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Family Ties: The European Court of Human Rights' Protection of the Family and its Impact in Future Litigation

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FAMILY TIES: THE EUROPEAN COURT OF HUMAN RIGHTS' PROTECTION OF THE FAMILY AND ITS IMPACT ON FUTURE LITIGATION

Rebecca J. Cambron

ABSTRACT

With family as the foundation for much of modern society's structure, the European Union included familial and parental rights when protecting individuals from unwarranted government influence through the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights's recent interpretation of the protection, however, in the case of Wunderlich v. Germany demonstrates a concerning shift in the Court's jurisprudence. This Comment analyzes the shift occurring within the Court's jurisprudence with respect to the protection of the family and parental rights regarding education, exploring the Court's arch away from the foundational principles behind the Court's formation and advocates for the adoption of levels of scrutiny that would protect familial rights.

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I. INTRODUCTION

La familia. For most, 'family,' whether through blood or other bonds, shapes who we are and how we see ourselves. Throughout the development of democratic society, the family has consistently formed

the foundation. As far back as Aristotle, society's political relationship reflected those found in the family.¹ Parents, as the guardians of children, help shape society's future, including its politics, by molding their children's political and social identities.² This process continues through to today.

Recently, the European Court of Human Rights ("the ECtHR" or "the Court") has questioned the role the family plays in shaping the next generation.³ In *Wunderlich v. Germany*,⁴ the Court moved away from this historical understanding of the family—focusing on the state's role: protecting and in effect determining the best interests of children.⁵ On January 10, 2019, the ECtHR upheld a German court's decision to interfere with the Wunderlich family by withdrawing a portion of the parent's rights regarding their children and forcibly removing the Wunderlichs' four children from the family home.⁶ The German government justified its action based on the parents' choice to educate their children at home and refusal to send their children to one of the government-approved schools.⁷

Under the Convention on the Political Rights and Fundamental Freedoms ("the Convention"), the state may only interfere with an individual's "family life" in certain circumstances.⁸ Article 2 of the Protocol to the Convention, which amends the agreement, however,

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1. ISI Archive, *The Family as the Basis for Political Existence*, INTERCOLLEGIATE STUDIES INST. (Oct. 8, 2014), [https://home.isi.org/family-basis-political-existence\[https://perma.cc/26EX-EXYR\]](https://home.isi.org/family-basis-political-existence[https://perma.cc/26EX-EXYR]).
 2. See ARISTOTLE, POLITICS. VIII (Benjamin Jowett trans.) (c. 350 B.C.E), <http://classics.mit.edu/Aristotle/politics.8.eight.html> [https://perma.cc/MA9S-KXH6] (noting the progression of society through individuals collecting into families, families into villages, and villages into states).
 3. See *Wunderlich v. Germany*, App. No. 18925/15, Eur. Ct. H.R. (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [https://perma.cc/4PBZ-D3EM] (holding that German authorities' removal of four homeschooled children from their family home did not violate Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms) [hereinafter *Wunderlich*].
 4. *Id.*
 5. *Id.* at 11.
 6. *Id.* at 16.
 7. *Id.* at 11.
 8. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, ETS No. 5, https://www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/E5VU-SG9A] [hereinafter *Convention*].

guarantees children the right to an education.⁹ The Court previously held that Germany's law requiring school attendance at either the state schools or the authorized private schools—but no other alternatives—did not violate the article.¹⁰ Because of the tension between these two rights, the Court's decision received much attention both inside and outside of the European Union.¹¹ The Court's decision to permit Germany's interference with the protected right to family life reflects a growing trend within the Court in allowing state governments to determine the balance struck between competing interests, resulting in the disintegration of parental and familial rights.¹²

This Comment addresses the Court's increasingly hostile view towards the family and its willingness to defer to the state's judgment of the "best interests" of the child, usurping the traditional role of the parents. Part I describes the development of the *Wunderlich* case and outlines the Court's analysis. Part II analyzes the Court's holding in light of its recent decisions regarding home education and the European Convention for the Protection of Human Rights and Fundamental Freedoms' Article 8's protection for family life. This section will further explore the balance the Court has struck between these two protections and what that means for future cases. Finally, this Comment concludes by advocating for the return to the original values of the ECtHR and proposes the adoption of clear, tiered-levels of scrutiny to better examine state actions.

