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**Legal cases cited:** *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. April 2, 2009); *Korematsu v. U.S.*, 323 U.S. 214 (1944) (on detention of Japanese-Americans during World War II); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that aliens benefit from the equal protection clause of the 14<sup>th</sup> Amendment); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (on takings); *Paquete Habana*, 175 U.S. 677 (1900) (Cuban boat owner suit) ; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (*jus cogens*).

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## The Harms of Homeschooling

Robin L. West

Over the last thirty years, "homeschooling"—teaching one's children at home rather than entrusting their education to either a public or private school—has virtually exploded: around ten thousand children were homeschooled in the early eighties; today, over *two million* children are being educated at home. There are now more children being homeschooled than are enrolled in charter and voucher schools combined. Of course, there have always been some parents, both religious and secular, who have homeschooled since the advent of public schools and compulsory attendance laws in the middle of the nineteenth century. For a hundred and fifty years, parents of special needs children, parents in isolated parts of the country who live far from any public schoolhouse, as well as a smattering of parents of circus performers, professional athletes, and child stage actors have homeschooled their children, and exemptions in the various states' compulsory attendance laws have explicitly allowed them to do so.

The explosion in homeschooling of the last quarter century, however, is a different phenomenon altogether. The majority of homeschoolers today, and by quite a margin, are devout, fundamentalist Protestants. And, of the hundreds of thousands of fundamentalist Protestant parents who in the past two decades have pulled their children from public schooling, the major-

ity have done so not because their kids have special needs, or because they live too far from a schoolhouse, but rather because they do not approve of the public schools' secularity, their liberalism, their humanism, their feminist modes of socialization, and in some cases, of the schools' very existence. Because they disapprove, they choose to educate their children at home, in accordance with their own traditions and by their own religious lights.

They do so, furthermore, with little or no oversight from public school officials, who in some states need not even be notified of the parents' intent to homeschool. Because of lax or no regulation, in most of the country parents who homeschool now have virtually unfettered authority to decide what subjects to teach, what curriculum materials to use, and how much, or how little, of each day will be devoted to education. In most (but not all) states, testing is optional, and in almost all states, the parent-teachers need not be certified or otherwise qualified to teach. In other words, in much of the country, if you want to keep your kids home from school, or just never send them in the first place, you can. If you want to teach them from nothing but the Bible, you can. If they want to skateboard all day, and you choose to let them, you can.

As late as the late 1970s, these massive withdrawals from the public schools that have become so common-

place over the past thirty years would have been illegal, everywhere, and regardless of the parents' motivations. Dating from the mid 19<sup>th</sup> century, with the advent of mandatory attendance laws, until three quarters of the way through the 20<sup>th</sup>, it was a crime to keep one's children home from school, and it did not matter in the slightest whether it was religion or some other felt conviction that was at the heart of the decision to do so. Parents who did so were criminals, and their kids were truants. Where homeschooling was allowed, for the rural out-posters, the special needs children, the circus performers and the stage kids, the homeschooling was heavily regulated: the children were tested annually, their parent-teachers or tutors had to be certified or otherwise deemed qualified by the state, courses and hours were specified, and the curricula were subject to approval and review by state authorities.

Compare that with today's legal landscape. In 2009, thousands of parents who keep their kids home and don't tell a soul are well within the bounds of the law. Their children are not truants; they're "homeschooled." Parents in many states have full authority,

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free of all state oversight, to determine the content of their children's education; in states with some remaining regulations, enforcement is lax or non-existent. Thus, over the course of the last thirty years, "homeschooling" has gone from illegal—meaning criminal—in all fifty states, to fully legal, and from heavily regulated, when allowed, to either completely unregulated or only lightly regulated, everywhere. That's quite a revolution, in law and education both. How did *that* happen? Why haven't more people noticed? Why don't more people care?

