between the state and the family are contingent upon their historical context. In other words, while the *legal* right to home educate has remained unchanged from 1870 to the present, acknowledging the ahistorical nature of the right serves to reveal that as a political policy, and as social, cultural and pedagogical practice its significance, meaning and uses are changeable and fluid.

The most striking contrast between 1870 and both 1944 and the present is the fact that home education at that time would not have been perceived as such an unconventional form of education (although the educators were more likely to have been governesses and private tutors than the parents). Indeed for many upper and middle-class children education at home would have been considered normal and especially so for girls from this background, for whom the option of attending school would have been considered unconventional.<sup>31</sup> For working-class children at this time the learning of basic skills was still compatible with certain forms of child-labour and the introduction of mass education required a reconstruction of working-class childhood from one of 'wage-earner' to 'school pupil', a transformation not always embraced by either the children or their parents.<sup>32</sup> Consequently, in 1870 the equating of 'education' as synonymous with 'schooling' and that of 'child' with 'pupil' was still evolving. The two developments are intimately connected as the 1870 Act not only made elementary education compulsory but led to an extensive programme of school building and alongside reforms in juvenile justice and labour law, represents a key moment whereby modern childhood becomes increasingly understood and defined by spatial boundaries.<sup>33</sup> While compulsory education is currently perceived as both unproblematic and beyond question,<sup>34</sup> at that time it was highly controversial and perceived by

30. *The School Attendance Committee of Belper Union v Bailey* (1882) IX QBD 259.

31. See generally F Hunt (ed) *Lessons for Life: The Schooling of Girls and Women 1850–1950* (Oxford: Basil Blackwell, 1987); J McDermid 'Women and education' in J Purvis (ed) *Women's History: Britain 1850–1945* (London: UCL Press, 1995) pp 121–123.

32. H Hendrick 'Constructions and Reconstructions of British Childhood: An Interpretative Survey, 1800 to the Present' in A James and A Prout (eds) *Constructing and Reconstructing Childhood* (London: Routledge Falmer, 2nd edn, 1997) p 46.

33. See, for example, A James, C Jenks and A Prout, who argue that 'Childhood is that status of personhood which is by definition often in the wrong place': *Theorising Childhood* (Cambridge: Polity, 1998) p 39.

34. Exceptions are more radical children's rights commentators see Jeffs, above n 7.

many as an unjustifiable infringement of a father's right to determine not only how to educate his children but whether to do so. As late as 1859 the political philosopher J S Mill wrote that while the educating of one's child, 'is unanimously declared to be the father's duty, scarcely anybody, in this country will bear to hear of obliging him to perform it'.<sup>35</sup> These concerns were pragmatic as well as a principled, for in working-class families child labour was often an important or essential source of family income and even after the 1870 Act, as the case relied on in *West Ridings* indicates, child domestic labour was considered an acceptable excuse for not attending school.<sup>36</sup> The reasons for state intervention in 1870 are complex and a result of political and social concerns about urbanisation, juvenile delinquency and the economy.<sup>37</sup> The 1870 Act followed the Electoral Reform Act 1867 extension of the franchise, which prompted Robert Lowe, the Chancellor of the Exchequer, to comment that, 'it is time to educate our masters' and the purpose of the Act was to 'fill in the gaps' left by existing educational provision to ensure that all working-class children would be taught the skills considered necessary for economic competitiveness. What is clear from the debates surrounding the 1870 Act is that its objectives were primarily, if not exclusively, concerned with the education of working-class children. The centrality of class as the key factor behind the 1870 Act has important consequences when considering the right to home educate. For the reference in the Act to 'efficient instruction in some other manner' can in this way be understood as exempting upper and middle-class parents, those capable of educating their children 'in some other manner' from the attentions of the new Local School Boards. This is the approach implicitly adopted by Alverstone CJ in the *West Ridings* case. It is more explicit in the case of *Bevan v Shears*<sup>38</sup> decided a year later in 1911. In this case a local school board attempted to compel a father to send his child to school on the grounds that the tuition provided by a governess at home was not 'efficient instruction in some other manner'. The court held for the father. An interesting insight into the thinking of the judiciary here is provided by Darling J. He rejected the argument that 'efficient education' had to be the same as that provided by the local school board or in accordance with curriculum guidance provided by the central Board of Education in the following way:

'If we agreed with the appellant's contention we should have to say that if the child had been educated at a good State school in Germany, according to the curriculum in that country, he would not be receiving efficient instruction, and that the parent must be convicted because the instruction the child was receiving in Germany did not compare with the curriculum at Lamphrey School. The fact that the German curriculum differed from that of

35. J S Mill *On Liberty* (first published 1859; London: J M Dent, 1983) p 175. Mill was famously home educated by his father James Mill under the influence of Jeremy Bentham, an experience which biographers suggest was one of the causes of a severe mental crisis: see B Russell *On Education* (first published 1926; London: Unwin, 1971) p 102.

36. *The London School Board v Duggan* (1884) XIII QBD 176.

37. J Murphy *The Education Act 1870* (Newton Abbot: David and Charles, 1972); E Rich *The Education Act 1870: A study of public opinion* (Harlow: Longmans, 1970).

38. *Bevan v Shears* [1911] 2 KB 936, 80 LJKB 1325. This case is cited in support of the right of home educators not to follow the National Curriculum (see Poole, Coleman and Liell above n 5, p 11).



an English elementary school might be the reason for the parent sending his child to Germany. The same observation might be made if the child had been sent to Eton or a French Lycee.’<sup>39</sup>

What is clear from this judgment is that what is considered ‘efficient education’ by central government and by local school boards need not apply to all children. The reference to Eton also indicates that the right to home education is intimately linked to the right to educate children in private schools. Private education is a matter of political debate and open to legitimate criticism, albeit in recent years rather muted within mainstream politics.<sup>40</sup> Acknowledging the connection between private and home education consequently exposes the right to home education to a similar political and social critique, and by doing so again challenges the ‘fundamental’ status of the right.

In many respects it is possible to trace continuities between 1870 and the present, for issues of social control and economic motivations are equally relevant today.<sup>41</sup> However, there are important distinctions between the 1870 Act and the perception of education reflected in the 1944 Act. Often referred to as the ‘Great’, Education Act or ‘Butler’s Act’, after Rab Butler the minister responsible for its enactment, the 1944 Act is frequently identified as laying the foundation for the modern education system and had an important practical and symbolic role in the development of the post-war welfare state. While it is important not to exaggerate or overstate the extent to which the 1944 Act ‘revolutionised’ public education, and critical commentaries which challenge the somewhat nostalgic narratives which surround the Act are explored below, it did herald a real shift in the dominant educational discourses. In particular, the 1944 Act envisaged a more interventionist role for the state in educational provision and a commitment to free universal education as a democratic right. Furthermore, it cohered with developments in child psychology which emphasised the importance of school attendance for child welfare – an issue explored in more detail below. This shift in political and social thinking about education, heralded by the 1944 Act, is reflected in judicial decisions about school attendance. After 1944, the courts, while not using the concept of children’s rights, have consistently rejected parental excuses for not ensuring their children’s attendance at school and in doing so explicitly reject earlier decisions decided under the 1870 Act such as those cited by Alverstone CJ in *West Ridings*.<sup>42</sup> Similarly, in every post-1944 case relating to other aspects of

39. [1911] 2 KB 936 at 940.

40. It is worth noting, however, that the recent moves towards regulating the standards of education in independent schools arguably makes the far less regulated position of home education more anomalous: see Education Act 2002, Pt 10, ss 157–171.

41. A Prout argues that ‘at a time when the intensification of global competition, the speed up of economic processes, the demand for more compliant and flexible labour, and the intricate networking of national economies erode the state’s capacity to control its own economic activity, the shaping of children as the future labour force is seen as an increasingly important option’: ‘Children’s Participation: Control and Self-Realisation in British Late Modernity’ (2000) 14(4) *Children and Society* 303 at 307. See also Hendrick, above n 10.

42. See, for example, *Jenkins v Howells* [1949] 1 All ER 942; *Spiers v Warrington Corp’n* [1954] 1 QB 61; *Hinchley v Rankin* [1961] 1 WLR 421.

home education, such as its content and the monitoring powers of LEAs, the courts have consistently decided against parents in support of the LEAs.<sup>43</sup> While it is not suggested that the Edwardian cases of *West Ridings or Bevan v Shears* would have been decided differently after 1944, it is unlikely that a court would have been able to base its decision as firmly on the principle of parental rights with no mention of the educational or developmental rights or interests of the child. The fact that the right to home education originated in 1870 and received judicial support in 1910 is, consequently, not surprising, but it does raise the question as to whether such an approach is still justifiable in the context of contemporary human rights culture.