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9. Protocol to Amend the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, ETS No. 9, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006377c> [<https://perma.cc/2R2Q-N5QZ>].
 10. *Wunderlich*, at 12.
 11. *See German official did not violate homeschoolers' rights, European court says*, CATHOLIC NEWS AGENCY (Jan. 11, 2019, 6:01 PM), <https://www.catholicnewsagency.com/news/german-officials-did-not-violate-homeschoolers-rights-european-court-says-85674> [<https://perma.cc/AN3F-V2H6>] [hereinafter *German Official*]; *German Family Pleads for Help from European Court of Human Rights*, Home School Legal Defense Association (Apr. 2017), <https://hslda.org/content/landingpages/Wunderlich/> [<https://perma.cc/PZ3N-SD6M>].
 12. *See Wunderlich v. Germany*, App. No. 18925/15, Eur. Ct. H.R. (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>]; *Wetjen and others v. Germany*, App. no. 68125/14 and 72204/14, Eur. Ct. H.R. (Mar. 3, 2018), <http://www.iri.edu.ar/wp-content/uploads/2018/07/ri-54-SG-Jurisprudencia-Marzo-CASE-OF-WETJEN-AND-OTHERS-v.-GERMANY.pdf> [<https://perma.cc/GJ6D-XHS4>] (holding that there had been no violation of Article 8 by domestic courts in removing the parental rights of parents involved in corporal punishment against their children as part of their religious beliefs).

II. REASONING GONE WRONG

A. *No Harm, Yes Foul?*

Since the early 1900s, Germany has effectively prohibited homeschooling, requiring compulsory school attendance at either state or private schools.¹³ Article 1666 of the German Civil Code requires local family courts to take the “measures necessary” to avoid harming the best interests of the child, including the obligation to attend school.¹⁴ In 2005, Dirk and Petra Wunderlich’s oldest child reached school age.¹⁵ They decided to educate their daughter at home and accepted the fines and criminal proceedings the German government pursued against them for this decision.¹⁶ Until 2008, when the family moved out of Germany, the only penalty or imposition on their family life that the Wunderlichs faced were the fines.¹⁷

Three years later, however, in 2011, the Wunderlichs returned to Germany.¹⁸ On July 13, 2012, the German State Education Authority reported the Wunderlichs to the local family court claiming they were “deliberately and persistently” refusing to send their children to the local school.¹⁹ Based on the State Education Authority’s finding that the Wunderlichs were creating a “parallel world” for their children, the Darmstadt Family Court appointed a guardian *ad litem* for the children.²⁰

At an oral hearing, the family court withdrew the Wunderlich parents’ right to determine their children’s place of residence, their right to make a decision regarding the children’s schooling, and their right to apply to the authorities on behalf of their children.²¹ The court based its decision on its interpretation of the parents’ refusal to send their

13. *German Official*, *supra* note 11.

14. BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1666, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5809 [<https://perma.cc/7V47-EAUT>] (Ger.).

15. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 6, 8 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

16. *Id.* ¶ 8.

17. *Id.*

18. *Id.*

19. *Id.* ¶ 25.

20. *Id.* ¶ 10-11.

21. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 12 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

children to an authorized school as not only a violation of German law, but also an abuse of parental authority which “risked damaging the children’s best interests in the long term.”²² The court stated, “Independent from the question of whether it could be ensured that the children were acquiring sufficient knowledge through the applicants’ homeschooling, the children’s not attending school was preventing them from becoming part of the community and learning social skills such as tolerance, assertiveness and the ability to assert their own convictions against majority-held views.”²³ The Wunderlichs appealed the decision.²⁴