### **A Right to Homeschool?**

The short answer to how it happened is simply that in the 1980s, all fifty state legislatures, in response to massive political pressure from religious parents and their lobbyists, legalized homeschooling. They either passed "homeschooling statutes" that explicitly allow the practice, or they amended their "compulsory attendance laws" so as create exemptions for parents who choose to homeschool, or they clarified existing laws such that homeschools would be classified as a species of "private schools" or "church schools" and thereby

be legal under statutes legitimating those institutions. State after state, one way or another, decriminalized homeschooling throughout the course of that decade. In the following decade—the 1990s—in response to the same set of pressures, the states followed up on legalization by steadily deregulating the practice. The result is what we face today: a widespread and thoroughly privatized educational practice that devolves full responsibility for a child's education to whatever parent wants to claim it, which is not only legal, but virtually unregulated as well.

But that short answer doesn't explain why the states did it, or put differently, why the political campaign to pressure them to do it was so spectacularly successful. Education, after all, is typically described as a core, and possibly the core, state responsibility. Why were the states so willing to turn the reins over to parents? They acted, at least in part, because of the belief, held by religious parents and proclaimed by their advocates, that a constitutional right required the states to do so. Specifically, the parents and their advocacy groups argued that religious parents had a free exercise right, grounded in the First Amendment, to educate their children as they see fit, in private, at home, in accordance with their religious beliefs, and with no oversight by or even interaction with state authorities. In the face of this adamantly asserted constitutional right, and strapped for cash in any event, the states ceded responsibility for what had previously been a core state function—the education of children—to whatever parents claimed that they preferred to educate their children themselves. The main purpose of this essay is to criticize this "right to homeschool" that the religious parents and their lawyers and lobbyists have claimed, or created, over the past couple of decades. My criticism will rest primarily on the basis of the harms such a right might inflict upon the children so educated.

Two clarifications are in order. First, courts, and particularly the federal courts, have never granted the existence of the "right to homeschool." Although the doctrine is messy and arguably on the cusp of change, the courts have with only a few exceptions upheld the constitutionality of mandatory attendance laws and regulations governing legalized homeschooling, against claims that parents have a constitutional right to homeschool that would invalidate those laws. It doesn't follow, however, from judicial recalcitrance that the right does not exist: hundreds of thousands of parents believe it exists and have acted upon it, and most important, whatever the courts might say, state legislators in all fifty states decriminalized the practice in partial reliance upon it, often explicitly making reference to the "parent's right to homeschool" in the amended legislation or regulations as they did so. Furthermore, it was the purported right to home-

school, so successfully asserted by homeschooling advocates and lobbyists in state legislative fora, that facilitated the extraordinary success of the still ongoing deregulatory campaign. It is the purported “right” to homeschool without any oversight or supervision by state educators—and not simply a right to its decriminalization—that has prompted states to withdraw so utterly from their once core duty to provide, or at least supervise, a shared minimal education for all their future citizens. Federal courts may someday acknowledge the existence of this right. Whether or not they do so, however, at this point doesn’t much matter: state law has already changed on the basis of it. Judicial recognition of this right, when and if it arrives, will be a redundancy.

Second, although I will be criticizing the right to completely deregulated homeschooling, I do not mean to deny for a moment that homeschooling itself is often—maybe usually—successful, when done responsibly. Passionately involved and loving parents, whether religious or not, can often better educate their children in small tutorials at home, than can cash-strapped, under-motivated, inadequately supported, and overwhelmed public school teachers with too many students in their classrooms. Results bear this out, as homeschool advocates repeatedly point out (and as critics virtually never deny): the homeschooled children who *are* tested, or who take college boards, whether or not religious, perhaps surprisingly, perhaps not, do very well on standardized tests, and on the average, they do better than their public school counterparts (though it must be noted that the parents and children who voluntarily subject themselves to testing are the self-selected educational elite of the homeschooling movement). My target is not the practice of homeschooling, whether religious or secular. My target, rather, is *unregulated* homeschooling—the total abdication of responsibility by the states for regulating the practice. The right to unregulated homeschooling visits quite concrete harms on the homeschooled children themselves, the mothers who are teaching them, and the often rural and isolated communities in which they are raised and taught.

### The Harms of Unregulated Homeschooling

First, children who are homeschooled with no state regulation are at greater risk for unreported and unnoticed physical abuse, when they are completely isolated in homes. As the trial judge in *In re Rachel* noted, “95% of referrals for child abuse come from public school teachers or officials.” Without the window provided by either public or private schooling, a family’s privacy and sometimes its isolation will shield it from officials with a duty to report evidence of abuse. This shields the abuser from accountability—and also

shields the child from help. Homeschooling, without visits or review, removes the children from the one forum in which their abuse may be identified.