### Human rights/parent's rights

There is no explicit reference to a right to home educate in human rights documents, but a number of provisions within international and European human rights law are relied on to legitimise and uphold the lawfulness of home education. Article 26 (3) of the Universal Declaration of Human Rights 1948 states that:

‘Everyone has the right to education ... Elementary education shall be compulsory ... *Parents shall have a prior right to choose the kind of education that shall be given to their child.*’

Article 2 of the First Protocol of the European Convention on Human Rights (now contained in the Human Rights Act 1998, s 1, Sch 1, Pt II, art 2) states that:

‘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 religious and philosophical convictions.*’

Parental rights in education are also present in domestic education legislation. Section 9 of the Education Act 1996 states that:

‘In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State, local education authorities and the funding authorities shall have regard to the general principle that *pupils are to be educated in accordance with the wishes of their parents.*’

For supporters of home education these provisions represent unequivocal support for the right to home educate; for while they uphold a child's right to education there is no mention of compulsory attendance at school. Consequently, attempts to ban or restrict home education are perceived as an unjustifiable form of state intervention. The representation of home education as an essential civil and parental right is particularly evident in the US. In the famous case of *Wisconsin v Yoder* the US Supreme Court overruled the conviction of members of the Amish community for failing to send their children

**43.** See *Baker v Earl* [1960] Crim LR 363; *R v Surrey Quarter Sessions, ex p Tweedie* (1963) 107 Sol Jo 555; *H v United Kingdom* (1984) Application No 10233/83 DR 105; *R v Gwent County Council, ex p Perry* (1985) 129 Sol Jo 737, CA.

to school after they had graduated from the eighth grade on the basis that it violated their First Amendment rights.<sup>44</sup> More recently, the home schooling movement in the US has become increasingly represented by and associated with the Christian Right movement<sup>45</sup> and, as a result, aligned with wider 'anti-government' campaigns which perceive the discourse surrounding 'children's rights' as a thinly veiled liberal and secular threat to family and parental rights and as a means for justifying increased intervention by state and particularly federal government.<sup>46</sup> While the issue has attracted far less attention in Western Europe, supporters of home education utilise the same rights discourse. For example, in Germany, where home education is prohibited by law, parents have sometimes moved to other countries in order to home educate and in doing so they perceive themselves as *political* refugees.<sup>47</sup> From these perspectives the parental right to home educate is not simply a private matter of individual choice but has a broader political significance to the extent that, as Petrie argues, it is 'an essential part of democracy'.<sup>48</sup> This perspective clearly draws on a post-Second World War model of human rights as 'liberty' or 'negative' rights where the emphasis is on protecting individuals from the state. This model is particularly evident in the traditional liberal Western critique of the rigid centralised control of education by totalitarian regimes: for example, the 'rewriting' of history books by Soviet regimes played an important role in the rhetoric of the Cold War.<sup>49</sup> Similarly, enhancing parental choice of school and challenging the 'politicisation' of education by LEAs were key arguments used to justify the radical changes in education introduced by the 1979–97 Conservative administrations.<sup>50</sup>

More recent approaches to human rights have emphasised 'claim' rights that require states to adopt a positive role to protect and uphold the developmental rights of children. This emphasis has both required and legitimised expanding educational provision and centralised regulation by liberal democratic states.<sup>51</sup>

44. *Wisconsin v Yoder* 406 US 205 (1972). Similar issues were addressed in the UK in *R v Secretary of State for Education and Science, ex p Talmud Torat Machzikel Hadass School Trust* (1985) Times, 12 April.

45. See M L Stevens *Kingdom of Children: Culture and Controversy in the Homeschooling Movement* (Princeton: Princeton University Press, 2001); L and S Kraseman 'HR6 and the Federalization of Homeschooling' (1991) *Home Education Magazine*, January–February. More generally see The US National Home Education Network at [www.nhen.org](http://www.nhen.org).

46. D Buss "'How the UN Stole Childhood": the Christian Right and the International Rights of the Child' in J Bridgeman and D Monk (eds) *Feminist Perspectives on Child Law* (London: Cavendish, 2000). More generally on the Christian Right in the US see D Herman *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997).

47. Petrie (1995), above n 5.

48. Petrie (1998), above n 5, at 134.

49. J White 'Two National Curricula – Bakers and Stalins. Towards a Liberal Alternative' [1988] *BrJ Educational Studies* 218, October.

50. Harris, above n 5; C Chitty *Understanding Schools and Schooling* (London: Routledge Falmer, 2002); L Bash and D Coulby (eds) *The Education Reform Act: Competition and Control* (London: Cassell, 1989).

51. D Hodgson *The Human Right to Education* (Dartmouth: Ashgate, 1998).

Constructing education as a form of 'welfare', emphasising the extent to which it can be understood to be a 'service offered for the benefit of the recipients',<sup>52</sup> enables state involvement to be distinguished from totalitarian control. The inherent tension however between education representing both a civil and political right and at the same time a social and welfare right gives rise to conflicts, familiar to family lawyers, between the 'liberty' rights of parents to educate their children as they wish and the 'claim' rights made on behalf of children for the state to protect their right to education and to monitor how parents exercise their duty to provide education. This conflict was addressed by the European Commission of Human Rights in the case of *Leuffen v Germany* (1992).<sup>53</sup>

### Legitimising compulsory schooling and *Leuffen*

In *Leuffen* the Commission held that a policy of compulsory schooling was compatible with the European Convention on Human Rights. Consequently, it represents an explicit challenge to the claim that the right to home educate is a fundamental 'human right' and one that is 'essential for democracy'. However, the case has received little attention, with advocates of home education regrettably, but perhaps not surprisingly, choosing to downplay its significance.<sup>54</sup>

The facts of the case are straightforward. Renate Leuffen<sup>55</sup> wished to educate her son at home. According to the case report, she believed that God had given her the exclusive responsibility and authority to educate her child; that it would be a sin to send her son to a traditional school because of the academic and moral decline in public schools (which would cause her son to be taught obscenities and become a victim of violent behaviour and negative socialisation pressures); and, that formal schooling amounts to child abuse and would be a disaster for her son's mental and physical health. She was opposed by the Youth Office of the City of Dusseldorf, which appointed a tutor for her son to ensure his attendance at school and threatened to remove him from his mother, if necessary by force.<sup>56</sup> She attempted to challenge their decision in the *Amtsgericht* (Dusseldorf District Court), *Landgericht* (Regional Court), *Oberlandesgericht* (Court of Appeal) and finally at the *Bundesverfassungsgericht* (Federal Constitutional Court) but was unsuccessful at every level. Having exhausted

52. J Finch *Education as Social Policy* (Harlow: Longman, 1984).

53. *Leuffen v Federal Republic of Germany* (1992) Application No: 00019844/92.

54. The only known references to it are by Petrie – but no citation is provided and the Commission's arguments are not stated: Petrie (1998), above n 5, at 226 and (1995), above n 5, at 293.

55. Renate Leuffen is in some respects a German equivalent of Victoria Gillick: a conservative Catholic, she is a journalist and high-profile parent's rights activist. Her publications include: *Natürlich ohne Schule leben* (Bonn: Kid Verlag, 1993); *Home Education Today: A Reference Book with Basic Information*, (unpublished manuscript, 1994), both cited in Petrie (1998) and (1995), above n 5.

