

Dangerous Policy Lurks Behind Romeike Home-School Triumph

Other than the Romeike family themselves, no one could have been more thrilled than me with the sudden reversal from the Department of Homeland Security (DHS) that allowed them to remain in the United States.

Just one day after the Supreme Court refused to review the court order that demanded their deportation to Germany, the Romeikes were informed by DHS that they could remain indefinitely in the United States, where they can continue to home-school their children.

The DHS notification came to attorney Will Humble, who was the immigration lawyer assisting the Romeikes and the Home School Legal Defense Association (HSLDA) at all phases of the proceedings. Humble was lead counsel before the administrative judge, and I was lead counsel before the federal courts.

This administrative victory needs to be understood for what it is. It is a victory for the Romeike family alone. No other German home-schooling family can benefit from the administrative grace that was shown in this one instance.

Damage Done

Despite this welcome relief for this one courageous family, the damage done to our laws on asylum and the principles of religious and parental freedom remains.

We cannot slip into complacency and believe that all is well on all fronts. The dangers latent in this case must be understood, combated and reversed.

Some court decisions contain language that presents a self-evident danger to liberty. Other times the dangers are much

more subtle. For example, in *Schechter Poultry Corp. v. United States* (1935), the court held that Congress could not regulate commerce once goods had come to rest within a state. It could only regulate commerce while in transit and—with words that launched a thousand regulations—those things that “directly affect” commerce.

The “effects test” has been used by Congress, the Supreme Court and the executive branch to impose countless regulations on all manner of activity that would otherwise be outside of federal jurisdiction.

The dangers to liberty that are embedded in the Romeike case are equally subtle. One has to take a closer look at the facts in the record, the arguments of the Obama Justice Department and the decision of the 6th Circuit to fully appreciate the very dangerous ideas that were embraced in this case.

But once these dangerous ideas are unmasked, it becomes apparent they pose real threats to the principles of freedom that virtually all Americans would have believed were solidly established.

Burden of Proof

As with any asylum case, the Romeikes needed to prove two basic propositions to be entitled to asylum. They had to prove that they faced either past or future persecution and that this persecution was motivated, at least in part, on one of the grounds contained in our asylum statute. Religious persecution is one of these recognized grounds for asylum.

Thus, the case boiled down to two particular questions:

1. Was the punishment that the Romeikes would face upon deportation back to Germany sufficiently severe to count as persecution?
2. Was the motive of the German government marked, at least in

part, by a desire to repress the family's exercise of their religious beliefs?

On one level, the first question was not seriously debated. All parties agreed that if the family returned to Germany and continued to home-school, they would face the threat of losing custody of their children.

Our government was not so callous as to suggest that losing one's children would not be a severe punishment. However, the government and 6th Circuit contended it would not be persecution, because the family could just stop home schooling and send their children to public schools in order to avoid the punishment.

In this context, the controlling legal rule is that persecution is proven when a government acts against a person either for an immutable characteristic or for a reason that *one should not be required to change*.

Our government contended that forcing a parent to have their children attend a school that violates their religious beliefs does not offend a conviction that one should not be required to change.

Dangerous Conclusion

Hence, the first dangerous rule to emerge from the Romeike case is that governments may order children to attend schools that violate the family's religious beliefs. It was not a direct ruling in this case any more than the effects test was a direct ruling in the Schechter Poultry case, but the conclusion is present just the same.

The second issue—was Germany motivated, at least in part, by a desire to suppress the religion of the Romeikes?—requires review of some important facts from the record. Both HSLDA and the Justice Department placed considerable emphasis on a finding by Germany's Federal Constitutional Court that

contained a discussion of the motive for the ban on home schooling:

“The general public has a justified interest in counteracting the development of religiously or philosophically motivated ‘parallel societies’ and in integrating minorities in this area. Integration does not only require that the majority of the population does not exclude religious or ideological minorities, but, in fact, that these minorities do not segregate themselves and that they do not close themselves off to a dialogue with dissenters and people of other beliefs.

“Dialogue with such minorities is an enrichment for an open pluralistic society,” it continued. “The learning and practicing of this in the sense of experienced tolerance is an important lesson right from the elementary school stage. The presence of a broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic requirement of democratic decision-making process.”

Our Justice Department and the 6th Circuit found no motive to suppress religion in this official description of Germany’s policy. Yes, Germany did say it was “counteracting the development” of religious and philosophical minorities. But look at the motive, our Justice Department and 6th Circuit argued. Germany is just trying to promote tolerance by putting children of all viewpoints together in one place.

Tolerance? Really? The aberrational German theory of tolerance was clearly demonstrated by the facts in the record.

Another German appeals court held that it is appropriate to use the family courts to seek “the removal of the right [of parents] to determine the residence of the children and to decide on the children’s education.” The same court held that it is “completely acceptable” for courts to “enforce the handover of the children, by force if necessary and by means

of entering and searching the parental home.”

Why was it acceptable to use these strong-arm police tactics? That German court gave an answer: to prevent “the damage to the children, which is occurring through the continued exclusive teaching of the children of [sic] the mother at home.” The court conceded that it was not concerned with academic issues—home schooling could successfully transmit knowledge. It was the philosophical development of children that was at issue.