On April 25, 2013, the Frankfurt Main Court of Appeals denied the parents’ appeal.²⁵ The court noted the children and parents’ resistance to all attempts at conducting a knowledge assessment.²⁶ Regarding the law, the court found that withdrawing parental authority “presupposed a significant endangerment of the best interests of the child,” and the court utilized a balancing of the rights and interests of the children, parents, and society to reach its ruling.²⁷ The court concluded that the Wunderlich parents created a danger by forming a “symbiotic” family system and did not meet the standards of education maintained by the state.²⁸

A few months later, on August 26, 2013, the German youth office met with the Wunderlichs and the Education Authority.²⁹ The parents continued in their refusal to send their children to the authorized schools.³⁰ Three days later, authorities and police officers removed the children from the home after they refused to comply with the court bailiff’s request to come voluntarily.³¹ On September 12 and 16, 2013, the children were assessed and determined to meet the appropriate class and schooling requirements.³²

Just prior to the assessments, however, on September 10, the Wunderlich parents agreed to send their children to school and on

22. *Id.* ¶ 15.

23. *Id.*

24. *Id.* ¶ 13.

25. *Id.* ¶ 15.

26. *Id.*

27. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 15 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

28. *Id.*

29. *Id.* ¶ 18.

30. *Id.*

31. *Id.* ¶19.

32. *Id.* ¶ 20.

September 19, the children were returned to their parents.³³ Following the end of the 2013-14 school year, the Wunderlichs' again pulled their children out of the state-authorized school.³⁴ On August 15, 2014, in a parallel proceeding, the Frankfurt Main Court of Appeals found that despite having underwent learning assessments and attending school for a time, the parents were still considered to be "endangering" their children.³⁵ The court did, however, determine that the detriment suffered by the children in being permanently removed from their home in order to attend an authorized school would significantly outweigh the danger posed by having them educated by the Wunderlichs at home.³⁶ Specifically, the court found that:

"[T]he learning assessment had showed that the knowledge level of the children was not alarming and that the children were not being kept from school against their will. Since permanent removal of the children from their parents would be the only possible way to ensure the continued schooling of the children, this was no longer proportionate as it would have a greater impact on the children than being homeschooled by their parents."³⁷

The family appealed the original decision removing their parental rights, but the Federal Constitutional Court refused to hear the case.³⁸ Having exhausted all state processes, the family appealed to the ECtHR.³⁹

B. ECtHR's Reasoning

The Wunderlichs claimed that the German authorities' interference with the Wunderlichs' parental rights and the removal of their children violated their rights protected under Article 8 of the Convention.⁴⁰ Article 8 provides that:

"1. Everyone has the right to respect for his [...] family life [...] 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and it

33. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 21 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

34. *Id.* ¶ 22.

35. *Id.* ¶ 23.

36. *Id.*

37. *Id.*

38. *Id.* ¶ 37.

39. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶¶ 37-38 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

40. *Id.* ¶ 32.

necessary in a democratic society...for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁴¹

The government did not contest that it interfered with the Wunderlich’s family life.⁴² It did, however, claim that such interference served the legitimate aim of protecting the health, rights, and freedoms of the Wunderlich children and was necessary in a democratic society, based on the children “grow[ing] up isolated within their own family enclave, in which the applicants [the parents] had ensured their children had established a strong attachment to them, to the exclusion of others.”⁴³

The ECtHR explicitly refrained from questioning Germany’s compulsory education law in its reasoning.⁴⁴ Rather, the Court looked exclusively at the balance required under Article 8.⁴⁵ It divided the question into two parts, first addressing whether the government’s actions were based on legitimate aims and then whether the actions were “necessary in a democratic society.”⁴⁶ Ruling that the government’s withdrawal of parental authority and removal of the children did serve legitimate ends, the Court relied on the Government’s assertions that the authorities acted with the intention of protecting the children and that “there is nothing to suggest that it [the removal of parental authority] was applied for any other purpose in the present case.”⁴⁷ The Court provided no further explanation of how the removal of children—against their own wishes and the wishes of their parents—tangibly served the best interests of the children.⁴⁸

The ECtHR provided a more in-depth analysis of whether the actions were “necessary in a democratic society.”⁴⁹ As part of making this determination, it considered whether the government’s reasons for the action were “relevant and sufficient.”⁵⁰ This requires that “[a] balance must be struck between the interests of the child and those of the parent and, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their

41. *Id.* (citing the Convention, art. 8).