56. The equivalent legal procedures in England would be a School Attendance Order (Education Act 1996, ss 437, 443, 444) and an Education Supervision Order (Children Act 1989, s 36). Failure to comply with these orders can, in extreme cases, lead to a parent being imprisoned or a child being taken into care.

her domestic remedies she brought a case to the European Commission of Human Rights where her central allegation was a violation of her rights under art 2 of the First Protocol (see above). On losing her case Petrie informs us that in order to avoid being separated from her son, 'with the knowledge of Interpol', she and her son, 'fled' from Strasbourg to the UK where, with the agreement of the London Borough of Haringey Education Authority, she was permitted to home educate.<sup>57</sup>

In deeming her application inadmissible, the Commission held that the German authorities were justified in their actions as they had established, with the help of expert opinion, that the mother was not able to ensure the education of her son.<sup>58</sup> In reaching this conclusion it relied on the decisions of the European Court of Human Rights which had held that the child's right to education takes precedence over any parental right. In particular it relied on the statement in *Campbell Cosans v UK* (1982) that, 'the convictions of parents must not conflict with the fundamental right of the child to education, the whole of Article 2 of the first protocol being dominated by its first sentence'.<sup>59</sup> In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) the court described the philosophical basis of the respect for parents' rights in the following way:

'it is in the discharge of a natural duty towards their children – parents being primarily responsible for the education and teaching of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and exercise of the right to education.'<sup>60</sup>

Thus far, the judgment in *Leuffen* adopts a line of reasoning which in effect reflects the domestic law of England and Wales; namely that the right to home educate is an aspect of parental responsibility and conditional on the provision of 'suitable' education.<sup>61</sup> Having established that in this case the mother was not able to ensure the education of her son the Commission could have stopped there. However, it went on to hold that, 'Article 2 of the First Protocol does not prevent the State from establishing compulsory *schooling*' (emphasis added).

57. Petrie (1995), above n 5, at 293.

58. This fact is disputed by Petrie who states that Leuffen's 'ability to home educate was never assessed, the school authorities stating that home education was not permitted': Petrie (1995), above n 5, at 293.

59. *Campbell and Cosans v UK* (1982) 4 EHRR 293, ECtHR. This case concerned parental objections to a policy of physical punishment of children in schools. While the court emphasised the limits to parental rights under the Convention, this is a rare case where the court held that the parent's rights under art 2 of the First Protocol had been violated.

60. *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, ECtHR.

61. That parental convictions should not prevail over the child's fundamental right to education was confirmed most recently in *R (Williamson) v Secretary of State for Education and Employment* [2003] ELR 176 at [302]. This case held that a belief in physical punishment as a form of discipline was a 'conviction' for the purposes of the art 2, albeit one that was not interfered with by prohibiting the practice of it by teachers. The question of whether an objection to schooling can be considered a 'conviction' was not raised in *Leuffen*. Following *Williamson* it is arguable that it could be; however, Arden LJ's equating of 'schooling' with 'education' suggests that such a conviction could be legitimately interfered with by the state: at [302].

This is significant, for while the article is clear in establishing a right to education it makes no reference to *schooling* and the distinction between the two is crucial in the case for home education.

The Commission reached this conclusion as follows. First, it argued that the first sentence of art 2 of the First Protocol, 'by its very nature calls for regulation by the State'. This interpretation, emphasising the positive role of the state, is problematic as the article is framed in negative terms; a fact that has been noted by the court in cases where parents have attempted, unsuccessfully, to argue for particular forms of education to be provided by the state.<sup>62</sup> In addition, the positive duty of the state to protect a child's right to education could, arguably, be adequately performed by monitoring the content and form of home education. This is the approach adopted in the UK and the right of LEAs to verify and enforce educational standards in relation to home education was upheld by the European Court of Human Rights in *H v United Kingdom* (1984).<sup>63</sup> However, while this case is referred to in *Leuffen*, the right to monitor home education is referred to as an 'integral part' of the right to establish compulsory schooling. The argument of the Commission here is confusing; for while the crux of the decision is based on accepting the finding of the experts that *Leuffen* was incapable of educating her child, a finding that implicitly supports the right to monitor, had they found otherwise, under German law she would still not have been entitled to home educate. Consequently, far from being 'integral' to the right to impose compulsory schooling, such a policy makes the right to monitor home education redundant.

The Commission's second argument focused on the second sentence of art 2 of the First Protocol, that:

'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 religious and philosophical convictions.'

In applying this provision the Commission quotes the following from the decision of the Court in *Kjeldsen* which held that this sentence:

'aims at safeguarding pluralism in education, which is essential for the preservation of the "democratic society" as conceived by the Convention. *In view of the power of the modern state, it is above all through State teaching that this aim must be realised.*'

In *Kjeldsen* the court upheld the provision of compulsory sex education in state maintained primary schools despite parental opposition. However, there are a number of important distinctions between *Kjeldsen* and *Leuffen* which the Commission failed to acknowledge and it is not clear how the statement above from *Kjeldsen* is applied in *Leuffen*. In *Kjeldsen*, the statement was made not to support the right of the state to impose compulsory lessons but, rather, to support the finding that art 2 of the First Protocol applies to teaching in state schools, a point that the Danish government had attempted to challenge.

62. See *Belgian Linguistics* (1968) Application Nos 6853/74 and 7782/77. For a discussion of other cases see H Mountfield 'The Implications of the Human Rights Act 1998 for the law of education' (2000) 1(3) Education LJ 146.

63. *H v United Kingdom* (1984) Application No 10233/83 DR 105.

The importance of this for *Leuffen* is that the statement was not made in order to argue that the power of the modern state justifies using compulsory education as a means of ensuring pluralism; indeed it is precisely the power of the modern state that forms the basis of the parental rights claims. In *Kjeldsen* the court held that the state is 'forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'. This statement is referred to in *Leuffen* and reading the two statements from *Kjeldsen* together the implication appears to be that as, according to the second sentence of the First Protocol, state education is required to respect parental convictions; a parent can not claim that compulsory schooling violates their rights under that provision where the state has complied with this restriction on its power. In *Leuffen* the authorities had enrolled Leuffen's son in a state-maintained catholic school, as a result the state was able to argue with some strength that her religious convictions had indeed been respected. Yet, while there is an element of logic in the approach adopted by the Commission, the extensive reliance on *Kjeldsen* is problematic, for the court in that case, while upholding the lawfulness of compulsory sex education stated that:

'the Danish State preserves an important expedient for parents who, in the name of the their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools which are bound by less strict obligations and moreover heavily subsidized by the State *or to educate them or have them educated at home.*'<sup>64</sup>

While *Leuffen* remains a significant challenge to the claims of home educators it is important to acknowledge its weaknesses. The emphasis placed on both the inability of *Leuffen* to educate her child and the importance of the child's right to education, gives credence to the possibility that the Commission simply 'confused' schooling with education. As Petrie demonstrates in a survey of comparative literature in this area, this error is frequently made.<sup>65</sup> However, had the Commission acknowledged this distinction it could still have reached the same conclusion, as there are a number of alternative ways in which the jurisdiction of the ECHR could have been applied to legitimise the policy of compulsory schooling.

### Necessary in a democratic society?

The Commission rejected *Leuffen*'s claim that her right to privacy under art 8 of the ECHR had been violated on the basis that it was justified by reason of art 8 (2). That the interference with her right was 'in accordance with the law and necessary in a democratic society ... for the protection of the rights and freedoms of others'; in this case the right of the child to education. As mentioned above, where the parents are considered to be incapable of educating their child this conclusion is unproblematic. However, the qualification to the right to privacy in art 8 may apply regardless as to expert opinion of the capabilities of

64. *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, ECtHR.

65. Petrie (1995), above n 5.

the parents or of the particular needs of the child. This alternative approach focuses not on the rights of the individual child to education, but on the public interest in education. In *Leuffen* the Commission balances the parental right against the rights of the child; the public interest in education is not mentioned and this omission is regrettable for a number of reasons.

