EUROPE'S SCHOOLHOUSE GATE? STRASBOURG, SCHOOLS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Yale law professor Justin Driver's 2018 book, The Schoolhouse Gate, *argues that American public schools have served as the most important sites of constitutional conflict in United States history. This Article, inspired by Driver's work, argues that primary and secondary schools similarly serve as some of the most significant forums of human rights conflict in the Council of Europe. In support of this argument, the Article adopts a two-tiered analysis. The first is court-centric, focusing primarily on the jurisprudence of the European Court of Human Rights involving schools. The second is society-centric and homes in on the crossroads at which the European Court of Human Rights, schools across the Council of Europe, and European societies meet. By making the above claim regarding the centrality of schools, this Article hopes not only to spur on further discussion about human rights within Europe's schoolhouse gate, but also to deepen the conversation regarding how schools as institutions interact with European supranational human rights protections.*

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I. INTRODUCTION

In a Croatian high school in 2011, a math teacher berated a group of high school seniors for being late to math class. He shouted at one of the late pupils, calling him a moron, an idiot, a fool, a hillbilly, and a stupid cop.[1] After the pupil reported the event that day to the head teacher, in class the following day, the math teacher said to the pupil, "[W]hen you say to a fool that he is a fool, that should not be an insult for him. . . . You don't know what the insults are, but you will see what the insults are."[2] In the third and final incident, eight days later, the math teacher asked the pupil to turn to a page in his textbook. After the pupil had turned to the wrong page, the math teacher said, "You, fool, not that page. I didn't mean to insult you, because I know you will call your dad."[3] The question that eventually wound up before the European Court of Human Rights (ECtHR, Strasbourg Court) was whether this verbal abuse and the Croatian authorities' response amounted to a violation of the applicant's right to private life under the European Convention on Human Rights (ECHR, Convention).[4]

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1 F.O. v. Croatia, App. No. 29555/13, para. 6 (Sept. 6, 2021), https://perma.cc/WLW3-AU6E.

2 *Id.* at para. 7.

3 *Id.* at para. 8.

4 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. The text of the Convention lists individual human rights that the forty-six member states of the Council of Europe pledge to protect. The Convention also establishes the ECtHR, which decides on individual human rights complaints (and, relatively rarely, inter-state cases) that meet the admissibility criteria. Following the entry into force of Protocol No. 11 to the Convention in 1998, the ECtHR merged with the prior European Commission for Human Rights into one permanent court in Strasbourg, France. Finally, the Convention outlines some of the powers of the Committee of Ministers in relation to the Strasbourg Court, namely, their power to supervise the execution of the Strasbourg Court's judgments. For more on the functioning of the ECtHR and ECHR, see ANGELIKA NUßBERGER, THE EUROPEAN COURT OF HUMAN RIGHTS (2020); ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010); Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F.L. REV. 1 (2005).

Finding a violation of the applicant's Article 8 rights under the Convention, the ECtHR noted early in the judgment that "in school . . . any form of violence, however light, is considered unacceptable . . . ."[5] In so doing, the ECtHR implicitly acknowledged what the U.S. Supreme Court had explicitly recognized in the U.S. context in *Tinker v. Des Moines Independent Community School District* in 1969:[6] Students do not shed their rights when they enter the schoolhouse gate. In fact, this finding is nothing new—the ECtHR has been adjudicating human rights claims of students and their parents involving the primary and secondary school context for some fifty-five years.[7] Yet, no scholarship exists that holistically examines the school as an important forum of supranational human rights protection in Europe. This Article, taking inspiration from Yale law professor Justin Driver's recent book *The Schoolhouse Gate*—arguing that schools have served as the most significant theater of constitutional conflict in the United States[8]—begins to bridge that gap through a broad-spectrum discussion of the intersection between two significant institutions in Europe: the ECtHR and European primary and secondary schools.

Labeled as one of the most effective international human rights tribunals in existence,[9] the ECtHR sits in Strasbourg, has jurisdiction to adjudicate human rights claims of applicants regarding forty-six different countries, and decides on issues with noteworthy legal, political, and societal consequences.[10] Schools are similarly central institutions in people's lives across Europe.[11] Schools perform many key functions in society, not limited to teaching pupils necessary skills for life like mathematics, reading, and writing. They also provide a significant social experience, in which young people from different families learn and coexist together for long periods throughout the school day and school year, and as the COVID-19 pandemic has brought back to the fore, they have an important and diverse caring function.[12] According to the ECtHR itself, among the objectives of schools is "the development and

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5 *F.O.*, at para. 69.

6 393 U.S. 503 (1969).

7 The first such case was the Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits) (*Belgian Linguistics Case*), 6 Eur. Ct. H.R. (ser. A) (1968).

8 JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 12 (2018) ("At its core, this book argues that the public school has served as the single most significant site of constitutional interpretation within the nation's history.").

9 Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008).

10 David Kosař & Jan Petrov, *The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular*, HEIDELBERG J. INT'L L. 585, 587 (2017) (observing that "the ECtHR delivers rulings which deal with crucial legal, political and societal issues of our day").

11 *See, e.g.*, Bram Spruyt et al., *The Perceived Quality, Fairness of and Corruption in Education in Europe*, OXFORD REV. EDUC. 1 (2022) (noting that "education is arguably one of the most central institutions in contemporary European societies").

12 *See, e.g.*, JACK SCHNEIDER & JENNIFER BERKSHIRE, A WOLF AT THE SCHOOLHOUSE DOOR: THE DISMANTLING OF PUBLIC EDUCATION AND THE FUTURE OF THE SCHOOL 45 (2020) ("[S]chools play an increasingly expansive role, providing food, clothing, medical care, and mental health counseling, as well as after-school and summer programs."); *id.* at 63 ("Schools have always played an essential role in readying students for employment."); *id.* at 79 ("[E]ducation is governed through a public system designed to promote broad aims like democratic competence and general principles like equity."); Brett Warnick, *Student Speech Rights and the Special Characteristics of the School Environment*, 38 EDUC. RESEARCHER 200 (2009); *see also* collection of articles in *What is School For?*, N.Y. TIMES OP. (Sept. 9, 2022), https://perma.cc/8WUL-3V65.

moulding of the character and mental powers of its pupils."[13] In a narrow sense, the ECtHR sustains what Jan Comenius—the father of modern education—said in the seventeenth century: A school is a "manufactory of humanity."[14] Yet, while existing scholarship has extensively examined important individual cases involving schools before the ECtHR, such as the *Belgian Linguistics Case*,[15] the *Lautsi* case,[16] and *O'Keeffe v. Ireland*,[17] or has examined particular Convention rights in the school context,[18] no scholarship exists attempting to characterize in broad strokes the relationship between the ECtHR and schools in Europe.[19]

Based on a holistic analysis of a body of international jurisprudence—never before collected and analyzed in one place—that I call "Strasbourg's schools jurisprudence,"[20] the central argument of this Article is that schools have served as one of

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[13] Campbell and Cosans v. U.K., 48 Eur. Ct. H.R. (ser. A) at para. 33 (1982). The Council of Europe has also emphasized the importance of youth education for, among other things, forming full citizens in democratic societies, transmitting generic European values, and fostering a European awareness that respects Europe's rich cultural, religious, and other diversity. *See* Eur. Parl. Ass., *Education for Europe*, 4th Sess., Rec. No. 1682 (2004).

[14] SIMON SOMERVILLE LAURIE, JOHN AMOS COMENIUS, BISHOP OF THE MORAVIANS: HIS LIFE AND EDUCATIONAL WORKS 198 (1899).

[15] *See* BATES, *supra* note 4, at 225–38; Katherine Williams & Bernadette Rainey, *Language, Education and the European Convention on Human Rights in the Twenty-First Century*, 22 LEGAL STUDIES 625 (2002).