42. *Id.* ¶ 39.

43. *Id.*

44. *Id.* ¶ 42.

45. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 42 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

46. *Id.* ¶ 40.

47. *Id.* ¶ 45.

48. *See id.*

49. *Id.* ¶ 46.

50. *Id.*

nature and seriousness, may override those of the parent.”⁵¹ In conjunction with this balancing test, the court grants a “margin of appreciation” to the national authorities, particularly regarding intervention for the protection of children.⁵²

Applying this analytical framework, the existence of a more beneficial environment for the child to grow up in is not sufficient to create a necessity.⁵³ Rather, the Court identified the Government’s finding that the children were endangered and socially isolated because of the parents’ decision to homeschool and held that the German government’s actions were reasonable and not a violation of Article 8.⁵⁴ Even though the government removed the children prior to an assessment of their actual knowledge, the ECtHR upheld the removal because it was reasonable in light of the information the youth office had.⁵⁵ Taking these justifications into consideration, and because the Wunderlichs received the proper process and the government’s measures were proportionate to the dangers, the Court upheld the withdrawal of partial parental rights and the temporary removal of the children.⁵⁶

C. ECtHR’s Precedent on Family Rights and the Balancing of Interests

Hidden beneath the discussion of “government inference,” the Wunderlichs’ situation rests on a host of previous cases where the Court addressed compulsory education laws and the parents’ right to have their child’s education conform to their religious and moral beliefs.⁵⁷ Rather than rule on these grounds, however, the Court side-stepped the question and relied on Article 8 as the basis for its reasoning.⁵⁸ This dodge only leads back to the same fundamentally flawed application of the law, however. This flaw undermines the strike for liberty that the origination of the Court was for Europe.

51. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 46 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

52. *Id.* ¶ 47.

53. *Id.* ¶ 48.

54. *Id.* ¶ 49.

55. *Id.* ¶ 51.

56. *Id.* ¶¶ 53–55.

57. See, e.g., Konrad and Others v. Germany, App. no. 35504/03, Eur. Ct. H.R. (2006) (prohibiting exemption from compulsory education for religious homeschool education).

58. Wunderlich v. Germany, App. No. 18925/15, Eur. Ct. H.R., ¶ 43 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

Briefly summarizing the Court's analysis from its jurisprudence on Article 8, the Court integrates a deference not only for the government's determination of a necessity, but also for its determination of the best interests of the child.⁵⁹ Determining a violation of Article 8 requires the Court to find: (1) a predicate government interference with private or family life, and (2) that either (A) the interference was not in "accordance with the law" and/or (B) it was not "necessary in a democratic society" for a specified interest.⁶⁰ In its application, the analysis turns into a balancing of the parent's obligation vs. the child's best interest vs. the state's interest, i.e. the necessity of the interest for a democratic society. "Necessity" under the ECtHR, "corresponds to a pressing social need and, in particular, ... it is proportionate to the legitimate aim pursued."⁶¹ Because social needs are best determined by the state, the Court grants a margin of appreciation for the state's action.⁶² States have a narrow margin of appreciation for interference with the family life.⁶³ But that margin may fluctuate depending on the state's proposed determination under the final portion of the balancing test: its necessity for a democratic society.⁶⁴

In comparison, the right to education found in Article 2 of Protocol 1 provides that:

"No person shall be denied the right to education. In the exercise of any functions which it assumed in relation to education and to

59. *Id.* ¶ 47.

60. *Id.* ¶¶ 43-44.

61. *Olsson v. Sweden* (no. 1), 130 Eur. Ct. H.R. (ser. A) ¶ 67 (1988).

62. *Wunderlich v. Germany*, App. No. 18925/15, Eur. Ct. H.R., ¶ 47 (Oct. 10, 2019), [http://hudoc.echr.coe.int/eng?i=001-188994\[https://perma.cc/4PBZ-D3EM\]](http://hudoc.echr.coe.int/eng?i=001-188994[https://perma.cc/4PBZ-D3EM]).