Most critically, it results in a failure to acknowledge that one of the key underlying justifications for compulsory schooling in Germany is that it is considered necessary for democracy; for the right to home educate potentially permits parents to bring up their children as anti-democratic and it is through compulsory schooling that liberal democratic values of tolerance and pluralism are to be transmitted and inculcated.<sup>66</sup> Avenarius explores this approach to education in Germany from an historical perspective and argues that, 'since the gradual introduction of compulsory schooling in Germany in the 18th century, schools have always been perceived as the most important agencies for the socialization of the young'<sup>67</sup> and he continues by commenting that, 'one must realize that State schools in Germany ... are inevitably included in the general process of secularization and pluralization that has taken hold of all strata of society' and that despite the protection of parental rights under the Basic Law, 'the educational responsibility of the state within the school is considered to be not of minor, but of equal rank to this parental right'.<sup>68</sup>

While this reasoning has a particular historical resonance in Germany, foregrounding this public interest in education is equally applicable to other Western democracies. In particular in the US, espousal of home education by the Christian Right is intimately connected to their opposition to what they perceive as secular, liberal and pluralistic indoctrination in public schools.<sup>69</sup> Moreover, in the UK the recent introduction of citizenship as a compulsory subject within the National Curriculum is an explicit acknowledgement of the linkage between education and concerns about democracy, although it has been criticised by some for being little more than, 'a form of prescriptive moral education'.<sup>70</sup> For Kymlicka the purpose of civic education should be to enable people to question authority. Consequently, he argues that public schooling is essential and that families, parents, religious bodies and the market should not be relied on as, 'people will not automatically learn to engage in public discourse, or to question authority, in any of these spheres, since these spheres are often held together by private discourse and respect for authority'.<sup>71</sup>

Lubienski adopts a similar public interest critique of home education and argues that its increase reflects a 'general trend of elevating private goods over public goods' and that the withdrawal of children from schools is also a withdrawal of social capital that undermines the ability of public education to

66. I am grateful to Professor Ludwig Salgo for discussing this with me.

67. H Avenarius 'Value orientation in German schools' (2002) 14(1) *Education and the Law* 83.

68. Avenarius, above n 67, at 84.

69. Stevens, above n 43.

70. M Wyness 'Childhood, agency and educational reform' (1999) 6(3) *Childhood* 353 at 365.

71. W Klymica 'Education for Citizenship' in J M Halstead and T H McLaughlin (eds) *Education in Morality* (London: Routledge, 1999) p 88.



improve and to 'serve the common good in a vibrant democracy'.<sup>72</sup> For Reich, enabling children to be 'minimally autonomous' protects them from 'ethical servility', and as such is both in the public interest and a right of the child. However, he argues that these interests justify increased state monitoring of home education as opposed to a ban.<sup>73</sup>

Under the ECHR the 'necessary in a democratic society' standard must be attached to one of the specific grounds for restriction listed in the relevant article and in theory it is possible to argue that compulsory schooling in democratic values is necessary for the protection of 'morals' or for the 'protection of the rights and freedoms of others'. Support for this approach can be found in cases concerning teachers where their right to freedom of expression under art 10 has been held to be legitimately restricted on the basis that pupils have a right to information that is conveyed in an objective, critical and pluralistic manner.<sup>74</sup> If adults who choose to be teachers must accept restrictions on their rights it could be argued that parents who take on the role of teachers should similarly be restricted. Such an approach is however highly unlikely to succeed. In *X v UK*, where a teacher was prevented from wearing religious and anti-abortion badges in a non-denominational school, the case was decided on the basis of the parental right in the second sentence of art 2 of the First Protocol, not the needs of a democracy. Similarly, it was on the basis of parental objections, as opposed to children's rights or public interest arguments, that the physical punishment of children in schools in the UK was restricted in accordance with the ECHR.<sup>75</sup> Moreover, this approach, in part, explains why the prohibition of physical punishment by teachers has not, at least in the UK, led to a similar restriction on the rights of parents. The fact that the parental right in art 2 of the First Protocol is restricted only by the right of the child to education is significant as it means that in relation to education, the possibility of articulating the varied collective or public interest arguments against home education are effectively excluded from the legal discourse. This is regrettable because the reasons for legitimately restricting the rights under arts 8 and 10, such as the 'economic well being of the country', and the 'rights and freedoms of others' are in reality both historically and now the more compelling motivations behind the provision of education. In this way the failure of the Commission in *Leuffen* to acknowledge the German state's public interest in compulsory schooling, reflects the construction of education within the

72. C Lubienski 'Whither the Common Good? A Critique of Home Schooling' (2000) 75(1) and (2) *Peabody J Education* 207. Stevens similarly suggest that the dramatic increase in home education in the US can in part be explained by the fact that its advocates draw on resonant chords in the national culture such as a celebration of individuality, distrust of intrusive government and privileging of market values; in the US home schooling products are a multi-million dollar business: above n 43.

73. R Reich *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago Press, 2002).

74. *Vogt v Germany* (1995) 21 EHRR 205; *X v UK* (1979) 16 DR 101.

75. *Campbell and Cosans v UK* (1982) 4 EHRR 293, ECtHR. A distinction that was reinforced in *R (Williamson) v Secretary of State for Education and Employment* [2003] ELR 176 at [206], [212] and [240].

convention as an individual right<sup>76</sup> and the individualistic paradigm of the convention as a whole. However, there are two alternative ways in which the Commission could have supported compulsory schooling on the basis of the child's right.

### School life = 'Private life'

While the Commission rejected Leuffen's claim that her right to privacy under art 8 of the ECHR had been violated, an alternative and converse use of art 8 would be to argue that denying a child the right to attend school would be a violation of the *child's* right to privacy. This speculative argument draws on the creative interpretations of 'private life' that have been accepted by the European Court of Human Rights; and in particular that it has been deemed to incorporate 'a right to develop a personality in conjunction with others'.<sup>77</sup> This approach has the advantage of bringing to the fore the crucial distinction between education and schooling. However, while one of the leading education law barristers, Helen Mountfield, suggested that the use of art 8 in the education field, 'may be an area which is apt for such development',<sup>78</sup> the courts have resisted the application of this right to pupils.<sup>79</sup> Moreover, even if the courts were minded to accept this argument, in the context of Leuffen such an approach would be of limited value as the case concerned the lawfulness of the state imposing a policy of compulsory schooling and there are two important distinctions between this and attempting to establish a child's right to school life. First, the former concerns a power of the state and does not attempt to impose a duty; secondly, in the context of *Leuffen* claiming the right to a school life is not in effect against the state, or a public authority, but against the parent wishing to home educate. To resist this it would be necessary to emphasise both the responsibility of the state to secure the rights protected by the ECHR to everyone in its jurisdiction<sup>80</sup> and that the parental decision to home educate is a statutory duty and a 'public function'.<sup>81</sup>

76. The nature of the right to education has been critical in cases where pupils have attempted to argue for process rights in accordance with art 6. In this context, however, resistance to awarding pupils such protection has required the courts to characterise education as a public right and explicitly not a private or civil right: see, for example, *Simpson v UK* (1989) Application No 14688/89. According to Craig such distinctions 'have little normative merit' and avoid squarely addressing which interests are sufficiently important to warrant protection: P Craig 'The Human Rights Act, Article 6 and Procedural Rights' [2003] PL 753 at 758.

77. *Niemetz v Germany* (1992) 16 EHRR 97 at para 29.

78. Mountfield, above n 62.

79. See *R (on the application of B) v Head Teacher of Alperton Community School and ors*; *R (on the application of T) v Head Teacher of Wembley High School and ors*; *R (on the application of C) v Governing Body of Cardinal Newman High School and ors* [2001] EWHC Admin 229, [2001] ELR 359. For further analysis of this case see A Bradley (2001) 2(3) Education LJ 154; I Sutherland 'Advances in Exclusions Law?' (2002) 2(4) Education LJ 216.

80. Such an approach was used in the case of *Costello-Roberts v UK* [1994] ELR 1 against an independent school's policy of corporal punishment.

81. See Mountfield, above n 62, for a more detailed discussion of the meaning of 'public authorities' in the context of education cases.

### Right to education = Right to school life

The third argument in support of compulsory schooling introduces the value or issue of 'socialisation'. If the socialisation benefits of school attendance, such as social skills and interpersonal development, are understood to form part of the right to education under art 2 of the First Protocol then it can be argued that *no* parent is capable of ensuring the education of his or her child at home and that in effect school attendance is essential for 'education'. This approach relies on two assumptions. First, that social and developmental benefits form part of the right to education and, secondly, that only school attendance can provide this form of education.

Authority for a broad definition of education can be found in a number of sources. Most importantly, the second sentence of art 2 of the First Protocol refers to both 'education' and 'teaching' and in the case of *Campbell and Cosans* the two words were given distinct meanings. The court argued that 'education' included, 'the development and moulding of the character and mental powers of its pupils' and referred to, 'the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas "teaching" or instruction refers in particular to the transmission of knowledge and to intellectual development'.<sup>82</sup>

Support can also be found in the United Nations Convention on Children's Rights 1989 and in domestic law. Article 29 of the Convention states that, 'the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential'. In domestic law there is no clear definition of education but the Secretary of State, LEAs, governing bodies and head teachers are required to ensure that the curriculum is 'balanced and broadly based' and 'promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society; and prepares pupils for the opportunities, responsibilities and experiences of later life'.<sup>83</sup>

However, this duty does not apply to parents and in the case law regarding definitions of 'suitable' education there is no reference to social or developmental aspects; rather, a narrow traditional skills-based approach is adopted.<sup>84</sup> Indeed the House of Lords recently held that a regime that kept a pupil in almost complete physical isolation from all staff and other pupils of

82. *Campbell and Cosans v UK* (1982) 4 EHRR 293, ECtHR.