[16] *See, e.g.*, Dominick McGoldrick, *Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?*, 11 HUM. RTS. L. REV. 451 (2011); Joseph Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013); Pierre-Henri Prelot, *The* Lautsi *Decision as Seen From (Christian) Europe*, 65 ME. L. REV. 783 (2013); Lorenzo Zucca, Lautsi*: A Commentary on a Decision by the ECtHR Grand Chamber*, 11 INT'L J. CONST. L. 218 (2013).

[17] *See, e.g.*, James Gallen, O'Keeffe v. Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education*, 78 MOD. L. REV. 151 (2015).

[18] *See, e.g.*, Noam Peleg, *Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights*, 18 HUM. RTS. L. REV. 111 (2018) (discussing many of the cases decided by the ECtHR involving discrimination in schools against Roma children).

[19] For the purposes of this Article, school is defined as a primary or secondary school. My study does not include, among others, pre-schools, nurseries, crèches, or universities.

[20] I identified forty-five judgments issued by the ECtHR involving a close factual nexus with primary and secondary schools. These cases were identified using a combing method on the primary search engine of ECtHR case-law, HUDOC. Specific key terms were used to identify initial cases, such as "school," "education," "primary," "secondary," "student," and "pupil." Then, I identified the cases that the search results turned up involving the rights of pupils or their parents that did not involve a close factual nexus with a primary or secondary school. Finally, the set of identified cases was cross-checked with the relevant literature, such as CLAIRE FENTON-GLYNN, CHILDREN AND THE EUROPEAN COURT OF HUMAN RIGHTS (2021). Admissibility decisions involving schooling were not included. This body of case law forms the basis for the Article's analysis. Only judgments issued before January 26, 2023, when this Article was accepted for publication, are included. Those cases are *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium"* (Merits), 6 Eur. Ct. H.R. (ser. A) (1968); *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) 711 (1976); *Campbell and Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1982); *Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. (ser. A) (1993); *Efstratiou v. Greece*, App. No. 24095/94, 24 Eur. H.R. Rep. 294 (1997); *Valsamis v. Greece*, App. No. 21787/93, 24 H.R. Rep. 294 (1997); *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 237; *Timishev v. Russia*, 2005-XII Eur. Ct. H.R. 169; *D.H. and Others v. Czech Republic*, 2006 Eur. Ct. H.R.; *Folgerø and Others v. Norway*, 2007-III Eur. Ct. H.R. 51; *Zengin v. Turkey*, 2007 Eur. Ct. H.R.; *D.H. and Others v. Czech Republic* (*D.H. II*), 2007-IV Eur. Ct. H.R. 241; *Sampanis and Others v. Greece*, 2008 Eur. Ct. H.R.; *Oršuš and Others v. Croatia*, 2008 Eur. Ct. H.R.; *Dogru v. France* 2008 Eur. Ct. H.R.; *Kervanci v. France*, 2009 Eur. Ct. H.R.; *Lautsi and Others v. Italy*, 2009 Eur. Ct. H.R.; *Oršuš and Others v. Croatia* (*Oršuš II*), 2010-II Eur. Ct. H.R. 247; *Grzelak v. Poland*, 2010 Eur. Ct. H.R.; *Ali v. UK*, 2011 Eur. Ct. H.R.; *Lautsi and Others v. Italy* (*Lautsi II*), 2011-III Eur. Ct. H.R. 63; *Ponomaryovi v. Bulgaria*, 2011-III Eur. Ct. H.R. 366; *Vejdeland and Others v. Sweden*, 2012 Eur. Ct. H.R.; *Kemaloğlu v. Turkey*, 2012

the most important sites of human rights conflict and ECHR interpretation in the post-World War II history of Europe. It is likely that few other "domains," in which the ECHR protects people from rights abuses by the state, rival schools in terms of the size of the interests within Council of Europe states, the divergence of views and contestation in the judiciary and academia on the correct interpretation of the ECHR as applied to the domain, and the significance for European societies in both the legal and social spheres. In making this claim, the Article advocates for the transposition of what Dean Heather Gerken of Yale Law School calls "domain-centered" constitutional law[21] to the European supranational context.[22] In other words, because interpretations of rights may depend on judges' understandings of their context, our understanding of the ECtHR's interpretation of the ECHR will improve by focusing on certain places or applicants rather than only specific clauses of the Convention.[23] As this Article shows, Convention interpretation is contextual. Therefore, we should study it as such.[24]

In support of the above, the Article adopts a two-tiered approach.[25] The first tier, explored in Part II, is court-centric. It focuses on the ECtHR's interpretation of the ECHR in schooling cases. A trio of observations supports the Article's argument that schools are critical sites of human rights conflict and Convention interpretation.

1. The Strasbourg Court frequently accentuates the distinctive characteristics of the unique and complex school setting in its judicial reasoning in schooling cases, sometimes in determinative ways.

2. Schooling cases before the Strasbourg Court often involve highly-contested questions about the correct judicial interpretation of the ECHR.

Eur. Ct. H.R; *Kayak v. Turkey*, 2012 Eur. Ct. H.R.; *Catan and Others v. Republic of Moldova and Russia*, App. Nos. 43370/04 et al., 57 Eur. H.R. Rep. 99 (2013); *Sampani v. Greece*, 2013 Eur. Ct. H.R.; *Horváth v. Hungary*, 2013 Eur. Ct. H.R.; *Lavida v. Greece* 2013 Eur. Ct. H.R.; *Yalçin and Others v. Turkey*, 2015 Eur. Ct. H.R.; *O'Keeffe v. Ireland*, 2014-I Eur. Ct. H.R. 155; *Memlika v. Greece*, 2015 Eur. Ct. H.R.; *Çam v. Turkey*, App. No. 51500/08 (May 23, 2016), https://perma.cc/7QEN-JC7P; *Osmanoğlu and Kocabaş v. Switzerland*, App. No. 29086/12 (Apr. 10, 2017), https://perma.cc/9SAZ-C8J2; *Papageorgiou and Others v. Greece* App. Nos. 4762/18 et al. (Jan. 31, 2020), https://perma.cc/86UE-DKG2; *G.L. v. Italy*, App. No. 59751/15 (Oct. 12, 2020), https://perma.cc/TN2E-SJFA; *Perovy v. Russia*, App. No. 47429/09 (19 Apr., 2021), https://perma.cc/YWR8-RNE7; *F.O. v. Croatia*, App. No. 29555/13 (Sept. 6, 2021), https://perma.cc/WLW3-AU6E; *Stoian v. Romania*, App. No. 289/14 (June 25, 2019), https://perma.cc/4V4N-SASG; *Kurt v. Austria*, App. No. 62903/15 (July 4, 2019), https://perma.cc/7QVG-JFEG; *Kurt v. Austria* (*Kurt II*), App. No. 62903/15 (June 15, 2021), https://perma.cc/C8RB-KJG5; *Tagayeva and Others v. Russia*, App. No. 26562/07 (Apr. 13, 2017), https://perma.cc/7J76-ZRGF; *Ádám and Others v. Romania*, App. No. 81114/17 (Mar. 8, 2021), https://perma.cc/U9A9-GK69; *X and Others v. Albania*, App. Nos. 73548/17 & 45521/19 (Aug. 31, 2022), https://perma.cc/7YMQ-WS48; *Elmazova and Others v. North Macedonia*, App. Nos. 11811/20 & 13550/20 (Dec. 13, 2022), https://perma.cc/CNG6-DHNH. The phrase "Strasbourg's schools jurisprudence" is inspired by James Ryan. *See* James Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1337 (2000) (discussing the U.S. Supreme Court's public schools jurisprudence).

[21] Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 122 (2007).

[22] While the registry of the ECtHR produces case law handbooks that detail jurisprudence on certain Convention rights, such as the right to education, and a handbook of all cases involving prisoners' rights exists, no handbook or scholarly work has ever tried to focus on the school as a specific institution or domain of rights protection at the ECtHR.

[23] Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 207 (2019).

[24] *Id.*

[25] My gratitude to a member of the Judicial Studies Institute in Brno for suggesting this way of organizing the Article's arguments.