63. *See Haase v. Germany*, App. no. 11057/02, Eur. Ct. H.R., ¶ 90 (2004) ("While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of the measure.").

64. *See id.* ("The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake."); *see also Elsholz v. Germany*, App. no. 25735/94, 2000-VIII Eur. Ct. H.R. ¶ 49 (ruling that stricter scrutiny was required when assessing restrictions on such rights as the parents' right to access or restricts which would limit current legal safeguards designed to protect the rights of parents and children, and holding that under this stricter analysis, Germany violated Article 8 in denying a father, attempting to maintain his access to his child, sufficient involvement in the decision-making process).

teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”⁶⁵

Developing a jurisprudence surrounding Article 2, the Court has sought to balance three competing interests in its jurisprudence: that of the child’s right to an education, the parents’ right to influence that education, and, as seen in the jurisprudence, the State’s goal to ensure pluralism in education.⁶⁶ Pluralism, according to the Court, is essential for the preservation of the “democratic society” as conceived by the Convention.⁶⁷ In addition to the preservation of pluralism, the state, under Article 2 of Protocol No. 1, serves a fundamental and required role in regulating education.⁶⁸ This role neither requires nor denies a state the ability to impose compulsory schooling laws.⁶⁹ The Court only requires that such education be objective and pluralistic in its presentation.⁷⁰

Three cases outline the Court’s recent articulation of the balance of these interests and demonstrate the challenges to both Article 2 and Article 8. Starting in 1992, the Court considered a single mother’s complaint against the German state’s decision to require her to send her son to one of the approved schools.⁷¹ The mother challenged the requirement based on her religious convictions and concern about the “academic and moral decline in public schools where her son would be taught obscenities and become a victim of violent behaviour and negative socialisation pressure.”⁷² Given the regulatory authority presumptively granted to the state over education, the Court held that the state “must take care that information or knowledge is conveyed in an objective, critical and pluralistic manner.”⁷³ In doing so, the rights of the parent cannot be used to deny the child its right to education.⁷⁴ The Court found that, after authorities reviewed the mother’s ability to provide for her son’s education alone, she was not capable and would

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65. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, ETS No. 9.
66. Konrad and Others v. Germany, App. no. 35504/03, Eur. Ct. H.R., 6-7 (2006).
67. *Id.* at 6.
68. *Id.* at 6-7.
69. *Id.* at 7.
70. Dojan and Others v. Germany, App. no. 319/08, 2455/08, 7908/10, and 8155/10, Eur. Ct. H.R., 14 (2011).
71. Leuffen v. Germany, App. No. 19844/92, Eur. Ct. H.R., 1-2 (1992).
72. *Id.* at 2.
73. *Id.* at 3.
74. *Id.* at 3-4.

in fact be damaging her son.⁷⁵ This reasoning also justified the interference under Article 8.⁷⁶

Nearly a decade later in 2006, the Court again dealt with a challenge to both articles, this time from parents who did not want their children to receive the sex education classes from either public or private schools.⁷⁷ Grounded in their religious concerns, the parents moved the German courts for exemptions from the compulsory education system, but were ruled against—not having the right to the “exclusive education of their children.”⁷⁸ Exhausting their claims in Germany’s courts, the parents filed a complaint before the ECtHR.⁷⁹ The Court acknowledged the competing roles of the state and parents in regulating and influencing the education of the child.⁸⁰ However, “respect is only due to the convictions on the part of the parents which do not conflict with the right of the child to education.”⁸¹ In determining if there was a conflict, the Court granted a “margin of appreciation” to Germany’s stated objectives—integration and socialization—holding that “those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge.”⁸² This goal, in combination with the parents’ ability to educate their children after school and on weekends, formed the basis for the Court’s rejection of the parents’ complaint.⁸³ Based on these reasons, the Court also found that the German law did not violate Articles 8 or 9.⁸⁴

Most recently in 2011, three couples, all members of the Christian Evangelical Baptist Church, appealed to the Court from Germany’s ruling requiring their children to attend a two-day school theater workshop raising awareness of the problem of sexual abuse.⁸⁵ The applicants alleged that the requirement violated Article 2 of Protocol

75. *Id.* at 4.

