
HOMESCHOOLING BATTLE IN CALIFORNIA

By Raymond J. Tittmann*

A constitutional crisis hit California this spring, although it was noticed more for its social than legal significance. On February 28, 2008, in the case *In re Rachel L.*, the Second District Court of Appeal in Los Angeles, California, found that the state's truancy statute prohibited homeschooling without a teaching credential for the grade taught: under California case law "parents *do not have* a constitutional right to home school their children."¹

California's truancy statute obliges all children to attend public school unless (1) the child is enrolled in a private full-time day school, (2) the child is tutored by a person with a state teaching credential for the grade being taught, or (3) other limited exemptions apply.² The father of the homeschooled children argued that homeschooling was protected by the first exemption because he had enrolled his children in a private school that directed the homeschooling. But the court disagreed, finding that homeschooling was governed by the second exemption, and the parents therefore had to obtain a teaching credential for the grade being taught.

Newspapers in California reported "shock waves" rocking the homes of some 166,000 California homeschooled children.³ Days later, the executive branch—both Governor Arnold Schwarzenegger and Superintendent of Public Instruction Jack O'Connell—announced its refusal to follow the decision of the appellate court. Superintendent O'Connell declared that Department of Education policy "will not change in any way as a result of this ruling."⁴ He said that the Department policy would remain, as before, pro-homeschooling: "Parents *still have* the right to home school in our state."⁵ The Department of Education blatantly repudiated the court's decision—even using the same language but replacing the phrase "do not" with "still."⁶ Governor Schwarzenegger did not pull any punches either: "This outrageous ruling must be overturned by the courts and if the courts don't protect parents' rights then, as elected officials, we will."⁷

Like the Cuban Missile Crisis, this constitutional standoff was resolved in a mere two weeks when the instigator withdrew. On March 25, 2008, the court of appeal granted rehearing, in effect vacating the precedential value of the opinion.⁸ Parties submitted briefs for the rehearing on April 28, 2008, and the court invited amicus parties to file briefs by May 19, 2008. However, like the Cuban Missile Crisis, the short-term resolution does not settle the long-term problem. The court is expected to issue another decision in the summer or fall, followed by an appeal to the California Supreme Court.

I. THE LEGALITY OF HOMESCHOOLING WAS NOT PROPERLY AT ISSUE

The court's decision in *In re Rachel* was remarkable for its lack of judicial restraint, with respect to both the legal issue and

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the factual issues framed by the court. Judicial restraint requires courts to avoid unnecessary constitutional issues when other grounds are dispositive.⁹ The father here argued that the proper legal issue was not the constitutionality of homeschooling at all, but rather the safety of the children.¹⁰

The father's argument is based on the procedural history. The case arose from a juvenile court proceeding in which attorneys appointed to represent the children argued that the court should intervene and order the children to school. The California Welfare & Institutions Code grants a court narrow authority to intervene in the parents' decisions concerning the education of their children; it is limited to situations where intervention is "necessary to protect the child."¹¹ Courts have interpreted this section to require, as a prerequisite to intervention, evidence establishing a "substantial risk" of "*serious physical harm or illness*."¹² Thus, for example, one court declined to intervene when a transient parent's child consistently failed to appear at her enrolled school because the parent's conduct did not cause serious physical harm.¹³

Given this onerous standard, the juvenile court predictably ruled that homeschooling did not present a "substantial risk" of "*serious physical harm or illness*," and declined to order the children into school.¹⁴ The proper standard on appeal was abuse of discretion. Consequently, to grant a writ ordering the children out of their home school, the court of appeal had to find that homeschooling unquestionably posed a risk of "*serious physical harm or illness*"—nothing more and nothing less. The court, however, did not decide or even consider the safety issue and instead broadly addressed the legality of homeschooling under the state's truancy statute, deciding at the same time both too much and too little.