83. Education Act 2002, ss 78, 79 and 99(1).

84. See, for example, *R v Carmarthenshire County Council, ex p White* [2001] ELR 172 and *R v Vale of Glamorgan County Council, ex p J* [2001] ELR 223, QBD. Beyond these cases psychological care and social development is now emphasised in the context of PSHE and citizenship – but linked to skills – not an end in itself: Monk, above n 7. Beyond law this broad definition of education finds support in philosophical writings, for example, C Wringle argues that the 'failure to receive education is not simply to be left with a restricted view and distorted understanding of the universe and our place in it. It is to have no understanding at all. It is also to have no possibility of independent existence among other human beings': *Children's Rights: a philosophical study* (London: Routledge and Kegan Paul, 1981) p 145, quoted in J Fortin *Children's Rights and the Developing Law* (London: Butterworths, 1998) p 131.

the school was acceptable.<sup>85</sup> This is in contrast to the approach adopted by the German domestic courts when rejecting Leuffen's appeals where the benefits of school attendance per se were emphasised. The Dusseldorf Court of Appeal argued that Leuffen's, 'refusal to send her son to school was an abuse of her right to care for her son and gravely endangered his *mental and emotional health and development*', and that, 'Compared to the education provided by a single person, conventional schools had the advantage of contributing to the child's *ability to interact successfully on a social level*'. Similarly, the Federal Constitutional Court stressed 'the importance for children to have school certificates and *learn social behaviour*'.<sup>86</sup>

While there is strong support for a definition of education that incorporates 'socialisation', the second assumption, that it is school attendance and not home education that can best provide for this broad form of education, is far more problematic and contested. Assumptions about socialisation, consequently, not only dominate popular concerns about home education but are central to attempts to establish that school life is part of the right to education. To explore these assumptions it is necessary to look beyond law.

### 'SOCIALISATION'

Concerns about the psychological and social developmental effects or implications of home education are widely held. An example of these concerns is the statements made by the German courts in *Leuffen* noted above. Similarly, in a recent newspaper article about home education, an educational psychologist was quoted as warning about 'the lack of social interaction with other children'.<sup>87</sup> However, these concerns are not limited to 'experts' or officials, for anecdotal evidence suggests that these concerns are widespread and frequently the initial response to the issue. They can also be detected in a variety of popular narratives. One example is the media reporting of home-educated 'gifted' children such as Ruth Lawrence. In these accounts the 'praise' for their precocious examination successes are quickly followed by a thinly veiled expression of concern, twinned with a degree of *schadenfreude*, about their lack of friends and inability to interact with their peers.<sup>88</sup> Similarly, the

**85.** *R (on the application of L) v Governors of J School* [2003] UKHL 9, [2003] 1 All ER 1012. According to L's counsel the regime treated him as, 'a social and educational pariah' and compared it to, 'a correspondence course in prison': [2003] 1 All ER 1012 at 1035e. However, the case is more complex than this suggests: for a detailed analysis see D Monk 'Undermining Authority? Challenging School Exclusions and the Problems of Reinstatement' (2004) 16(1) CFLQ 87.

**86.** *Leuffen v Federal Republic of Germany* (1992) Application No 00019844/92 (emphasis added).

**87.** G Bainer, London Borough of Bromley, in R Garner 'Rising number of parents decide they can do a better job than the education system', *Independent*, 28 January 2002.

**88.** See, for example, Danny Leigh comparing his own experiences with that of Lawrence: 'Adolescence in all its sordid, humiliating glory was calling; but not for Ruth, busy disappearing in a quicksand of perpetual scholarship and arrested development', 'Ruth and me', *Guardian*, 10 May 2000. See also E Addley 'Are the kids all right?', *Guardian*, 24 August 2001; and S Hattenstone and E Brookes 'I'm not Crybaby Soo-Fi any more', *Guardian*, 7 July 2000.

obituaries of Princess Margaret frequently implied that her isolated home education was in part the cause of her unhappiness in later life. Conversely, the decision to send later generations of the Royal Family to schools is praised and associated with a degree of normalisation.<sup>89</sup> While being exceptionally 'gifted' and 'royal' are arguably the prime causes of the distinctive 'otherness' of these individuals, what is significant in this context is the extent to which within these popular narratives, home education is clearly identified as having exacerbated the 'harm' deriving from their 'difference' by failing to temper it. The clear message underlying these narratives is that attending school is the 'normal thing to do'. Despite the fact that the norm of school attendance in Western countries is a relatively recent phenomenon, and globally still far from universal, it is perceived as an almost essential component of the experience of childhood. It is this premise that underlies assertions of the existence of a 'right to school life', for as the critical theorist Erica Burman argues, 'childhood becomes an entity, the deprivation of which constitutes a violation of human rights'.<sup>90</sup> Within this cultural paradigm home education is a label that does not simply describe an alternative form of education but, rather, a practice that robs a child of childhood. The largely unquestioned assumptions about the benefits of schooling attest to what Hendrick describes as the 'self-confidence and tenacity of contemporary western notions of childhood'.<sup>91</sup> Commencing school represents a rite of passage of emotional, as much as educational, significance and one that informs individual subjectivities; as the psychoanalyst Susie Orbach writes, 'For many of us, long out of school, the rhythm of the year still starts in September'.<sup>92</sup> Similarly, school reunion websites and school uniform parties reflect what Chris Jenks, one of the leading 'new' sociologists of childhood, describes as the adult nostalgia in late modernity for childhood.<sup>93</sup> But these popular adult activities also reinforce the importance of school as a key spatial and temporal marker of childhood and the concerns about home education similarly attest to limits to *legitimate* childhood spaces for socialisation. For while 'socialisation' is understood to be an important aspect of child development, when it takes place at a time or place that is perceived as inappropriate then it is a problem to be dealt with rather than celebrated. Anti-social behaviour orders and truancy patrols are current examples.<sup>94</sup> In this way upholding the school as a *legitimate* childhood space for socialisation reflects a prevailing cultural resistance to constructing children as anything other than family members or school pupils.<sup>95</sup>

89. See, for example, C Warwick *Princess Margaret: A Life of Contrasts* (London: Andre Deutsch, 2000).

90. E Burman 'Innocents abroad: Western fantasies of childhood and the iconography of emergencies' (1994) 18 *Disasters* 238 at 242.

91. Hendrick, above n 32, p 34.

92. S Orbach 'Starting School' in S Orbach *What's really going on here? Making sense of our emotional lives* (London: Virago, 1994).

93. C Jenks *Childhood* (London: Routledge, 1996).

94. A Grier and T Thomas 'A war for civilization as we know it: some observations on tackling anti-social behaviour' (2004) 82 *Youth and Policy: The Journal of Critical Analysis* 1.

95. In relation to childhood and space see A James, C Jenks and A Prout *Theorising Childhood* (Cambridge: Polity, 1998) pp 37–58.

In theoretical terms these popular concerns about the socialisation of home-educated children (which are quite distinct from academic skills) represent a 'common sense' knowledge claim, an 'a priori' claim to truth. This is to say that it represents a dominant and largely unquestioned knowledge which functions as a powerful discourse that defines 'normality'. Power here is not repressive, but a positive form of power, which operates as, 'a part of the routine practice of daily life, not as a separate guide to it'.<sup>96</sup> The self-evident and unquestionable status of this common sense is reinforced by silences. For example, the relative silence about the increase in home education and the erroneous but frequent equating of education with schooling<sup>97</sup> whereby the right to education becomes synonymous with a right to attend school and in so doing renders home education invisible. Most strikingly, while the rhetoric of enhancing parental choice, participation and partnership in education has been emphasised and celebrated by both Conservative and New Labour governments,<sup>98</sup> the option of home education has been notably absent from political discourses. These silences and the 'common sense' perceptions of home education function as a mode of governance which is quite distinct from traditional juridical control. For while in Germany, where home education is forbidden by law, parents wishing or attempting to home educate are effectively criminalised, in this country parents who choose to home educate are pathologised; perceived at best as somewhat eccentric or odd and at worst viewed with a degree of suspicion and unease.