Second, there’s a public health risk. Children who attend public schools are required to have immunizations. Without the immunizations they will not be allowed to begin classes. In only a few states have legislatures written their homeschool statutes in such a way as to require that homeschooled children be immunized, and that the immunization be verified in some way. Thus, deregulated homeschooling means that homeschooled children are basically exempted from immunization requirements. They are more susceptible to the diseases against which immunization provides some protection.

Third, public and private schools provide for many children, I suspect, although I have yet to see studies of this, a safe haven in which they are both regarded and respected independently and individually. Family love is intense, and we need it to survive and thrive. It is also deeply contingent on the existence and nature of the family ties. Children are loved in a family *because* they are the children of the parents in the family. The “unconditional love” they receive is anything but unconditional: it is conditioned on the fact that they are their parents’ children. School—either public or private—ideally provides a welcome respite. A child is regarded and respected at school not because she is her parent’s child, but because she is a *student*: she is valued for traits and for a status, in other words, that are

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independent of her status as the parent’s genetic or adoptive offspring. The ideal teacher cares about the child as an individual, a learner, an actively curious person—she doesn’t care about the child because the child is hers. The child is regarded with respect equally to all the children in the class. In these ways, the school classroom, ideally, and the relations within it, is a model of some core aspects of citizenship.

Fourth, there are political harms. Fundamentalist Protestant adults who were homeschooled over the last thirty years are *not* politically disengaged, far from it. They vote in far higher percentages than the rest of the population. They mobilize readily. The “army” in which adult homeschooled citizens are soldiers has enormous clout: homeschoolers were called “Bush’s Army” in 2000 and 2004 for good reason. Their capacity for political action is palpable and admirable, although doubly constrained: it is triggered by a call

for action by church leaders, and in substance, it is limited to political action the aim of which is to undermine, limit, or destroy state functions that interfere with family and parental rights. Nevertheless, and by their own accountings, these citizen-soldiers in the “homeschooling movement” and the various political campaigns in which they are enlisted have no clout in the army in which they serve. They are as effective as they are, and as successful as they are, because they engage in politics in the same way that soldiers participate in combat. They don’t question authority, and they can’t go AWOL. With little education, few if any job skills, and scant resources, their power either to influence the lines of authority within their own sphere, or to leave that sphere, is virtually nil.

The remaining three sorts of harms—ethical, educational, and economic—are much discussed in critical literature both on homeschooling and on child-raising in devout households, and I won’t belabor them here other than to note them. Child-raising that is relentlessly authoritarian risks instilling what developmental psychologists call “ethical servility”: a failure to mature morally beyond the recognition of duties of obedience. In the most devoutly fundamentalist households, ethical servility might not be regarded as a bad outcome; it may be the desired goal. But whether a virtue or a disability, homeschooling—where the parents have full responsibility for the extent and substance of the child’s education as well as upbringing—clearly multiplies the risk.

The educational harm is the most immediate, direct risk of unregulated homeschooling. It is also the only one in this litany of possible risks adamantly denied by homeschooling advocates. There is indeed no credible evidence that homeschoolers as a group do worse on standardized tests, but contrary to their claims, there is also no credible evidence that they do better. There is no credible evidence of accomplishment here at all. Because of the non-existence of testing requirements in much of the country—itsself an important political victory of the homeschooling movement—the studies suggesting as much suffer from severe selection bias: the elite of the homeschool world—those parents who voluntarily submit their children for testing—is tested against the total public school population. It doesn’t of course follow from the selection bias that as a group homeschooled children do *worse*. Nevertheless, it is clear from both anecdotal accounts, memoirs, and trial transcripts that some homeschoolers are suffering educational harm which would be avoided or minimized, were they either in public school or were their homeschool subjected to decent regulation.