In similar circumstances, the First District Court of Appeal recently reversed a decision by the family court for its failure to exercise judicial restraint. It found that the family court did not need to decide the constitutionality of the Indian Child Welfare Act because it failed to first apply the statutory provisions to determine whether a constitutional issue actually existed.¹⁵

Likewise here, the court should have applied the provisions of the Welfare & Institutions Code to determine if it had the authority to intervene. If the court lacked the statutory authority to intervene (i.e., if the children's safety was not threatened), the constitutional and statutory legality of homeschooling was irrelevant.

II. THE COURT OUTLAWED HOMESCHOOLING PRACTICES OF NON-PARTIES

The court also demonstrated a lack of judicial restraint by deciding factual situations not before it. The parents in *In re Rachel* homeschooled through a private school, but several other methods of compliance, implicating different statutory provisions, were not at issue and were improperly addressed by the court.

Public charter home schools (not at issue): California permits state-funded and state-run charter schools to establish home independent study programs. The state not only knows about this homeschooling, it sponsors, funds, and monitors the homeschooling pursuant to a statutory framework. The children in *In re Rachel* were not enrolled in such a charter school, and the parents therefore had no incentive to present the statutory framework authorizing public charter home schools. Nevertheless, the court called homeschooling through public charter schools illegal when the parent teacher is not credentialed precisely because “the parents present[ed] no authority” to justify such public charter schools, ignoring that the parents had no interest in presenting such authority.¹⁶ Technically this finding is dicta and not enforceable, but it is nevertheless a dangerous statement that could—if it survives rehearing—be misunderstood to ban established state schools.

Home private schools (not at issue): The Home School Legal Defense Association (HSLDA) and several other home school organizations have long asserted that parents in California can declare their home a private school by filling out a Form R-4 affidavit.¹⁷ California law does not prohibit private schools from operating on a residence, using parents as teachers, or enrolling children living in the residence. Accordingly, California law does not prohibit private home schools. The parents in *In re Rachel* did not submit an R-4 affidavit declaring their home a private school. Accordingly, the parents had no incentive to argue the mechanics and legality of the R-4 affidavit in this context, and the HSLDA and other affected non-parties had no opportunity to argue this issue. The court nevertheless rejected the argument that a home school could avoid credentialing requirements by calling itself a private school: “parents instructing their children at home” do not “come within the private full-time day school exemption.”¹⁸

Private schools directing home school (only method at issue): Numerous private schools allow homeschooled students to enroll and then the school assists parents in the education of their children. Like the state-funded charter schools, private home schools may provide curricula, books, resources, grading, advice, tutoring, and consultation. The children in *In re Rachel* were enrolled in Sunland Christian School, a private school of this type. The court found that this method also “does not qualify for the private full-time day school... exemption[] from compulsory education in a public full-time day school.”¹⁹ However, the entities with the most interest in this issue, such as the Sunland Christian School and the numerous associations representing such schools, were not parties and therefore were unable to brief the issue.

The decision in *In re Rachel* therefore not only decided the wrong issue, it also outlawed practices without hearing from the parties whose conduct was being outlawed. The court’s presumably granted rehearing to correct at least some of these procedural improprieties.

III. THE COURT FAILED TO ANALYZE THE STATUTORY AND CONSTITUTIONAL ISSUES THOROUGHLY

Critics of the *In re Rachel* decision disagree not only on procedural grounds but on substantive grounds as well. The court relied heavily on *People v. Turner*:²⁰

These provisions of the Education Code [prohibiting homeschooling, under the court’s interpretation] were held to be constitutional in *People v. Turner* (1953) 121 Cal. App. 2d Supp. 861, and an appeal to the United States Supreme Court from that decision was dismissed for want of a substantial federal question in *Turner v. People of the State of California* (1954) 347 U.S. 972.²¹

The careless reader might think the decision in *In re Rachel* was, legally speaking, nothing new—homeschooling has been illegal for at least fifty years, under binding California authority implicitly endorsed by the United States Supreme Court. In fact, there is no such binding authority in California. *Turner* was decided by the appellate department of the superior court, which decides appeals of such matters as parking tickets and small claim disputes. It is not binding precedent.²² Nor is the citation to the U.S. Supreme Court helpful; the Court devoted a mere sentence to the matter: “The appeal is dismissed for the want of a substantial federal question.”²³ The court’s decision finding homeschooling illegal and not constitutionally protected was not only shocking to homeschoolers, it broke new legal ground as well.