Home educators strongly refute the allegations about the potential harm caused by home education. This is, of course, not surprising but their arguments present a serious challenge to the negative assumptions about the social development of their children. For example, Petrie describes as 'overwhelming' the findings of various researchers that children educated at home are 'more mature and better socialised than those sent to school'.<sup>99</sup> The most detailed review of the research in the US is provided by Medlin, and while he acknowledges the weaknesses in the methodology of much of the research, he argues that home-educated children participate in more activities of their wider communities than schooled children and grow up to be functional and happy in their chosen lives.<sup>100</sup> Underlying the claims of home educators are two distinct approaches. First, in arguing that home education does not harm their children

96. A Hunt and G Wickham *Foucault and Law: Towards a Sociology of Law and Governance* (London: Pluto Press, 1994) p 102. See also M Foucault 'Truth and Power' in C Gordon (ed) *Power/Knowledge: Selected Interviews and Writings 1972-1977* (Hemel Hempstead: Harvester Wheatsheaf, 1980); P Miller and N Rose 'Political Power Beyond the State: Problematics of Government' (1992) 43(2) BRJ Soc 173.

97. M Freeman 'Children's Education: A Test Case for Best Interests and Autonomy' in R Davie and D Galloway (eds) *Listening to Children in Education* (London: David Fulton Publishers, 1996).

98. The rhetoric about parental rights and involvement in education has been subject to much critical commentary: see, for example, Harris, above n 5; A Blair and M Waddington 'The home-school "contract": regulating the role of parents' (1997) 9(4) *Education and the Law* 291.

99. Petrie (2001), above n 5, at 493.

100. R G Medlin 'Home Schooling and the Question of Socialization' (2000) 75(1) and (2) *Peabody J Education* 107.

they emphasise that their children develop and function 'normally'; in this respect they emphasise friendships, interaction with peers and academic and work achievements. The second approach is more radical and claims that home educated children in effect are 'better socialized'; in this respect they emphasise that their children, compared with children who attend school, mix with a wider range of people and, crucially, are not restricted by age in their social interaction.<sup>101</sup> In challenging the school/socialised versus home-educated/unsocialised dichotomy these arguments highlight the importance of considering activities beyond formal education in a child's life and, at the same time, the fact that schooling per se does not in itself provide greater or broader forms of social engagement; a particularly pertinent reminder in the context of increased government support for faith-based schools.<sup>102</sup>

Home educators and their supporters often speak of themselves in transgressive terms as, 'free range educators'<sup>103</sup> and 'trailblazers'<sup>104</sup> and a number of their key texts in the UK are published by the Educational Heretics Press.<sup>105</sup> The use of language here is significant as it represents a defiant acknowledgment of the fact that they are challenging deeply embedded norms. As mentioned above they also use the language of political dissidents and refugees; this enables them to draw on the discourse of rights but also indicates a perception of themselves as a discriminated – almost persecuted – minority. The construction of this minority group status is reinforced by the existence and development of an increasingly well-organised national and international community which campaigns, networks and provides support for home educators.<sup>106</sup> Moreover, within this 'community' the parents often speak of themselves as *becoming* home

**101.** There are similarities here with the strategies adopted by lesbian mothers; where there is a similar tension between a strategic need to emphasise their normality and a desire to celebrate the radical transformative potential of their choice, for while some lesbian mothers claim that their parenting can challenge the gendered assumptions of the traditional family, home educators argue that they challenge the ageism of dominant educational practices: S Golombok 'Lesbian Mothers' in S Day Sclater, A Bainham and M Richards (eds) *What is a Parent? A Socio Legal Analysis* (Oxford: Hart, 1999).

**102.** An important case in this respect is *R v Secretary of State for Education and Science, ex p Talmud Torah Machzikei Haddass School Trust* (1985) Times, 12 April, where a small school run strictly in accordance with orthodox judaism was, unsuccessfully, threatened with closure on the grounds that the education provided did not prepare the children for life in the modern world and within the society beyond their community. For a searing critique of faith-based schools see A C Grayling 'Keep God out of public affairs', *Observer*, 12 August 2001.

**103.** T Dowty (ed) *Free Range Education* (Stroud: Hawthorn Press, 2000).

**104.** R Meighan *The Next Learning System: and why home educators are trailblazers* (Nottingham: Educational Heretics Press, 1997).

**105.** Meighan, above n 104; J Fortune-Wood *Doing it their way: home based education and autonomous learning* (Nottingham: Educational Heretics Press, 2000).

**106.** Examples of support group websites in the UK are [www.heas.org.uk](http://www.heas.org.uk) (Home Education Advisory Service); [www.education-otherwise.org](http://www.education-otherwise.org); [www.home-education.org.uk](http://www.home-education.org.uk); [www.free-range-education.co.uk](http://www.free-range-education.co.uk). For Europe generally see [www.worldzone.net/lifestyles/homeducation](http://www.worldzone.net/lifestyles/homeducation). In the US there is a vast array of organisations for home educators; however, the Home Schooling Legal Defense Association ([www.hsllda.org](http://www.hsllda.org), HSLDA), which is closely associated with the Christian Right, is currently the most influential, whereas the National Homeschool Association (NHA) represents 'alternative' parents.

educators not simply as parents who home educate.<sup>107</sup> It becomes an identity and not simply an activity, and the implications of becoming a home educator frequently go beyond the education of their children. For example, in many of the narratives of the parents the decision to home educate is spoken of in emancipatory life-changing terms. However, home educators are enormously diverse and it is important not to characterise them as a monolithic group; they range from deeply conservative and traditional fundamentalist Christians to new age spiritualists and child liberationists influenced by counter-culture values of the 1960s and 1970s.<sup>108</sup> Yet it is this very diversity that makes the construction of an identity and the development of a community more striking, and this arguably represents a response to the marginalisation of home educators from the mainstream and reflects the extent which their choice to home educate challenges dominant norms.

### **Beyond ‘common sense’ – Winnicott, Bowlby and child psychology**

As a considerable amount of the research has been undertaken by those associated with home education, or at least highly sympathetic to it, it is not surprising that it challenges the concerns about socialisation. However, what is more surprising is that despite the prevailing common-sense perception that attending school per se is a ‘good thing’ and necessary for healthy child development there is remarkably little evidence and no specific research which explicitly supports this claim. Rather, school attendance simply appears to be ‘the normal thing to do’ and indeed, as mentioned above, the absence of research reinforces this view as it is the ‘problematic’ and not the ‘normal’ that is the object of social science research. However, in attempting to identify a rational or intellectual basis for this perception or, more critically, to trace a genealogy of the ‘common sense’ knowledge, clues can be found in the work of the post-war British child psychologists John Bowlby and Donald Winnicott.

The work of Bowlby and Winnicott, while not uncontested, has had a long-lasting influence on contemporary understandings of child development and on parental identities and practices more generally.<sup>109</sup> In particular, Bowlby’s thesis of ‘maternal deprivation’ and Winnicott’s pro-natalist approach both emphasised the importance of the mother-child bond and the dangers of early separation. In the context of family law the influence of these ideas are reflected in the assumption, or ‘consideration’, in residence disputes that young children are best cared for by their mothers.<sup>110</sup> Feminist and social constructivist critics

**107.** See Stephens, above n 45, ch 2, ‘From Parents to Teachers’.

**108.** Stevens, above n 45, describes these two extremes as ‘believers’ and ‘inclusives’ and they have also been described as ‘ideologues’ and ‘pedagogues’ to reflect the fact their decision to home educate is a response to radically distinct philosophies. Not all home educators belong to these groups; the decision is sometimes motivated by concerns about the child, such as bullying, where the focus is more explicitly on the perceived needs of the child rather than the beliefs of the parents.

**109.** Hendrick, above n 32, pp 54–56; Rose, above n 10; S Kingsley Kent *Gender and Power in Britain 1640–1990* (London: Routledge, 1999).