76. *Id.*

77. *Konrad and Others v. Germany*, App. no. 35504/03, Eur. Ct. H.R., 2, 7 (2006).

78. *Id.* at 2-3.

79. *Id.* at 6.

80. *Id.*

81. *Id.* at 7.

82. *Id.* at 8.

83. *Konrad and Others v. Germany*, App. no. 35504/03, Eur. Ct. H.R., 8 (2006).

84. *Id.* at 9.

85. *Dojan and Others v. Germany*, App. no. 319/08, 2455/08, 7908/10, 8152/10, and 8155/10, Eur. Ct. H.R., ¶ 10-11 (2011).

1, as well as Articles 8 and 9 of the Convention.⁸⁶ In balancing the interests, the Court reasoned that the respect granted parents' rights did not usurp the responsibility of the State to provide objective information.⁸⁷ Rather, the Court found that accommodating every philosophical or moral objection would strain the State's ability to provide educational materials.⁸⁸ Because the State provided information in an "objective, critical and pluralistic manner" the Court found the pluralistic goal sufficiently within the State's margin of appreciation to not violate the Convention or Protocol 1.⁸⁹

III. TREND ALLOWING DEFERENCE FOR GOVERNMENT INTERFERENCE

Analyzing the application of the balancing test for family rights and the role of the "needs of a democratic society" demonstrates an overarching shift in the Court's precedent away from protecting educational or familial rights and towards a growing deference to the State's determinations.⁹⁰ This is best seen in the Court's deference to pluralism in Article 2 cases and attempts under Article 8 to distinguish between real and hypothetical harm.⁹¹ Ultimately, such imbalance results in the Court failing to serve its initial purpose and protect citizens from encroaching state action.

A. "Necessity" as the Mother of Deference

The evolution of family and parental rights within the ECtHR reflects a dangerous trend towards supplanting the rights of the parents and family with the State's determination of the needs of a democratic society. Within the realm of Article 2 of Protocol 1, the Court's jurisprudence demonstrates the one-sided nature of the Court's application of the balancing of interests. The protection of family life

86. *Id.* ¶ 52.

87. *Id.* ¶ 72-74.

88. *Id.* ¶ 65 (explaining that although parents may require state schools to respect their children's religious convictions, in order for institutionalized teaching to remain practicable, state schools must be able to disseminate objective information).

89. *Id.* ¶ 72-74.

90. See Jeffery Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 116, 129 (2004) (explaining that the court uses the balancing test for the margin of appreciation inconsistently).

91. See George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 710-11 (2006) (discussing the power left to states to balance fundamental freedoms with the public interest, in regards to Articles 8-11).

exemplified in the *Wunderlich* case similarly mirrors this trend and shows its dangerous consequences—ultimately resulting in the State’s interference in families’ lives when no harm is present.⁹² Each of the three cases outlined above, articulates a religiously-based reason for why parents would wish to find an alternative to the state-authorized school.⁹³ None of the cases resulted in the outright denial of the child’s education.⁹⁴ But in each case, the Court deferred to the State’s objective of ensuring the socialization and pluralism it deemed necessary.⁹⁵

Similarly, under Article 8, the balancing test ends up tilted towards the government with its determinations trumping parents’ rights. This can be seen in the Court’s struggle to distinguish between a real risk of harm and religious considerations in *Wetjen v. Germany*.⁹⁶ In *Wetjen*, the parent’s believed, based upon their religion, that they had the obligation to cane their children under the age of 12 when they were disobedient.⁹⁷ The Court distinguished the right granted to parents to pass on their religious and philosophical beliefs from the *Wetjen*’s actions stating that, “[w]hile the Court has accepted that this [the passing on of moral convictions] might even occur in an insistent and overbearing manner, it has stressed that it may not expose children to dangerous practices or to physical or psychological harm.”⁹⁸ Thus, the Court’s precedent has created a line drawn around parental rights based on philosophical beliefs, restricting the communication of those beliefs when they threaten the state’s determination of what interference is necessary in a democratic society.