3. The ECtHR has repeatedly confirmed that it has a role to play in upholding human rights in schools across the Council of Europe's member states and in cases involving numerous Convention rights.

The second tier of the argument, in Part III, takes a broader view and considers the societal implications of the intersection between schools and the Strasbourg Court. Three observations in this realm lend credence to the notion that schools should be understood as key theaters of human rights encounters in Europe.

1. The number of people involved and the size of the interests in elementary and secondary schooling across the Council of Europe are enormous.

2. Many of the ECtHR's schooling cases may be reflective of broader apprehensions that permeate membership in Europe's human rights protection regime.

3. Some of the Strasbourg Court's schooling cases have made important contributions to the European social landscape.

While there is some overlap between these two levels of analysis, the framework provides a meaningful distinction between jurisprudential analysis and broader societal considerations at the intersection of schools and the Strasbourg Court. Finally, by introducing the relationship between schools and the ECtHR and arguing that schools have been key sites of Convention conflict, the Article seeks to start a discussion, not to finish it. The observations and arguments therefore take a general rather than a particular form and suggest possible answers rather than definite conclusions.

II. STRASBOURG, SCHOOLS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Convention Interpretation and the School Context

While the ECtHR has stated that prisoners do not shed their Convention rights at the prison gate,[26] it has never made a similar statement regarding the school, as the U.S. Supreme Court famously did in *Tinker*.[27] This is perhaps not surprising, as the Convention's Additional Protocol 1 Article 2 (P1-2), unlike the U.S. Constitution, directly mentions education.[28] Yet, the ECtHR in its jurisprudence involving

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[26] Khodorkovskiy and Lebedev v. Russia, 2014 Eur. Ct. H.R. at para. 836.

[27] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[28] Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. II, Mar. 20, 1952, E.T.S. 9 ("No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.").

schools has repeatedly emphasized the importance of the school context in shaping the way it interprets at least eight different Convention rights.[29]

To be sure, the general observation that Convention interpretation in schooling cases is contextual is multifaceted. Judicial reference to the school context in a case may lead to different results vis-à-vis Convention interpretation. Some ECtHR opinions simply accentuate various characteristics of elementary and secondary schools in their judicial reasoning, with varying impacts on how they apply the Convention to the facts of the case. Other judgments view the school setting as more directly impacting the ECtHR's supervisory role—in some cases the ECtHR appears to make supervision of the Convention rights more stringent, and in others it affords more deference to the national actor involved in the case. Below, I conceptualize and consider examples of the former before turning to several illustrations of the latter.[30]

1. The Particular School Context and Convention Interpretation: A Complex Relationship

Schools are unique and complex legal and social institutions. However, it is difficult to articulate precisely the exact nature of schools, the elements that make the school setting unique, and the broader function of schools in society, perhaps because no two schools are the same and a school's function is often subjective. Nonetheless, U.S. legal and educational literature helps us to go slightly deeper into the nature of schools, as well as the "special characteristics" that make them *sui generis* environments. For example, legal scholar and former Dean of the University of Colorado Law School Betsy Levin argues:

> The 'special characteristics' of the elementary and secondary school environment include the fact that students, being compelled to attend school, are a captive audience, that the students are not yet fully developed intellectually or emotionally, that the educational enterprise has an obligation to protect the safety of all students and to provide them with an atmosphere conducive to education, and that the purpose of compulsory education is to inculcate the social, moral and political values of the community (however defined) and, in particular, to prepare the young to participate as citizens in our democratic society.[31]

In a similar vein, education scholar Brett Warnick claims that seven characteristics of schools shape judicial interpretation of free speech in the United States: the age of pupils, school attendance requirements, heightened safety considerations, the necessity for public accountability, the multiple constituencies served by schools, the

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[29] *See infra* note 133.

[30] The cases presented in the following two Subparts are not an exhaustive discussion of Strasbourg's schools jurisprudence. Given the broad scope of this Article and its primary goal of spurring on future scholarship at the intersection of schools and rights protection in Europe, I selected the cases in this Article for their representativeness of different Convention rights and different factual scenarios involving the school context, as well as their relatively simple factual patterns.

[31] Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1678 (1986).

school-associated nature of much student speech, and the need to promote educational goals.[32]

Adding another layer of complexity, legal scholar and current President of the University of Virginia James Ryan argues that the U.S. Supreme Court's jurisprudence concerning schools rests on a necessarily imperfect distinction between two functions of schooling: the academic and the social.[33] The academic is easy enough to understand—in schools students learn important skills for life, including mathematics, science, history, reading and writing, and (hopefully) critical thinking. The social function is more difficult to grasp. To Ryan, schools are institutions that not only convey to the youth certain values or touchstones of behavior important to the broader society, but also that can correct certain broader societal flaws. For example, schools could be the places where society attempts to cure racial segregation.[34]

This brief sketch of several scholars' views on what schools are and what schools do in the United States reveals schools to be complex legal and multidimensional social institutions. How does the Strasbourg Court conceive of the unique nature of the school environment in its judicial reasoning? Below I illustrate that the Strasbourg Court consistently engages with the "special characteristics" inherent in the school setting in its schools jurisprudence—though in a complex and varying manner—via concrete illustrations involving religion, safety, discrimination, and freedom of speech.[35]

In 1976, in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, three sets of Christian parents objected to Danish legislation making sex education classes compulsory in Danish schools—legislation that came about in light of, amongst other things, a worrying rise in unwanted pregnancies. Finding no violation of the Convention, the ECtHR emphasized that "the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner" and is forbidden from pursuing "an aim of indoctrination."[36] Most significantly, the ECtHR linked P1-2 with Article 9 of the Convention's protection of the freedom of religion, reasoning that the second sentence of P1-2 was essential for the preservation of democratic society, which states achieve above all through *teaching*.[37] In light of this reasoning, the Strasbourg Court found that the Danish legislation mandating compulsory sex education, while of a moral order, did not overstep the bounds of what a democratic state might regard as in the public interest, particularly where "public authorities wish to enable pupils to take care of themselves and show considerations for others in that respect."[38] The fact that "the setting and planning of the curriculum fall in principle within the competence of the Contracting States"[39] and

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32 Warnick, *supra* note 12. *Cf.* J.C. Blokhuis, *Student Rights and the Special Characteristics of the School Environment in American Jurisprudence*, 49 J. PHIL. EDUC. 65, 74 (2015) (claiming that in the U.S. context, the "special characteristics of the school environment" are only predicated on the custodial and tutelary relationship between the teacher and pupil, due precisely to the legal status of minors and the *parens patriae* doctrine under the common law).

33 Ryan, *supra* note 20, at 1340.

34 *Id.*

35 This discussion is meant to be illustrative rather than exhaustive. *See infra* note 63.

36 Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at para. 53 (1976).

37 *Id.*

38 *Id.*

39 *Id.*

that the Danish legislation intended to prepare and protect pupils rather than indoctrinate them pushed the ECtHR towards finding no violation of the Convention. Thus, one of the earliest of Strasbourg's school cases evinces the tension between the ECtHR's understanding of the school as an institution with specific societal functions—e.g., preserving democracy and empowering young people to be safe and autonomous in their sexual lives[40]—and how such functions ought to interact with the Strasbourg Court's interpretation of specific Convention rights.