Again, in unregulated states, parents need not teach their children a thing, if they so desire. Religious parents can teach nothing but the Bible, and nothing but a literal interpretation of that, and secular anti-schooling parents can allow their children to skateboard, dance,

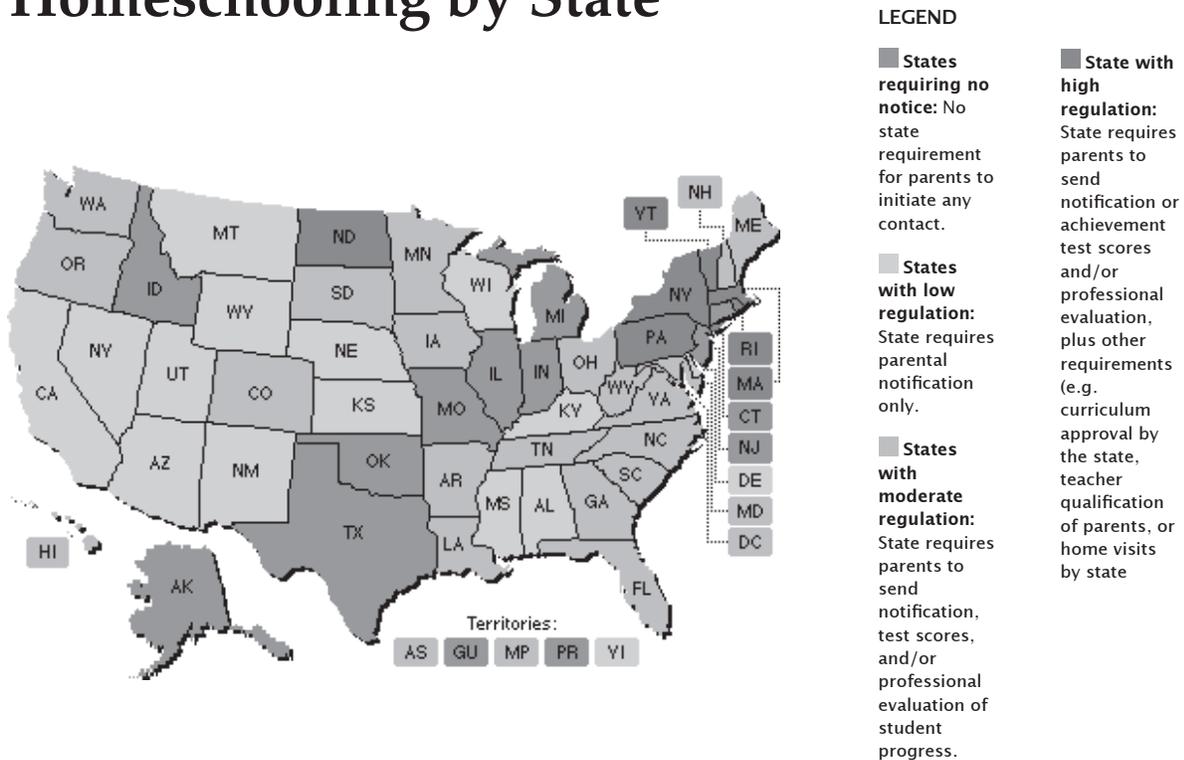
or play video games to their hearts’ content, free of any dull training in reading and arithmetic. Whether homeschooled children receive an education comparable to that provided in public schools is almost entirely a matter of parental discretion. This is not an incidental effect of the homeschooling movement; this was its entirely intended result. What is sacrificed most immediately by the radical deregulation of homeschooling is some children’s knowledge base, literacy, and numeracy. Some children are less educated than they would be, were homeschools either regulated or banned. Also sacrificed is their exposure to diverse ideas, cultures, and ways of being. Again, this is not incidental; it is the fully intended result of the deregulation movement. The children of the most devout fundamentalists are being intentionally shielded from those parts of a public school curriculum that have this broadening potential.

Finally, the economic harms. The average homeschooling family may have a higher income than the average non-homeschooler, as was recently reported by *USA Today*. The radically fundamentalist “movement” family, however, is considerably poorer than the population, and it is the participants in these movements—the so-called “patriarchy movement” and its “quiverfull” branch and related groups—that are the hardcore of the homeschooling movement. The husbands and wives in these families feel themselves to be under a religious compulsion to have large families, a homebound and submissive wife and mother who is responsible for the schooling of the children, and only one breadwinner. These families are not living in romantic, rural, self-sufficient farmhouses; they are in trailer parks, 1,000-square-foot homes, houses owned by relatives, and some, on tarps in fields or parking lots. Their lack of job skills, passed from one generation to the next, depresses the community’s overall economic health and their state’s tax base.