In either case, the analysis ends up tilted towards the state, creating a near presumption that interference with family life or the state’s determinations regarding education will not violate the Convention.

92. *Wunderlich v. Germany*, App. No. 18925/15, Eur. Ct. H.R., ¶ 51 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

93. *See Konrad and Others v. Germany*, App. no. 35504/03, Eur. Ct. H.R. at 6 (Sept. 11, 2006); *Dojan and Others v. Germany*, App. no. 319/08, 2455/08, 7908/10, and 8155/10, Eur. Ct. H.R. at 12 (Sept. 13, 2011); *Leuffen v. Germany*, App. No. 19844/92, Eur. Ct. H.R. (Feb. 18, 1992).

94. *See Konrad and Others v. Germany*, App. no. 35504/03, Eur. Ct. H.R. at 3 (Sept. 11, 2006); *Dojan and Others v. Germany*, App. no. 319/08, 2455/08, 7908/10, and 8155/10, Eur. Ct. H.R. at 16 (Sept. 13, 2011); *Leuffen v. Germany*, App. No. 19844/92, Eur. Ct. H.R. (Feb. 18, 1992).

95. *See Konrad and Others v. Germany*, App. no. 35504/03, Eur. Ct. H.R. at 7 (Sept. 11, 2006); *Dojan and Others v. Germany*, App. no. 319/08, 2455/08, 7908/10, and 8155/10, Eur. Ct. H.R. at 15 (Sept. 13, 2011); *Leuffen v. Germany*, App. No. 19844/92, Eur. Ct. H.R. (Feb. 18, 1992).

96. *Wetjen and others v. Germany*, App. no. 68125/14 and 72204/14 2018, Eur. Ct. H.R., ¶ 77–78 (2018).

97. *Id.* ¶ 10.

98. *Id.* ¶ 66.

This overemphasis on the state's analysis reflects the positive obligations the Court has interpreted Article 8 and Article 2 to require from states. As one author noted:

“[This positive interpretation] reflects a social view of human rights according to which it is the obligation of the State to take whatever action is needed to promote human dignity and worth. It attributes a much greater role to the state in the promotion of human welfare than does the liberal view. In the latter, the individual is to be protected from the State; in the social view, the individual achieves freedom and dignity through the State.”⁹⁹

While it is not generally disputed that states should interfere in order to protect individual's rights from others, such as protecting children from abuse or ensuring parental access in cases of divorce, the Court's acceptance of state interference reaches into the world of hypothetical harms.

The Wunderlichs' experience demonstrates this overstep. “Necessity,” according to the Court's case law implies the existence of (a) a “pressing social need” and (b) that the interference is “proportionate to the legitimate aim pursued.”¹⁰⁰ No emergency situation existed in the Wunderlichs' home.¹⁰¹ Rather, the State knew of the family's intentions and past in choosing to homeschool their children.¹⁰² Yet, the State ended the Wunderlichs' parental right to determine where their children lived based the children's unwillingness to undergo knowledge assessments.¹⁰³ But Germany still acknowledged that the removal was “not necessary from an ex post perspective.”¹⁰⁴ The Court acknowledged that the state's fears about homeschooling were outweighed by the damage the removal of the children from the home had on them—but still permitted the interference.¹⁰⁵

B. (Un)Balanced Interests and the Need to Account for Harm

99. A.M. Connolly, *Problems of Interpretation of Article 8 of the European Convention on Human Rights*, 35(3) I.C.L.Q. 567, 574-75 (Jul. 1986).

100. *Olsson v. Sweden* (no. 1), 130 Eur. Ct. H.R. (ser. A), ¶ 67 (1988).

101. Observations of the Applicants and Application, *Wunderlich v. Germany*, App. No. 18925/15, ¶ 42 (Apr. 12, 2017).

102. *Id.* ¶ 42.

103. *Id.* ¶ 18.

104. *Id.* ¶ 95 (quoting Respondent's observations).

105. *Wunderlich v. Germany*, App. No. 18925/15, Eur. Ct. H.R., ¶ 23 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994> [<https://perma.cc/4PBZ-D3EM>].