Six years later, in *Campbell and Cosans v. United Kingdom*, dealing with corporal punishment in Scottish schools, the ECtHR pointed out that:

> The use of corporal punishment may, in a sense, be said to belong to the internal administration of a school, but at the same time it is, when used, an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[41]

Because of the understanding that "discipline is an integral, even indispensable, part of any education system," the ECtHR found that Campbell and Cosans' claim fell squarely under P1-2's protection of respect for parents' philosophical convictions in the education of their children.[42] Thus, judicial understanding of discipline's importance in schooling underscored P1-2's application in the case. Yet, twenty-six years later, in *Dogru v. France*, which dealt solely with the Article 9 freedom of religion right of an eleven-year-old pupil who was expelled for not removing her veil on multiple occasions during physical education class, the ECtHR borrowed from the *Campbell and Cosans* case to find no violation of the Convention. The judgment reiterated that:

> The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[43]

As a result, the ECtHR was able to sidestep some of the thornier interests of the child in relation to the religious minorities question and find no Article 9 violation, in part because schools must enforce their own rules with disciplinary measures, particularly when a pupil's objections to the terms of participation in certain school classes "had led to a general atmosphere of tension within the school."[44]

Strasbourg's judges also have considered the school context important regarding safety in school. In *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, the

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[40] For an argument that "the schoolhouse is a site—perhaps the preeminent site—for the inculcation of values of sexual citizenship," see Melissa Murray, *Sex and the Schoolhouse*, 132 HARV. L. REV. 1445, 1484 (2019).

[41] Campbell and Cosans v. U.K., 48 Eur. Ct. H.R. (ser. A) at para. 33 (1982).

[42] *Id.* at para. 34. The Court ultimately found in favor of the applicants, holding that the P1-2 rights of the applicants had been violated. *Id.* at para. 38.

[43] Dogru v. France, 2008 Eur. Ct. H.R. at para. 83.

[44] *Id.* at para. 74.

ECtHR unanimously found a violation of the right to life when a seven-year-old student—who had not enrolled in the paid school busing service—froze to death while attempting to walk the four kilometers home after school closed early due to an unexpected snowstorm. In delineating the state's positive obligations under Article 2's protection of the right to life, the ECtHR stated "that the State's duty to safeguard the right to life is also applicable to school authorities, who carry an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under the exclusive control of the authorities."[45] Thus, in that case, the age of pupils, vulnerability in the school setting, and the pupils being under the exclusive control of school authorities swayed the ECtHR to find a violation under Article 2 of the ECHR.

Consider *G.L. v. Italy*, involving disability discrimination in school. In that case, the ECtHR unanimously found a violation of Article 14 in conjunction with P1-2. A thirteen-year-old girl with nonverbal autism, during her first two years of primary school, had not been provided with specialized learning support, even though such support was required by law. Specifically rejecting the government's claim of a lack of financial resources, the case relied on the educational context and cited many of the Strasbourg Court's relevant prior decisions. In a telling part of the judgment, the ECtHR reflected that "the discrimination suffered by the applicant is particularly serious as it occurred in the framework of primary schooling . . . which provides the bases for overall education and social integration and the first experiences of living together—and which is compulsory in most countries."[46]

A final example of the Strasbourg Court stressing the distinctive characteristics of the school environment in its interpretation of the Convention relates to freedom of expression under ECHR Article 10. *Vejdeland v. Sweden* arose out of the convictions of four Swedish nationals under the Swedish penal code for "agitation against a national or ethnic group" after leaving homophobic pamphlets in approximately one hundred lockers of students in an upper-secondary school. With a nod to the reasoning in the Swedish Supreme Court's decision to uphold the criminal conviction, the ECtHR found no violation of the Convention, emphasizing that "the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access" and that, citing the ECtHR's *Handyside* case,[47] "the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them."[48] Moreover, the concurring opinion of Judge Boštjan M. Zupančič would have placed the primary reasoning of the case on this latter fact because "high-school grounds may not be seen primarily as the setting for a captive audience . . . yet they are definitely a protected setting where only those authorised to distribute any kind of information may do so."[49] In this context, Judge Zupančič cited one of the key judgments in the U.S. Supreme Court's schools jurisprudence—*Bethel School District v. Fraser*. In that case, the U.S. Supreme Court upheld a school's suspension of star student Matthew Fraser for a lewd speech at a school assembly in which he claimed his free speech rights allowed him to advocate for the election of his "firm" friend for student

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45 Kemaloğlu v. Turkey, 2012 Eur. Ct. H.R. at para. 35.

46 G.L. v. Italy, App. No. 59751/15, at para. 71 (Oct. 12, 2020), https://perma.cc/TN2E-SJFA.

47 Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

48 Vejdeland v. Sweden, 2012 Eur. Ct. H.R. at para. 56.

49 *Id.*, Concurring Opinion of Judge Zupančič at para. 9.

president. The key part of that ruling for Judge Zupančič was the U.S. Supreme Court's finding that "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."[50]

2. *The School Context and the Stringency of Supranational Scrutiny*

The above cases illustrate that in its judicial reasoning for schooling cases, the ECtHR frequently accentuates the distinctive characteristics of the school setting in complex and multifaceted ways. However, the school setting sometimes appears to play a more significant role in the Strasbourg Court's understanding of the scope of protection under the Convention, at times wrapped up in the question of the level of discretion left to member states. In some cases, the school setting appears to make more stringent the ECtHR's supervisory role, while in others it appears to widen the discretion left to member states. This Subpart first considers examples of the former in safety schooling cases involving Articles 2, 3, and 8 of the Convention, before concluding with examples of the latter in schooling cases concerning religion and discrimination.

In a debated passage in *Kayak v. Turkey*, a case concerning the right to life of a fifteen-year-old who was stabbed by a nearly eighteen-year-old pupil just outside of an Istanbul schoolhouse, the Strasbourg Court held that "the mission entrusted to the educational institution . . . implies the primordial duty to ensure the safety of the pupils in order protect them against all forms of violence of which they could be victims during the time when they are placed under its supervision."[51] Thus, under this standard, states' positive obligations to protect the right to life would appear to take on a particularly stringent standard in the school setting.

Similarly, in *O'Keeffe v. Ireland*, a case concerning Ireland's liability for not having set up an effective system of detecting and reporting sexual abuse in primary schools, the Strasbourg Court discussed ECHR Article 3 and its protection of the right not to be subjected to inhuman or degrading treatment:

> [T]he primary-education context of the present case defines to a large extent the nature and importance of this obligation. The Court's case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities . . . .[52]

The school thus played a key role in the Grand Chamber of the Strasbourg Court's understanding of the scope of obligations incumbent on the state regarding the right not to be subject to inhuman or degrading treatment or punishment.

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50 Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

51 Kayak v. Turkey, 2012 Eur. Ct. H.R. at para. 59.

52 O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155, 192 (citations omitted).

In the recent case of *F.O. v. Croatia*, mentioned above, the ECtHR expanded its jurisprudence under Article 8's right to privacy with respect to school safety. In that case, invoking teachers' duty of care and the dignity of students, the Strasbourg Court stated, "[A]s a teacher, he should have been aware that any form of violence, including verbal abuse, towards students, however mild, is not acceptable in an educational setting and that he was required to interact with students with due respect for their dignity and moral integrity."[53] Under this reasoning, Europe's teachers may have altered responsibilities with respect to ECHR Article 8 regarding the language they use in interactions with their students in the classroom.

In other school cases, however, the school setting works in the opposite manner—affording a greater (or different) level of discretion to national authorities. In *Osmanoğlu and Kocabaş v. Switzerland*, concerning the ability of Muslim parents to obtain an exemption from mandatory mixed swimming classes for their daughters, the school context played a key role in how the ECtHR interpreted the discretion left to national authorities under ECHR Article 9's protection of the freedom of religion. The ECtHR, applying the general principles to the specifics of the case, reiterated that "States enjoy a considerable margin of appreciation concerning matters relating to the relationship between the State and religions . . . *particularly where these matters arise in the sphere of teaching and State education.*"[54] Thus, the level of protection afforded under Article 9, when it occurs in the context of state-provided schooling and teaching, is particularly deserving of a wide margin of appreciation.[55] This gives more leeway to states and *raises the threshold* for finding a violation of the individual's right to religion in the school context. Of course, supplementing the wide margin of appreciation in this schooling case, the ECtHR also mentioned various aspects specific to its view of the school environment, such as that "school plays a special role in the process of social integration, one that is all the more decisive where children of foreign origin are concerned."[56] The ECtHR's statement speaks to its view of the school's role as one of promoting social integration, a role which outweighed the parents' right to respect for their religious views in the education of their children.[57]

The ECtHR similarly found the school context key to its interpretation of the level of discretion left to states under the Convention's prohibition of discrimination in *Ponomaryovi v. Bulgaria.* That case concerned the right of two Khazaki-born, Russian pupils legally living in Bulgaria with their mother, who had married a Bulgarian national, not to be subject to discriminatory fee payments to attend secondary

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53 F.O. v. Croatia, App. No. 29555/13, para. 87 (Sept. 6, 2021), https://perma.cc/WLW3-AU6E.