**110.** See B Neale and C Smart ‘In Whose Best Interests?: Theorising Family Life Following Parental Separation or Divorce’ in S Day Sclater and C Piper (eds) *Undercurrents of Divorce* (Aldershot: Ashgate/Dartmouth, 1999); C Piper ‘Assumptions about children’s best interests’ (2000) 22(3) *J Social Welfare and Family Law* 261;



of Bowlby have demonstrated that while the emphasis on the mother-child bond represented a shift from paternal rights to a child-centred approach, it simultaneously reinforced an essentialist construction of mothers as ‘innately’ nurturing and that in the post-Second World War era this understanding reinforced:

‘a powerful ideology of the centrality of motherhood that supported the intentions of the government of the day to reconstruct “the family” as the cornerstone of a stable and prosperous society.’<sup>111</sup>

However, in the post-war era, alongside the family, state education was also perceived to be a key ‘cornerstone of a stable and prosperous society’ – and this is particularly evident in the ideological and political investment underlying the 1944 Act.<sup>112</sup> The significance of Bowlby and Winnicott here is that, while best known for their identification of the importance of the mother-child bond, they also, albeit in different ways, emphasise the importance of breaking this bond in ways that, arguably, can be read implicitly to support compulsory school attendance. In short, and using Bowlby’s concepts, while parent, and in particular mother-child, ‘separation’ is problematised to support a particular idea of motherhood and the new family, ‘attachment’ is problematised to support compulsory schooling and a commitment to public education.

In Bowlby this understanding is most apparent in his writings on ‘school phobia’ or school refusal.<sup>113</sup> Before addressing school phobia, Bowlby takes pains to distinguish it from truancy; and in doing so demonstrates the potential problems of both ‘anxious attachment’ and ‘traumatic separation’. In instances of truancy, he argues that children do not express anxiety about attending school and that truants, ‘often steal or are otherwise delinquent’ and ‘commonly come from unstable or broken homes and have experienced long/and or frequent separations or changes of mother figure’.<sup>114</sup> From the familiar identification here of mothers and ‘broken homes’ as a cause of juvenile delinquency and truancy it is easy to see why Bowlby has been popular with conservative commentators seeking to demonise single mothers and the breakdown of traditional morality and, conversely, why his work has been the object of feminist critique. In the context of school phobia the approach is quite different. Here Bowlby states that ‘relations between child and parents are close, sometimes to the point of suffocation’.<sup>115</sup> Significantly, Bowlby attributes the

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M Freeman ‘Feminism and Child Law’ in J Bridgeman and D Monk (eds) *Feminist Perspectives on Child Law* (London: Cavendish, 2000); M Place ‘Attachment and identity – their significance in decisions about contact and placement’ [2003] *Fam Law* 260.

111. S Day Sclater, A Bainham and M Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart, 1999) Introduction.

112. R Cocks ‘Ram, Rab and the civil servants: a lawyer and the making of the “Great Education Act 1944”’ (2001) 21(1) *LS* 15; Chitty, above n 50; M Barber *The Making of the 1944 Education Act* (London: Cassell, 1994).

113. J Bowlby *Attachment and Loss. Vol 2 Separation: Anxiety and Anger* (London: Penguin, 1978, first published London: Hogarth Press and The Institute of Psycho-Analysis, 1973).

114. Bowlby, n 113 above, p 300.

115. Bowlby, n 113 above, p 300 (emphasis added).

cause of school phobia not with the school but with the parenting. This point is made more explicitly later when he states authoritatively that:

‘there is widespread agreement that what a child fears is not what will happen at school, but leaving home ... almost all the students of the problem conclude that the disagreeable features of school, for example a strict teacher or teasing or bullying from other children, are *little more than rationalizations*.’<sup>116</sup>

Bowlby then proceeds to contrast this with what he describes as ‘genuine phobias’ and argues that school phobia is consequently ‘an obvious misnomer’ and instead identifies its causes within four different models of ‘anxious attachment’. Within all these models the mother is key – although Bowlby does acknowledge that in rare circumstances it may be the father that is to blame. In the first model, which Bowlby argues is the commonest and may be combined with the others, the mother is a sufferer from chronic anxiety regarding attachment figures and retains the child at home to be a companion. In the other models the child fears that something dreadful will happen to the mother while he is at school and so remains at home to prevent it happening or the mother fears that something will happen to the child while he is at school and so keeps him at home or the child fears that something dreadful will happen to himself if he is away from home and so remains at home to prevent that happening.<sup>117</sup>

School phobia and bullying are examples of the reasons why parents increasingly choose to home educate,<sup>118</sup> but Bowlby’s approach to the subject has implications for all home educators. This is because the motives of any parent or mother that attempts or expresses a desire to home educate are immediately suspected of being an indication of a pathological condition of the mother and not a rational assessment of her child’s best needs. In this way his work is arguably a basis of the collective common sense suspicion and unease that home educators provoke. More generally, Bowlby’s refusal to see the school as in any way responsible for school phobia reinforces the perception of schooling as inherently normal and unproblematic. In this respect there are similarities again with feminist scholarship in family law, as attempts to raise awareness of the potential harms and dangers to children within both the nuclear family and within schools causes unease as they pose a threat to the social and political investment and construction of them as child-friendly and child-appropriate spaces.<sup>119</sup> Indeed it is only relatively recently that the seriousness and extent of bullying in schools has been recognised and that school refusal has been acknowledged to be a rational reaction to school.<sup>120</sup>

In Winnicott’s work the home and the school represent distinct but mutually supportive sites or spaces for child development. This is most evident in his explanation of early years through the binary concepts of Excursions and

116. Bowlby, n 113 above, p 301 (emphasis added).

117. Bowlby, n 113 above, pp 301–304.

118. The Advisory Centre for Education *Home Education* (London: ACE, 1996) p 4.

119. D Monk ‘Education Law/Educating Gender’ in J Bridgeman and D Monk (eds) *Feminist Perspectives on Child Law* (London: Cavendish, 2000).

120. See, for example, C Furniss ‘Bullying in schools: it’s not a crime – is it?’ (2000) 12(1) *Education and the Law* 9.

Returns and of Loyalty and Disloyalty.<sup>121</sup> Underlying both concepts is an understanding of the home, and in particular the mother-child bond, as a uniform natural state from which the child gradually moves away from the mother towards the father and the external objective world in order to develop as an independent individual. Within this framework Excursions away from the mother enable the child to discover the objective world, but for healthy development in the early years a child needs to Return from them and merge again with the subjective environment represented by the relationship with the mother. Similarly, in relation to Loyalty and Disloyalty, which Winnicott argues is a necessary conflict inherent in child development, the relationship within the family and especially with the mother should ideally provide the immature child with 'a situation in which loyalty is not expected'.<sup>122</sup> School life, in contrast to the family, requires group discipline and while Winnicott argues that children have different needs and that there is no right age at which children should go to school he implies that the Excursion to school and the Loyalty that it requires are necessary for healthy development. Indeed he argues that 'the school can provide tremendous relief for the child living in the family'.<sup>123</sup> The reference here to '*the* school' is significant to the extent that it echoes his references to 'the mother' and 'the family' and in this way reinforces the construction of the school as an institution that requires no definition; that it exists prior to discourse. Moreover he echoes Bowlby's idealised view of the home and simultaneous concerns about anxious attachment in his approach to the early pre-school years as he argues that:

'When in doubt the child's home is the place where the richest experiences can be reached, but one has to be always on the look out for the child who, for one reason or another, cannot be creative in imaginative play until he or she spends a few hours each day outside the family.'<sup>124</sup>

In relation to both Bowlby and Winnicott it is important to make clear that while, to varying degrees, they pathologise or problematise parents who challenge school attendance, neither of them explicitly addresses the issue of home education and it is important not to perceive their work as simply justifying government policies. Indeed, to the extent that Winnicott challenges a set age for compulsory education and argued that in relation to the early years 'in any one neighbourhood all kinds of provisions should be available',<sup>125</sup> his approach conflicts with both the contemporary and current legal and educational policy. Conversely, the fact that home education and in a similar way boarding school for young children fail to cohere with 'expert' views of good parenting, but are nevertheless permitted, also demonstrates the disjuncture between child psychology and educational policy. Moreover, the 'child centered' perspective which they both championed, while problematic to the extent that it bonded the child, 'only to "good" or "bad" parents, not to being a member of a wider community or kin network',<sup>126</sup> arguably played an

121. D W Winnicott *Home is Where We Start From* (London: Penguin, 1986).

122. Winnicott, above n 121, p 137.

123. Winnicott, above n 121, p 139.

124. Winnicott, above n 121, p 139.

125. Winnicott, above n 121, p 139.

126. J Mitchell and J Goody 'Family or Familiarity?' in S Day Sclater, A Bainham, M Richards (eds) *What is a Parent? A Socio Legal Analysis* (Oxford: Hart, 1999).