Fundamentally, the unbalanced nature of the ECtHR's interpretation undermines the principles foundational to the Court. With the scars of World War II still fresh, the Congress of Europe, forerunner of the modern European Union, set about to construct a judicial mechanism to protect human rights and fundamental freedoms.¹⁰⁶ Lodovico Benvenuti, the Secretary General of the Council of Europe at the time of the Convention's adoption, said, "[This Convention] provides foundations on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism."¹⁰⁷ Described as a "Bill of Rights for free Europe,"¹⁰⁸ the very act of granting more power to the state over the individual or family subverts the strike for individual liberty made by the acceptance of the Convention and marks a passive approval of an over-empowered state. Unlike the International Court of Justice, established through the United Nations that only has jurisdiction over disputes between states, the ECtHR's application process permits individuals to challenge state decisions.¹⁰⁹ In addition to these protections for individuals, the Convention also provided for the protection of family rights and education.¹¹⁰

This deference results in no real limitations or guidance for states actions—like children in need of rules for proper behavior, states may run wild, legislating as they see fit. As one justice noted, "The empty phrases concerning the State's margin of appreciation—repeated in the Court's judgments for too long already—are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights."¹¹¹ Clarifying the margin of appreciation through the application of stricter scrutiny, even levels of scrutiny in light of the rights at issue, could rebalance the scale of justice.

This recalibration would carry with it two benefits. First, it would better identify that not all state interference is justified in the same manner. Thirty years have passed without a truly clear articulation of the "margin of appreciation."¹¹² And this is reflected in the jurisprudence of the court. As such, the state could assert that not

106. J. COLEMAN, *THE CONSCIOUS OF EUROPE* 18 (Council of Europe 1999) https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf [<https://perma.cc/2T69-KRSV>].

107. *Id.* at 22.

108. *Id.* at 25.

109. How the Court Works, INT'L CT. OF JUSTICE (2019), <https://www.icj-cij.org/en/how-the-court-works> [<https://perma.cc/MLC8-UQNV>].

110. Convention, Art. 8.

111. *Z. v. Finland*, 1997-I Eur. Ct. H.R. 323, 357-58 (Meyer, J., dissenting).

112. Brauch, *supra* note 90 at 125.

providing a child with a cough drop was just as dangerous to their health, in the eyes of the state, as withholding emergency medical care. The Court would have no clearly articulated law which identified the distinction, intuitive to the world, that those actions should not be treated the same under the law.

Second, it would recognize that the state does have a role in ensuring the basic needs of children are met. Even those who categorize Germany's actions in the Wunderlich case as inappropriate government interference, recognize that states have a responsibility to protect children from abuse.¹¹³ Integrating a varied level of scrutiny for determining the "necessity in a democratic society" of the government's interference would maintain the government's ability to step in when harm is occurring.¹¹⁴ For example, the Court could distinguish analysis of state interference in abuse cases, from those involving the right to education, which initially started the state's complaint against the Wunderlichs, and recognize that the right to education did not imply that any actual, physical harm was being done to the children.

IV. CONCLUSION

The ECtHR cannot continue to claim to protect the citizens of the European Union while consistently deferring to State judgments. The Wunderlich family's struggles within the Court identify the tension between these obligations and family rights. Though the Wunderlichs' caused no harm to their children, the Court permitted the state to step in and interfere with one of the most fundamental relationships in society. The tension only escalates when looking at the Court's rulings in other cases. Either by denying the need to provide alternatives to sex education classes or presuming a denial of education based on it taking an alternative form—the protection enshrined in the Convention undergoes a constant reinterpretation by the states. Supplanting the current method of analysis and utilizing a higher standard of scrutiny that roughly corresponds to the harm actually wrought would help realign the ECtHR with its founding ideas.

113. See Observations of the Applicants and Application, Wunderlich v. Germany, App. No. 18925/15, ¶ 42 (Apr. 12, 2017) (explaining that a state's interest in protecting children is legitimate).

114. See O'Donnell, *supra* note 92 at 479, 486.