54 Osmanoğlu and Kocabaş v. Switzerland, App. No. 29086/12, para. 95 (Apr. 10, 2017), https://perma.cc/9SAZ-C8J2 (emphasis added).

55 The margin of appreciation is a judicially created doctrine that the ECtHR uses to interpret the Convention. "It generally refers to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention. It is somewhat analogous to a standard of review." Jeffrey A. 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. 113, 115 (2005). The literature on the margin of appreciation is immense. *See, e.g.*, Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324 (2011); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705 (2006).

56 *Osmanoğlu*, App. No. 29086/12 at para. 96.

57 For more on this case, see Sarah Trotter, *'Living Together', 'Learning Together', and 'Swimming Together':* Osmanoğlu and Kocabaş v Switzerland *(2017) and the Construction of Collective Life*, 18 HUM. RTS. L. REV. 157 (2018).

school. Citing to *Leyla Sahin*,[58] a case regarding wearing a veil in a Turkish medical school, the *Ponomaryovi* court pointed out that "[i]n a democratic society, the right to education . . . is indispensable to the furtherance of human rights."[59] Then, in the most important passage of the judgment, the ECtHR stated that "the State's margin of appreciation in [the educational] domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large."[60] Thus, the ECtHR privileges primary schooling as deserving of the most restrictive margin of appreciation, in part because it "provides basic literacy and numeracy—as well as integration into and first experiences of society—and is compulsory in most countries."[61] Likewise, secondary education, at issue in the case, "plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned."[62] Therefore, the school context was key to the ECtHR's understanding of the margin of appreciation in different levels of schooling under the prohibition of discrimination in Article 14 taken together with P1-2. With the Strasbourg Court finding in favor of the applicants despite the wider margin left in secondary education, the school context played an influential role in the ECtHR's interpretation of the degree of discretion left to states at different stages of schooling.

What is clear from this brief discussion of select passages from Strasbourg's schools jurisprudence is that the school context often plays an important role in shaping both the particular judicial application of Convention rights to the facts of a given dispute and the Strasbourg Court's understanding of the general protection offered by various Convention rights. A holistic reading of Strasbourg's schools jurisprudence confirms what the smattering of case law explored above illustrates: In the vast majority of Strasbourg's schooling cases, the specific school context affects how the Strasbourg Court interprets the Convention—frequently in decisive ways.[63]

B. Judicial and Academic Contestation in Strasbourg's Schooling Cases

Disagreement over the proper interpretation of the ECHR in many of Strasbourg's schooling cases further supports the claim that the school domain has been a key site of Convention conflict before the ECtHR. There are several metrics by which one might measure the contested nature of these judgments, both within the walls of the Strasbourg Court and outside the ECtHR building. First consider judicial disagreement.

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58 Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 115.

59 Ponomaryovi v. Bulgaria, 2011-III Eur. Ct. H.R. 366, para. 55.

60 *Id.* at para. 56.

61 *Id.* at para. 55.

62 *Id.*

63 For a more thorough discussion of the specific characteristics of the school environment that ECtHR judges consider (including the age of pupils, compulsory attendance requirements, the extent to which a school is rules-based and orderly, the extent to which a school serves multiple constituencies, the nature of a school's learning spaces, how a school differentiates and groups students, safety considerations, and the extent to which a school is open, accessible, and non-exclusive) and how this affects judicial reasoning and outcomes in schooling cases, see Patrick Leisure, *The European Court of Human Rights' Schools Jurisprudence* (forthcoming) (on file with author).

1. Judicial Contestation in Strasbourg's Schooling Cases

Taking a global view, of the forty-three novel judgments[64] issued by the Strasbourg Court involving schools, less than half were unanimous judgments,[65] and two of those unanimous judgments were later overturned by the Grand Chamber.[66] A high dissenting incidence rate exists in Strasbourg's schools jurisprudence,[67] and unanimity as to outcome is lower in Strasbourg's schools jurisprudence than that indicated in one other study.[68] Finally, of the forty-five total judgments, six cases were split judgments, where one single judge made the difference in the case's outcome on at least one substantive issue.

Staying at the global level, separate opinions in schooling judgments occasionally use harsh language to illustrate profound disagreement with the outcome or judicial reasoning in the case.[69] Most ominously, dissents have labelled majority opinions in Strasbourg's schooling cases as "Kafkaesque,"[70] bordering "on the absurd,"[71]

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[64] Two sets of cases in the corpus of judgments I call Strasbourg's schools jurisprudence were released on the same day, were decided by the same judges, and contained the same reasoning. Those cases are *Valsamis v. Greece*, App. No. 21787/93, 24 H.R. Rep. 294 (1997) and *Efstratiou v. Greece*, App. No. 24095/94, 24 Eur. H.R. Rep. 294 (1997); and *Dogru v. France*, 2008 Eur. Ct. H.R. and *Kervanci v. France*, 2009 Eur. Ct. H.R.

[65] For the definition of a unanimous judgment, see Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, *in* ANCILLA IURIS 32, 36 (2008) (classifying a unanimous judgment as one "without a separate opinion, dissenting or concurring").

[66] Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61; Oršuš and Others v. Croatia, 2010-II Eur. Ct. H.R. 247.

[67] Over fifty percent of the cases in this subset have dissenting opinions, *infra* note 68.

[68] *See* Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 53 (2009) (showing that from 1999 to 2004, roughly twenty-five percent of judgments at the ECtHR were unanimous, fifteen percent had at least one dissenting opinion, and sixty percent at least one concurrence). Thus, in relation to this study, my global view indicates within Strasbourg's schooling cases, there is a higher than average proportion of unanimous judgments (this may be because of the high number of unanimous judgments regarding discrimination in schools), a higher than average dissenting incidence rate, and lower than average proportion of unanimity as to outcome (i.e., about fifty-five percent versus the eighty-five percent observed by White & Boussiakou). By including these numbers, I only mean to illustrate the level of disagreement in Strasbourg's schools jurisprudence. These numbers are subject to the caveat that numbers of dissenting, concurring, and unanimous judgments should be treated with some skepticism because separate opinions may extend only to one legal issue, which may or may not be the primary one in the case. Thus, categorizing cases along these lines may not be the full picture. *Id.* at 49. These numbers represent only a baseline quantitative inquiry, and a somewhat superficial one at that, into the existence of judicial disagreement in Strasbourg's schools jurisprudence.

[69] Some of this language may call into question the judicial norm of politesse and respect at the Strasbourg Court more generally. *See* Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 MICH. J. INT'L L. 47, 94 (2018) (noting that in addition to the "highly permissive norm about writing separately [there] were secondary norms that separate opinions should be brief and should be respectful of both the Court and the majority").

[70] O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155, Partly Dissenting Opinion of Judges Zupančić, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek, para. 9 ("We disagree with the retrospective application of the present-day understanding of positive obligations of the State to a situation obtaining about forty years ago. It is Kafkaesque to blame the Irish authorities for not complying at the time with requirements and standards developed gradually by the case-law of the Court only in subsequent decades.").

[71] D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, Dissenting Opinion of Judge Zupančič, 324 ("[T]he Czech Republic is the only Contracting State which has in fact tackled the special-educational troubles of Roma children. It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words, this "violation" would never have happened had the respondent State approached the problem with benign neglect.").