Though California had not specifically resolved the homeschooling issue before *In re Rachel*, federal and state constitutional law has generally recognized parents’ “right of control” and “natural duty” concerning their children’s education.²⁴ Given the constitutional rights implicated, the court should have construed the truancy statute to “avoid constitutional infirmities.”²⁵ Here, the statute could have been construed to avoid compromising the parents’ rights. The Education Code, strictly speaking, is silent as to whether homeschooling may qualify as a “private school” under Education Code sections 48222 and 33190. Those sections require “the owner or other head” of the private school to file an affidavit with the Superintendent of Public Instruction. Nothing in either section precludes application of the statute to homeschools or private schools that enroll homeschooled children.

The court followed *Turner* in finding that these sections addressing private schools were not “intended” to apply to home schools because the legislature must have intended the tutor exception (which, importantly, requires state teaching credentials) for homeschoolers.²⁶ Parents should not be allowed to escape the credentialing requirement by purporting to enroll their homeschooled children in a private school. The court’s interpretation is plausible, but it invites rather than avoids a constitutional issue. The alternate interpretation, that home schools are legal under the private school exemption, is also reasonable and does not compromise fundamental parental rights.

After construing the Education Code to prohibit homeschooling without a state teaching credential, the court conducted a brief constitutional analysis. The court did not apply the “strict scrutiny” called for when parental rights of this sort are implicated.²⁷ In fact, the court did not even decide what sort of scrutiny should apply. The word “scrutiny” does not appear anywhere in the decision. The only case cited in the court’s constitutional analysis—*Wisconsin v. Yoder*²⁸—held thirty-six years ago that an Amish community *did* have the right to school their own children for religious reasons.²⁹ Constitutional law

professors on the left and the right have criticized the decision for its abbreviated constitutional analysis, leaving out the last several decades of First Amendment jurisprudence.³⁰

One can only assume that the case was briefed summarily. It is doubtful that the parents or the children (all represented by court-appointed counsel) had significant resources to brief the constitutional issues with any great detail. And, as noted, the groups with greater interest and resources, such as Sunland Christian and the Home School Legal Defense Association, were not parties to the case. Consequently, the court's decision to vacate and invite briefing by interested *amicus* parties does a great service to this important issue.

Thus, as the Cuban Missile Crisis did not end the Cold War, the court's grant of rehearing does not settle the legality of homeschooling. The issue remains.

Endnotes

1 *In re Rachel L.* (Jonathan L. and Mary Grace L. v. Superior Court), 160 Cal. App. 4th 624, 626 (2008) (emphasis added). The Court stated, "California courts have held that under provisions in the Education Code, parents do not have a constitutional right to home school their children."

2 CAL. EDUC. CODE § 48220 *et seq.*

3 *See, e.g.*, Bob Egelko et al., *Homeschoolers' Setback Sends Shock Waves Through State*, SAN FRANCISCO CHRON., Mar. 7, 2008, at A1 ("Shock Waves").

4 Press Release, Superintendent of Public Instruction Jack O'Connell, Schools Chief Jack O'Connell Issues Statement Regarding Home Schooling In California (Mar. 11, 2008).

5 *Id.*

6 The statement by Superintendent O'Connell is even more remarkable considering that his political constituents, teachers unions such as the California Teachers Association, support the court's ruling. *See* <http://www.oconnell2006.org/endorsements.htm>; Shock Waves at A1 ("The ruling was applauded by a director for the state's largest teachers union. 'We're happy,' said Lloyd Porter, who is on the California Teachers Association board of directors.")