### Conclusions

Even given these potential harms, there remain good reasons to permit homeschooling, in plenty of circumstances. Parents, both religious and secular, often justifiably wish to shield their children from public schools. Public schools too often ill serve children who are at risk of bullying, or who are hurt by the overly sexualized culture of middle and high schools in many parts of the country, or who have special abilities or needs, or simply idiosyncratic learning styles or habits. Many of these children can best or even only be educated by those who know them best. The children well served by homeschooling might outnumber the children who are badly victimized by the practice. The lessons given homeschooled children by those who homeschool responsibly are also

# Homeschooling by State



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often of very high quality. The gains to these children may be such as simply to outweigh the lack of socialization, diversity, training for citizenship and so on, for those who do so badly. Because of the lack of notice, testing, and review of homeschoolers, it's hard to know. But the evaluative question, for practical purposes, at this point is largely moot. Homeschooling is now such an entrenched practice, recriminalization is not a viable option in any event.

However, even if we assume that the benefits of homeschooling when done well are quite substantial, and even if the harms of public school when done poorly are equally so, *nothing* follows regarding the wisdom of deregulating homeschooling. Special needs kids, vulnerable or sensitive children, parents of children who are for very good reason fearful of bullies, children and parents who rightly or wrongly are repelled by the sexual and misogynist propaganda that proliferates in middle and high school culture, parents

of kids who are preternaturally curious and gifted kids themselves, children of the over-educated and under-employed suburban mothers who simply would prefer to do this work themselves than delegate it to the state, *all* of these children and parents would not be hurt, and would likely be helped, by reasonable state regulation. Annual standardized testing is not the bane of all existence it is often made out to be, and it would give rightly proud parents and children alike a record—and evidence—of their accomplishments. It would also make clear where they had slipped, and where there is need for correction.

As the political philosopher and homeschool critic Robert Reich has persuasively argued, curricular review would give the state a way to ensure that the academic content is such as to protect the children's interest in both acquiring the necessary skills for active, autonomous, and responsible citizenship in adulthood, and in being exposed to diverse and more liberal ways

of life. Mandatory testing would give the states, and the parents, a way to ensure that the students are performing at a level consistent with their own abilities, and consistent with the abilities and performance of their public and private schooled peers. It would give the parents and the state a way to ensure that the children who should be college bound are being prepared for that path, or at least, it would ensure that the parents are aware of their children's capacity for college level work. Periodic visits would open the door to college and career counseling, of benefit to both the children and their parents. They would give the state a window into the quality of home life, and a way to monitor signs of abuse as well as immunizations. The sanction for failure to comply with minimal curriculum, content, visitation, and testing requirements would simply be enrollment in a certified private or public school. The benefits of homeschooling are now protected through legalization of the practice. Deregulation, however, serves no one's interests and harms many. Many of the most serious harms could be prevented through its responsible regulation.

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**Case law:** *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Mozert v. Hawkins County Board of Education* 827 F.2d 1058 (6th 1987); *In re Rachel*, 73 Cal. Rptr. 3d 77 (Cal. App. 4th Dist. 2008); *Jonathan L. v. Sup. Ct.*, 81 Cal. Rptr.3d 571 (Cal. App. 4th Dist. 2008).

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## Insider Trading: A Moral Problem

Alan Strudler

Insider trading is a crime that can have sensational results. Its perpetrators risk finding themselves behind bars for many years and vilified in popular opinion, while their firms and the people heavily invested in them risk financial ruin. Even so, doubt may be raised about our understanding of insider trading, a doubt that should prompt concern about the justice of insider trading prosecution and about the harsh moral judgments people often make of insider

traders. The doubt comes from trying to identify the moral wrong in insider trading.

Perhaps the most influential insider trading case is *SEC v. Texas Gulf Sulphur*, in which officers of Texas Gulf Sulphur learned of their company's rich ore strike in Canada and traded on this information before the news became public. These officers, who engaged in securities transactions on the basis of material, non-public information, are paradigm insider traders. It is

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