"like a Formula One car, hurtling at high speed into the new and difficult terrain of education,"[72] and "not necessarily advanc[ing] human rights protection."[73] Even when judges agree with the overall outcome in the case, some concurring opinions disagree profoundly with the majority's characterization of the ECHR's scope of protection in the schooling realm. Judge Tulkens stated in no uncertain terms that the level of protection mandated by the majority in the school setting in *Kayak v. Turkey* was "excessive, dangerous and contrary to our case law."[74] And in *Lautsi II*, Judge Bonello's concurrence struck out at the dissent and the unanimous Chamber judgment, implying that they were suffering from "historical Alzheimer's."[75] Finally, in the recent *Perovy* judgment, the four-judge majority took the unusual move of issuing a joint concurring opinion specifically to respond to the three judges in dissent.[76] The majority's concurrence concluded that the dispute "could have been better solved by a constructive talk between the parents and the school, rather than through bitter lawsuits brought before the domestic courts and the Strasbourg Court."[77] In short, Strasbourg's concurring and dissenting judges at times use harsh language to disagree with the outcome and/or reasoning in schooling cases.

Having assessed some global considerations indicating important disagreement between majority judges and those writing separately from the same bench, this Subpart proceeds to consider several school cases involving religious convictions, safety, and discrimination that reflect more detailed disagreement between judges.

In *Perovy v. Russia*, mentioned above, the judges split four-to-three, disagreeing decisively on the precise role of the school environment in how to interpret ECHR Article 9's protection of religious freedom and P1-2's protection of parental religious convictions. In that case, the seven-year-old son of a priest of the Church of the Community of Christ sat at his desk on his first day of school while the father of one of his new classmates, a priest of the Russian Orthodox Church, performed the rite of blessing the classroom. Dressed in a cassock and priestly robes, this blessing consisted of lighting incense and candles, distributing small paper icons to the children, singing prayers in Church Slavonic, sprinkling the classroom with holy water with some students making the sign of the cross in line with the Russian Orthodox tradition, and then inviting the children to kiss a crucifix.

The dissent of Judges Keller, Serghides, and Poláčková would have found a violation of the right to freedom from religion in conjunction with P1-2 in the case for four reasons, all intimately connected with the school environment. First, the child

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72 *Id.*, Dissenting Opinion of Judge Borrego Borrego, 331 (making a general observation).

73 F.O. v. Croatia, App. No. 29555/13, Dissenting Opinion of Judges Wojtyczek and Paczolay, para. 4 (Sept. 6, 2021), https://perma.cc/L36Z-QX6U ("In our view, lowering the threshold of applicability of Article 8, thus triggering a flow of applications to the Court lodged by pupils complaining about their relations with teachers, will not necessarily advance human rights protection.").

74 Kayak v. Turkey, 2012 Eur. Ct. H.R., Concurring Opinion of Judge Tulkens, para. 3.

75 Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61, Concurring Opinion of Judge Bonello, 101 ("A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. . . . No court, certainly not this Court, should rob the Italians of part of their cultural personality. . . . Now, a court in a glass box a thousand kilometres away has been engaged to veto overnight what has survived countless generations. The Court has been asked to be an accomplice in a major act of cultural vandalism.").

76 Perovy v. Russia, App. No. 47429/09, Concurring Opinion of Judges Lemmens, Dedov, Schembri Orland, and Guerra Martins (Apr. 19, 2021), https://perma.cc/LNZ3-V7NP.

77 *Id.* at para. 3.

was only seven years old at the time, and thus easily influenced and unable to "dissociate the school authorities from the rite."[78] Second, it was his first day of regular schooling—"a milestone in one's life"—and the ceremony consisted of active observance and interactions, like passing out icons meant to be taken home, that argued in favor of the event's more lasting impact on the applicant.[79] Third, the dissent—citing to the U.S. Supreme Court's *Lee v. Weisman* decision—did not think that "mere presence" espoused by the majority accurately characterized the fact that attendance "signified more than respect *in a school context*."[80] Rather, "given *the particular school context* in which the facts took place," the majority's analysis should have taken account of the above factors and the fact that students are in a "hierarchical relationship with the school authorities and their teachers" that makes them more likely to be influenced by witnessing a religious ceremony.[81] Finally, the three dissenters pointed to the compulsory nature of schooling and the school environment in recognizing that the young boy "had virtually no possibility of escaping the religious act."[82] Thus, for the dissenting judges in *Perovy v. Russia*, the school context[83] was the crucial element that changed how they interpreted the Convention's articles to apply in the case.

Moving on to the school safety realm, consider in more depth Judge Tulkens' concurrence in *Kayak v. Turkey*, in which she questioned what sort of educational model the majority's opinion encouraged. The majority's emphasis on surveillance over the entry and exits to schools made Judge Tulkens wonder if the judgment encourages the "carcelization" of schools.[84] She queried in her opinion, "[D]o we really want to make schools and boarding schools into securitized zones with police patrols around them . . . ?"[85] Judge Tulkens' model of education would rest neither on fear nor suspicion of students, but rather on engaging and further developing adolescents' sense of responsibility.[86]

Similarly, in the same case, partly dissenting Judges Sajó and Raimondi stressed that the fatal stabbing actually took place 150 meters from the garden of the school and thus did not take place on school premises, nor did it involve a "cause-and-effect relationship with a structural defect in the educational system."[87] Finally, the involvement of a fifteen-year-old and a nearly-eighteen-year-old did not implicate the typically "vulnerable children" that may be involved in other schooling cases.[88]

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78 *Perovy*, App. No. 47429/09, Dissenting Opinion of Judges Keller, Serghides, and Poláčková, para. 16 (emphasis added).

79 *Id.* (emphasis added).

80 *Id.* at para. 20 (emphasis added).

81 *Id.* at para. 21.

82 *Id.* at para. 23.

83 Kaufman, *supra* note 23, at 207–08 (citations omitted) (outlining an explanation for judicial reasoning, observing that "[s]choolchildren are perhaps the most sympathetic plaintiffs in all of constitutional law. They are less culpable than adults, or at least courts tend to treat them as such; they are young enough for judicially imposed institutional reforms like racial or gender integration to have a real effect on their perceptions of the world; and they are acutely subject to state power— after all, they cannot leave the building until the school bell rings. Schoolchildren are, in short, very easy to want to protect, which is why courts have so often protected them.").

84 Kayak v. Turkey, 2012 Eur. Ct. H.R., Concurring Opinion of Judge Tulkens, para. 4.

85 *Id.* (author's translation).

86 *Id.* at para. 5 (citing Mastromatteo v. Italy, 2002-VIII Eur. Ct. H.R. 123).

87 *Id.*, Partly Dissenting Opinion of Judges Sajó and Raimondi (author's translation).

88 *Id.* (author's translation).

Thus, the concurring and dissenting judges took a different stance on how aspects of the school environment affected their view of the case and what model of education the majority's opinion espoused.

Remaining in the school safety realm but this time regarding ECHR Article 3's protection against inhuman and degrading treatment, the dissenting judges in *O'Keeffe* also disagreed with placing such an exacting standard on countries with respect to pupil safety in school. The partly dissenting opinion of Judges Zupančić, Gyulumyan, Kalaydjieva, De Gaetano, and Wojtyczek stated that "the majority judgment imposes a positive obligation of constant and retrospective vigilance with regard to assumed inherent risks arising out of unpredictable human conduct 'in an educational context,' which in our view amounts to imposing . . . an 'impossible and disproportionate burden.'"[89] Thus, rather than following the minimum severity test, which the court in *Costello-Roberts* rightfully clarified includes the *context* of the alleged degrading treatment, the dissent would have applied the reasoning in *Osman v. United Kingdom*[90] and found that states' positive obligation to protect individuals does not extend to unpredictable human behavior, even with respect to sexual abuse by a lay teacher in a primary school.