7 Press Release, Gov. Arnold Schwarzenegger, Governor Schwarzenegger Issues Statement Regarding Court of Appeals Home Schooling Ruling (Mar. 7, 2008).

8 *See* Order (1) Granting Rehearing, (2) Denying Motion To Intervene but Permitting Amicus Briefing; (3) Setting Schedule for Additional Briefing; (4) Setting Tentative Date for Further Oral Argument; (5) Announcing Intent To Solicit Additional Amicus Curiae Briefing, filed Mar. 25, 2008.

9 *See, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988) (principle of judicial restraint requires courts to avoid reaching constitutional questions in advance of the necessity of deciding them); *Santa Clara County Local Transp. Auth. V. Guardino*, 11 Cal. 4th 220, 230 [902 P.2d 225] (1995) (court will not decide constitutional questions where other grounds are available and dispositive of the issues).

10 Father's Brief on Rehearing, Apr. 28, 2008, at 4 (identifying the issue precisely as this: "whether the juvenile court abused its discretion in concluding that enrollment in school outside the home was not required to protect the children's safety.")

11 Welfare and Institutions Code § 361.

12 *In re Janet T.*, 93 Cal. App. 4th 377, 388-89 (2001) (emphasis in original).

13 *Id.* at 382.

14 The decision of the juvenile court is apparently not a public record, and this version of the court's decision is based on statements in the Father's Brief on Rehearing, April 28, 2008, at 6-8.

15 *Erika K. v. Brett D.*, 2008 WL 963408 (Cal. App. Apr. 10, 2008).

16 *In re Rachel L.*, 73 Cal. Rptr. 3d at 84. The court stated, "the parents present no authority to the effect that a charter school can excuse the statutory requirement that tutors be credentialed if their students are to come within the tutor exemption to compulsory public school education."

17 *See, e.g.*, Letter from Debbie Schwarzer, Home School Association of California (HSC), Legal Committee, to California Homeschoolers, Sept. 8, 2002.

18 *In re Rachel L.*, 73 Cal. Rptr. 3d at 82.

19 *Id.* at 84.

20 121 Cal. App. 2d Supp. 861 (1953).

21 *In re Rachel L.*, 73 Cal. Rptr. 3d at 81

22 *Worthington v. Unemployment Ins. Appeals Bd.*, 64 Cal. App. 3d 384, 389 (1976).

23 *Turner v. People of the State of Calif.*, 347 U.S. 972 (1954).

24 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The Supreme Court has more recently affirmed the same principle: "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). "Parents possess a profound interest in the custody of their children, which includes 'the right to direct his activities and make decisions regarding his care and control, education health, and religion.'" *Walker v. Superior Court*, 47 Cal. 3d 112, 134 (1988).

25 *People v. Whaley*, 160 Cal. App. 4th 779, 793 (2008).

26 *In re Rachel L.*, 73 Cal. Rptr. 3d at 82.

27 *Herbst v. Swan*, 102 Cal. App. 4th 813, 819 (2002) (applying strict scrutiny to statute that infringing on parents' right to control their child's upbringing).

28 406 U.S. 205, 214 (1972).

29 *In re Rachel L.*, 73 Cal. Rptr. 3d at 85.

30 Professors Erwin Chemerinsky, Dean of U.C. Irvine Law School, and John Eastman, Dean of Chapman University Law School, both predicted reversal by the California Supreme Court and the U.S. Supreme Court, and noted the failure to address several recent decisions since *Yoder*. Dean Chemerinsky specifically added, "And I have read Justice Croskey's opinion. It's a very short opinion for such a major issue." <http://hughewitt.townhall.com/talkradio/transcripts/Transcript.aspx?ContentGuid=781d1498-961b-436f-ab39-09bba04dfd4c>.