important part in the recognition of the potential conflict between parents' rights and child welfare and the development of the children's rights movement. Indeed it is their child-centred focus that informs their implicit concerns about home education. Moreover, in recognising the complexity of their work it is also important to acknowledge the extent to which it has been criticised and developed by institutional reflexivity within their disciplines.<sup>127</sup> However, communicating this professional reflexivity into the contexts of law and public policy is complex, for here the influence of assumptions based on earlier understandings of 'child welfare' are often more deep seated and develop in different ways.<sup>128</sup> Consequently, the aim here is not to criticise psychology or psychoanalysis per se, as Adam Phillips argues, 'if we are living in the age of the specialist, then psychoanalysis can be useful as a critique of the whole project of wanting authorities'.<sup>129</sup>

While acknowledging these considerations, a critical reading of Bowlby and Winnicott helps to challenge a universal and ahistorical understanding of childhood; for locating their work in a particular historical and cultural context reveals the extent to which their understanding of healthy, functional child development lends credence to and coheres not only with a norm of a particular form of family life and parenting but with a norm of school attendance. Crucially, however, the reverse is not true. Which is to say that concerns about child development in 1944 were neither the sole nor even the primary motive underlying the provision of education and the more rigorous enforcement of school attendance. As mentioned above, in contrast to 1870, when home education was not unusual and moreover childhood as the object of expert psychological discourses was still developing, the provision of education resulting from the 1944 Act appears to be far more a service offered for the benefit of its recipients than simply a method of social and class control. Indeed the 1943 *White Paper on Educational Reconstruction* states that the purpose of education is 'to secure for children a happier childhood and a better start in life'.<sup>130</sup> Furthermore, in the post-war context where the explicit aim of various policies was to treat individuals according to their needs rather than their economic power and social status, education was perceived by many as a means of creating a more egalitarian society enabling individuals to reach their 'full potential'. However, this perspective, which has led the 1944 Act to become 'entrenched in folklore as benevolent and accommodating'<sup>131</sup> has recently been subject to critical reappraisal and this research reveals the extent to which the consensus of support for the 1944 Act reflected political compromise more than a shared utopian vision; and that while the Act undoubtedly created new opportunities for some, it simultaneously created a structure of state education that reproduced and reinforced existing inequalities<sup>132</sup> and protected the

127. See, for example, P Elfer, who makes clear the extent to which the notion that mothers who go to work harms children is rejected now by child psychologists: 'Attachment theory and day care for young children', Highlight No 155, National Children's Bureau, 1997.

128. Piper (2000), above n 110.

129. A Phillips *Terrors and Experts* (London: Faber and Faber, 1995) p xiii.

130. Quoted from Finch, above n 52.

131. Chitty, above n 50, p 11.

132. Chitty, above n 50; Finch, above n 52; R Watts, 'Pupils and Students' in R Aldrich (ed) *A Century of Education* (London: Routledge Falmer, 2002).

interests of private schools.<sup>133</sup> In relation to the 1944 Act, Ransom comments that, 'in exchange for the retention of liberal capitalism the working class would be offered the opportunity of social mobility'.<sup>134</sup> Consequently, while the Act was undoubtedly informed by an explicit and progressive concept of citizenship rights, the fact that the Act failed to tackle fundamental inequalities is a natural consequence of the compromises implicit in the Act; as Finch argues, 'If the principle of citizenship rights is to be applied without challenging the economic order, the aim of the right to *unlimited* education for every citizen cannot be sustained'.<sup>135</sup>

Acknowledging that there are 'very good reasons for doubting whether any type of educational provision can be regarded as solely and unambiguously for the benefit of its recipients'<sup>136</sup> has important implications for home education. For contextualising the work of Bowlby and Winnicott and acknowledging their failure to relate the child to the broader community, together with an awareness of the economic and political interests in educational provision, suggests a degree of caution in uncritically accepting the concerns about the socialisation of home-educated children. One of the key insights from feminist and critical scholarship in child law is that policies and legal provisions premised on the 'welfare of the child' serve to mask less neutral or more controversial interests, be they political, social or economic.<sup>137</sup> Consequently, a child's right to school life premised on an assumption that school attendance is in a child's best interests because of concerns about psychological development, masks the fact that mass education by way of schooling has rarely been aimed primarily at serving 'the best interest of the child' and that collective interests have always 'exercised the more compelling pressures'.<sup>138</sup> This is not to say that these other interests in education, be they the traditional concerns about social control and economic competitiveness or more progressive concerns about equality and pluralism, are illegitimate or necessarily always at odds with individual children's best interests; rather, that they are distinct from concerns about socialisation and may not cohere with parental or children's aspirations and expectations of education. Consequently, if a right to school life is to be imposed then it needs to make the case explicitly on the basis of these public interest concerns.

133. See Cocks, above n 112, who argues that the introduction of the expression 'Independent' Schools by the 1944 Act was, 'a shrewd change to make in a society which was less respectful of private property than it had been: "independent" had all the right political connotations': p 28.

134. S Ransom *Towards the Learning Society* (London: Cassell, 1994).

135. Finch, above n 52, p 87.

136. Finch, above n 52, p 85.

137. Piper (2000), above n 110; H Reece 'The paramountcy principle – consensus or construct?' (1996) 49 CLP 267; D Monk 'Children and the Law: in whose best interests?' in M J Kehily (ed) *An Introduction to Childhood Studies* (Buckingham: Open University Press, 2004).

138. Finch, above n 52, p 85.

## CONCLUSION

'The cats out the bag and people know it's a legal option ... All kinds of people are doing it and if it continues growing like this, the authorities are either going to have to stop it or embrace it.'<sup>139</sup>

'Government is a problematising activity: it poses the obligations of rulers in terms of the problems it seeks to address.'<sup>140</sup>

In the UK at present home education is 'tolerated', which is to say that while it is 'allowed'<sup>141</sup> it is neither encouraged nor officially or popularly perceived as equal to schooling. In this respect the UK can be seen to have adopted a middle path between the prohibition in Germany and the position in the US where home education has become 'fully institutionalised if still unconventional'<sup>142</sup> and is protected as a fundamental civil liberty. However, if the number of parents choosing to home educate continues to increase, both government and popular responses to home education and to home educators may change. The availability of extensive educational resources through the medium of the internet is highly significant here. Already embraced by the government as an educational tool in schools,<sup>143</sup> the internet has the ability to make home education a far more feasible option, both practically and financially, and as a result a realistic option for the increasing numbers of parents dissatisfied with aspects of state schools, and not simply for those with ideological or principled objections to schooling. The full impact of technology on the experience and understandings of childhood is the subject of much debate,<sup>144</sup> but its use as a learning tool, whether directed and regulated by adults or by children themselves, is beyond doubt. Consequently, if the 1870 Act signified a shift from the 'factory child' to the 'schoolchild' and the 1944 Act a shift towards the 'welfare child' or the 'psychological child'<sup>145</sup> it is not implausible that the increase in home education through the use of internet might reflect a subsequent shift towards a radically new form of childhood, and historians of the future may talk of schooling as a form of mass education not as an end point of a progressive narrative but, rather, as a relatively short social experiment. It is, of course, too early to tell. However, whether home education is embraced or resisted, claims based both on the civil

139. M Fortune-Wood, from Education Otherwise, quoted in the *Guardian*, 10 December 2002.

140. Miller and Rose, above n 96, at 181.

141. See Department for Education and Skills guidance, above n 14.

142. Stevens, above n 45, p 196.

143. Leader article, 'E is for e-education', *Guardian*, 10 January 2003.

144. S Holloway and G Valentine *Cyberkids: Children in the Information Age* (London: Routledge Falmer, 2003); I Hutchby and J Moran Ellis *Children, Technology and Culture: The Impacts of Technology in Children's Everyday Lives* (London: Routledge Falmer, 2001); D Buckingham *After the Death of Childhood: Growing Up in the Age of Electronic Media* (Cambridge: Polity Press, 2000); R Sutherland, K Facer, R Furlong et al 'A new environment for education? The computer in the home' (2000) 34(3-4) *Computers and Education* 195; N Lee *Childhood and Society: Growing up in an age of uncertainty* (Buckingham: Open University Press, 2001).

145. Hendrick, above n 32.

and political right of parents to home educate and the right of children to a school life are likely to play an important role in future debates. This article has sought to problematise both in order to provide an alternative critical framework to understand responses to home education. For the individualistic nature of both claims may be used strategically to mask both the historical and contemporary importance of public interests in the provision of education and the legitimacy of such interests. However home education develops in the future, acknowledging the contingency and ahistorical basis of these conflicting truth claims, requires us to question the purpose of education and the nature of democracy.

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