In the discrimination realm, we also see judges disagreeing according to their educational predilections. In his *D.H. II* dissent, Judge Jungwiert pointed out two aspects of school systems that in his view changed the outcome of the case. First, he argued that schools must draw a distinction "between what is desirable and what one might term realistic, possible or simply feasible."[91] And second, "[E]very school system entails not only education but also a process of assessment, differentiation, competition, and selection."[92] In his view, the ECtHR could not substitute desirability for feasibility, and inherent parts of schooling are tests, selection, and differentiation. Thus, the Czech practice of placing Roma students in special schools in Ostrava was simply a necessary evil inherent in all education systems, not a violation of the ECHR.

Moreover, in some judges' views, pedagogical reasons justify some level of segregation in schooling matters. In *Oršuš II*, in a split nine-to-eight judgment, the dissent emphasized that separation in the "common school" may not always be harmful, reasoning that important pedagogical goals like language acquisition may actually be served by such a practice.[93] Likewise, in *G.L. v. Italy*, not all the judges shared the majority's view of schools as places always requiring social integration of handicapped individuals. In his concurring opinion, Judge Wojtyczek pointed out that for certain children, notably some autistic children, scientific studies demonstrate that mainstream education can cause suffering and actually harm their development, whereas specialized (and separate) schools can provide a better environment for their specific educational and social needs.[94]

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89 O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155, Partly Dissenting Opinion of Judges Zupančić, Gyulumyan, Kalaydjieva, De Gaetano, and Wojtyczek, 219.

90 Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 3124, para. 116.

91 D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, 329.

92 *Id.* at 330.

93 Oršuš and Others v. Croatia, Partly Dissenting Opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić, 2010-II Eur. Ct. H.R. 247, 322.

94 G.L. v. Italy, App. No. 59751/15, para. 5 (Oct. 12, 2020), https://perma.cc/TN2E-SJFA.

As this brief discussion of separate opinions in three different types of schooling judgments illustrates, judges in Strasbourg's schools jurisprudence can disagree profoundly over both the general outcome or reasoning of the majority, as well as over the majority's specific understanding and characterization of the school environment. Convention interpretation in Strasbourg's schools jurisprudence is frequently divided, sometimes directly over how the school context should influence judicial application of the Convention, and this disagreement occasionally involves the use of rather acerbic language. I next turn to judicial contestation in-between different judicial benches and even from off the bench, where a similar dynamic of concentrated judicial disagreement emerges in Strasbourg's schools jurisprudence.

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Judicial contestation regarding the Convention's application in school cases is further evidenced by disagreement between judges on different benches. Of the nine Grand Chamber judgments in Strasbourg's schools jurisprudence, four included both section judgments and Grand Chamber judgments on the merits.[95] In three out of four of those cases, the Grand Chamber came to a different conclusion than the Chamber. Moreover, in several school cases before the Strasbourg Court, the ECtHR has diverged from the ruling of the constitutional court of the state in question. This was the case in *D.H. II*,[96] *O'Keeffe v. Ireland*,[97] *Oršuš II*,[98] *Grzelak v. Poland*,[99] and *Folgerø v. Norway*.[100] Finally, the United Nations Human Rights Committee has come to the opposite conclusion to the ECtHR regarding the wearing of religious garments in French schools.[101]

Consider, in this regard, the different reasoning between the Chamber and Grand Chamber judgments in the *Lautsi* case. One element of the *Lautsi* saga that has not—to this author's knowledge—been discussed in the vast literature on that case is that the difference in opinion between the unanimous Second Section and the 15–2 judgment of the Grand Chamber coming to the opposite conclusion was in large part due to the judges' different emphases on the school context in interpreting the scope of protection afforded by the Convention in religious freedom matters. According to the lower Second Section judgment, three characteristics of the school

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95 *D.H.*, 2007-IV Eur. Ct. H.R. at 241; Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61; *Oršuš*, 2010-II Eur. Ct. H.R. at 247; Kurt v. Austria, App. No. 62903/15 (June 15, 2021), https://perma.cc/C8RB-KJG5.

96 *Compare D.H.*, 2007-IV Eur. Ct. H.R. at 256–57 (noting the Czech Constitutional Court's ruling in favor of the government), *with id.* at 322 (noting the ECtHR's ruling in favor of the applicants).

97 *Compare* O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155, 169 (noting the Irish Supreme Court's ruling in favor of the government), *with id.* at 206–07 (noting the ECtHR's ruling in favor of the applicants).

98 *Compare Oršuš*, 2010-II Eur. Ct. H.R. at 264 (noting the Croatian Constitutional Court's ruling in favor of the government), *with id.* at 316–17 (noting the ECtHR's ruling in favor of the applicants).

99 *Compare* Grzelak v. Poland, 2010 Eur. Ct. H.R. at paras. 8–12 (noting the Polish Constitutional Court's rulings in favor of the government), *with id.* at para. 28 (noting the ECtHR's ruling in favor of the applicants).

100 *Compare* Folgerø and Others v. Norway, 2007-III Eur. Ct. H.R. at 66 (noting the Norwegian Supreme Court's ruling in favor of the government), *with id.* at 103 (noting the ECtHR's ruling in favor of the applicants).

101 *See* Saila Ouald Chaib, *Freedom of Religion in Public Schools: Strasbourg Court v. UN Human Rights Committee*, STRASBOURG OBSERVERS (Feb. 14, 2013), https://perma.cc/YAW9-7FKE.

environment were key to the analysis of the ECHR's negative protection of religious freedom: the age of students,[102] the compulsory nature of school attendance,[103] and, with reference to *Dahlab v. Switzerland*,[104] the classroom environment.[105] In contrast, the Grand Chamber utilized the school context for the opposite purpose. Finding that Italian authorities had acted within the limits of the margin of appreciation granted to states within the Convention system in the sphere of education and teaching, the ECtHR rejected each of the lower chamber's findings with respect to why the school environment mandated closer supervision by the Strasbourg Court. Instead, the Grand Chamber emphasized the fact that, in general, "Italy opens up the school environment in parallel to other religions."[106] Whatever one thinks of the merits of the Second Section's or the Grand Chamber's invocation of the school environment in interpreting the scope of protection afforded by the Convention, the school context did play a significant dividing role in how the section judges and the Grand Chamber judges understood the Convention to apply in the case.

As a final remark, in addition to strong words on the bench, at least one judge has also taken to extrajudicial speech regarding a school case to signify his displeasure with the approach taken by the Strasbourg Court. Former ECtHR and Spanish Supreme Court Judge Javier Borrego (who was not at the ECtHR when the *Lautsi* judgments were released) called the *Lautsi* Chamber judgment a "stilted decision that has much to do with pre-established opinions (not to speak of ideology) and very little with a judgment adopted by judges applying the Convention and its Protocols to a concrete case."[107] Thus, in Strasbourg's schools jurisprudence, judges on the same judicial bench, between different benches, and even from off the bench, regularly disagree over the outcomes and reasoning. I next turn to critical academic commentary regarding Strasbourg's schools jurisprudence, unearthing a significant corpus of academic critique.

2. *Academic Contestation and Strasbourg's School Cases*

Academic commentary on the outcome and judicial reasoning used in some of Strasbourg's school cases is intense and often divided. The volume of academic writing on and critique of various aspects of the *Lautsi* case is as immense as it is varied.[108] As one illustration, in his high profile academic exchange regarding both

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[102] Lautsi and Others v. Italy, 2009 Eur. Ct. H.R., para. 50 (noting "the Court will take into account in particular the nature of the religious symbol and its impact on young pupils").

[103] *Id.* at paras. 55–56 ("That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice . . . . The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought.").

[104] *See generally* Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447 (declaring inadmissible the application of a primary school teacher who was prohibited from wearing a hijab when teaching).

[105] *Lautsi*, 2009 Eur. Ct. H.R., para. 54 ("It is impossible not to notice crucifixes in the classrooms. In the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered 'powerful external symbols.'").

[106] Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61, 96.

[107] Javier Borrego, *Estrasburgo y el Crucifijo en las Escuelas* [*Strasbourg and the Crucifix in Schools*], EL MUNDO (Dec. 17, 2009), https://perma.cc/5ZAN-NVA3.