The German court believed that it was “damaging” to children to be taught only the philosophy of their mother.

And so as to not leave any discretion for leniency by lower officials, this appellate court instructed the family courts that they have “the immediate task to take away all home schooled children.”

All About Tolerance

So, what does our Justice Department say about all of this?

“The German court thus explained what it saw as the value of the law in bringing people of differing views together to learn from each other and to learn to accept those whose views differ from their own. The goal in Germany is for an ‘open, pluralistic society.’ Teaching tolerance to children of all backgrounds helps to develop the ability to interact as a fully functioning citizen of Germany. It is scarcely feasible, with those stated goals in mind, to tease from the opinion a persecutory motive on the part of those who enforce the law.”

There you have it. The German courts have said it is damaging for children to learn only the religious and moral values of their parents. The German courts say that they wish to counteract the development of religious and philosophical minorities. The German courts say it is appropriate to use force to remove children. The German appellate courts tell the

lower courts that they have the immediate task to remove all home-schooled children from their parents. And our Justice Department says it is impossible to find in these facts anything other than an open, pluralistic, democratic society teaching children to be tolerant.

The Justice Department's view echoes the words of George Washington University law professor Catherine Ross:

"In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference. Respect for difference should not be confused with approval for approaches that would splinter us into countless warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant home schoolers to inculcate hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement."

Ross joins Germany and our Justice Department in believing that pluralistic societies may crush "intolerant" home-schooling parents to promote tolerance in their children.

History and logic prove, however, that tolerance will never be achieved by a government that is intolerant of religious minorities.

Incidentally, the International Covenant on Economic, Social and Cultural Rights—a treaty Germany has adopted—says this about the rights of parents in education:

"The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”

This treaty was adopted in the aftermath of the horrors of Nazi Germany. The right of parents to ensure that their children have an education that conforms to the parents’ convictions is considered a fundamental human right—a right Germany currently rejects and considers dangerous.

Freedom at Risk

The long-term concern for American home schoolers arising from the Romeike case is obvious. If our government contends that Germany did not violate the principles of religious freedom when it banned home schooling in order to gain philosophical control over children, then it implies that it would not violate religious freedom or parental rights if the United States decided to ban home schooling for the same purpose. After all, we would simply be promoting tolerance and pluralism.

That is the subtle but dangerous message buried in the Romeike decision.

How should we respond?

There are two specific areas of concern that demand our attention. First, we need to deal with the specific problems in our asylum system that have led to a severely limited view of religious freedom and parental rights. Second, we need to address the underlying antagonism that our government is expressing against the right of parents to direct the upbringing of their children.

HSLDA has worked with leaders in the House of Representatives to secure language that would ensure an amendment to our asylum law that addresses parental rights and religious freedom. If an overhaul of the immigration system passes

Congress, there is a very good likelihood that this correction will be adopted. We will have more to say on that topic, including calls to action, should this provision become a point of contention in that process.

HSLDA is unlikely to get engaged on the broader immigration issue. We simply want to ensure that if such a measure is moving through Congress, families like the Romeikes will find refuge in the United States.

The more pressing issue is the need to address parental rights in general. At the same time that the Romeikes were facing deportation, other pitched parental rights battles in our own country were taking place. Perhaps the best known of these battles was the Pelletier case in Massachusetts.

Doctors at Boston Children's Hospital (BCH) conspired with the Massachusetts Department of Children and Families to seize custody of Justina Pelletier because the BCH doctors thought they knew better than the doctors at Tufts Medical Center how to treat this young girl. Because the Pelletiers wanted to choose the doctor for their daughter, they lost custody to the state of Massachusetts.

I was asked to draft a specific statute that has been introduced in Massachusetts to fix the underlying law in that state. And such laws, which specifically address parental rights to choose a doctor, may become necessary in other states.

Protecting Liberty

But there is a bigger and broader solution. The Parental Rights Amendment (PRA) is the ultimate form of protection for our family liberties. Just as the Second Amendment tells all levels of government that they may not interfere with our right to bear arms, the Parental Rights Amendment tells all governments to not interfere with our rights to raise our children.

We have also proposed state versions of the PRA in statutory form, which have recently been enacted in Virginia and Nevada. We also helped draft Michigan's parental rights statute, which was adopted in 1994. Utah, Kansas and Arizona have similar statutes on their books.

Everyone who believes that we need to ensure parental rights are protected at the highest legal level should join these efforts. Please go to [www.homeschoollegaldefense.org](#) and sign up to become a part of the team—which, at a minimum, is a commitment to call or write your legislators when bills are moving in Congress or in your state.

Do we want a nation where the government can tell us they can take our children away from us—all day or during the school day—so that they can ensure our children develop the philosophy the government wants to instill?

Liberty cannot be sustained in a nation in which all children are indoctrinated in the government scheme of homogenized philosophies. We must have a people that can think for themselves and believe in the religion of their own choice.

These freedoms are threatened by our own government. But only our silence and inaction will actually defeat us.

Stand up. Speak up. Show up.

Michael Farris *is the founder and chairman of the Home School Legal Defense Association.*