[108] *See, e.g.*, THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM (Jeroen Temperman, ed., 2012); Susana Mancini, *The Crucifix*

the outcome and reasoning of *Lautsi II* with Professors Lorenzo Zucca,[109] Dimitrios Kyritsis, and Stavros Tsakyrakis,[110] Professor Joseph Weiler sums up one of his disagreements by querying "why all the rage" when "[t]he European Court of Human Rights is not a constitutional court—neither of Italy nor of Europe; and the European Convention is not a constitution."[111]

Writing about the 2006 judgment of *D.H. and Others v. Czech Republic* regarding the placement of Roma pupils in special schools, Professor Morag Goodwin expressed severe criticism of the Chamber opinion, stating:

> [T]he Court has chosen to leave exposed the most vulnerable victims of a particularly vicious form of racial discrimination, and one that will have lasting effects for a generation. It is a hugely disappointing and flawed decision that is almost certain to be appealed to the Grand Chamber. In refusing to see the evil before it, the Court has not avoided doing evil itself.[112]

Yet, one year later, the Grand Chamber's judgment in *D.H. II* also led to mixed reactions among the legal public. For example, while some American and European lawyers in the aftermath of the case positively likened the case to Europe's *Brown v. Board of Education*,[113] on the Czech legal blog forum Jiné Pravo, "opinions were both positive and negative towards the judgment, with a slight prevalence of critical views."[114] Professor Goodwin, despite agreeing with the overall outcome, heavily critiqued the reasoning of the majority—arguing among other things that the ECtHR had abandoned its judicial role.[115] Other academics critiqued not the reasoning or outcome in the case, but the length of time from when the Roma applicants lodged their complaint in *D.H. and Others v. Czech Republic* in 2000, to when the Chamber and

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Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty, 6 EUR. CONST. L. REV. 6 (2010); Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT'L L. REV. 95 (2011); Carla Zoethout, *Religious Symbols in the Public School Classroom: A New Way to Tackle a Knotty Problem*, 6 RELIGION & HUM. RTS. 285 (2011); sources cited *supra* note 16.

[109] Zucca, *supra* note 16 (critically commenting on the reasoning in *Lautsi II* regarding the ECtHR's treatment of religious symbols, secularism, and parental convictions).

[110] Dimitrios Kyritsis & Stavros Tsakyrakis, *Neutrality in the Classroom*, 11 INT'L J. CONST. L. 200 (2013) (developing an account of neutrality that contraindicates the Grand Chamber's *Lautsi II* judgment).

[111] Joseph Weiler, Lautsi*: A Reply*, 11 INT'L J. CONST. L. 230, 232–233 (2013).

[112] Morag Goodwin, D.H. and Others v. Czech Republic*: A Major Set-Back for the Development of Non-Discrimination Norms in Europe*, 7 GERMAN L.J. 421, 431 (2006).

[113] *See* MICHAEL GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 159 (2007) ("[The] case languished for so many years that it aroused suspicions . . . that it would be remembered as the *Brown v. Board of Education* that wasn't. But in November 2007 the Strasbourg tribunal found its voice and showed itself to be the true successor of America's Warren Court."); *see also* Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 940 (2010) ("After *D.H.* was decided, many European lawyers and Roma rights advocates referred immediately and primarily to *Brown v. Board of Education*.") (citations omitted).

[114] Hubert Smekal & Katarína Šipulová, DH v Czech Republic *Six Years Later: On the Power of an International Human Rights Court to Push Through Systemic Change*, 32 NETH. Q. HUM. RTS. 288, 300 (2014).

[115] *See* M.E.A. Goodwin, *Taking on Racial Segregation: The European Court of Human Rights at a* Brown v. Board of Education *Moment?*, RECHTSGELEERD MAGAZIJN THEMIS 93, 101 (2009).

Grand Chamber released their judgments in 2006 and 2007, respectively.[116] Similarly, regarding another Roma rights schooling case, Moria Paz critiqued the *Oršuš II* judgment for taking "a narrowly utilitarian approach to the Romani language, forcing Croatia to accept the use of the minority language only in the process of its elimination."[117] As a result, "Romani is treated as an obstacle that Roma pupils must overcome in order to participate in the school environment, rather than as a valuable cultural possession worthy of legal protection" in and of itself.[118] Finally, Professor Ian Leigh stated of the *Folgerø and Others v. Norway* case, "The judgment of the Grand Chamber of the European Court of Human Rights is noteworthy for the serious division that it produced over fundamental questions."[119]

Division over and critique of the ECtHR's schooling caselaw is not limited to Grand Chamber decisions with divided benches. Consider just a few of many possible examples. Professor Georgios Milios critiqued *Papageorgiou and Others v. Greece* because "the ECtHR dealt with the case merely from the exemption procedure perspective, avoiding more complex and controversial issues such as the mandatory nature of the religious courses or their actual content."[120] Similarly, Professor Liav Orgad critiqued *Osmanoğlu v. Switzerland* as one of a number of court judgments in Europe that orient the principle of freedom "toward the majority's understanding of it" while often giving "little tolerance . . . in Europe toward the minority's perception of being free."[121] Critiquing the proportionality analysis in the same case, Fiona de Londras and Konstantsin Dzehtsiarou discussed the Strasbourg Court's prioritization of integration over belief in school, stating:

> One can imagine, however, the Court coming to precisely the other conclusion . . . Either outcome is possible, and the inability to predict which will be arrived at in a particular case makes the outcome of a complaint difficult to foresee, and thus calls into question the effectiveness of the Convention in ensuring practical protection of rights, including at the stage of making the kinds of policy that mandate mixed-sex swimming lessons regardless of the likely objections of people who follow a more

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[116] *See* Rory O'Connell, *Substantive Equality in the European Court of Human Rights?*, 107 MICH. L. REV. FIRST IMPRESSIONS 129, 132 (2009) ("The children in *DH* were in special schools from 1996–1999, and they lodged a complaint in the ECtHR in 2000. The Chamber decision came down in 2006 and the Grand Chamber decision a year later. By the time the Chamber decided the case, the Czech Republic had already introduced legislation abolishing the special schools . . . .").

[117] Moria Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, 54 HARV. INT'L L.J. 157, 187 (2013).

[118] *Id.*

[119] Ian Leigh, *New Trends in Religious Liberty and the European Court of Human Rights*, 12 ECCLESIASTICAL L.J. 266, 275 (2010); *see also* Ian Leigh & Rex Ahdar, *Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away*, 75 MOD. L. REV. 1064, 1086–87 (2012) (critiquing the pre-*Lautsi* religious education exemption cases including the *Folgerø* and *Zengin* cases as possibly undermining one of the key purposes of religious education classes).

[120] Georgios Milios, *Schoolchildren's Right to Education and Freedom of Religion in the Case Law of the ECtHR: Comments on* Papageorgiou v Greece, 16 VIENNA J. INT'L CONST. L. 135, 136 (2022) ("The [ECtHR] only considered the exemption procedure from the courses offered, and made no reference to, or examination of, the courses themselves."); *id.* at 148 (noting that perspectives on the right to private life are also missing and that "the judgment can mainly be criticized for not dealing with all case facts and human rights issues related to them").

[121] Liav Orgad, *Forced to Be Free: The Limits of European Tolerance*, 34 HARV. HUM. RTS. J. 1, 35 (2021).

> conservative approach to religious beliefs and for whom this would likely cause real difficulties, such as Orthodox Jews or devout Muslims.[122]

While not an exhaustive survey of the academic commentary on specific Strasbourg school cases, these examples nonetheless illustrate that academic commentators, for a variety of reasons, have expressed critical assessments of how Strasbourg's judges have interpreted the Convention to apply in specific schooling cases.

Commentators have also criticized not only the outcomes and reasoning in certain specific Strasbourg schooling cases, but also the reasoning used in certain types of school cases more generally. Noam Peleg has argued that "the Court consistently fails to treat children as agents in their own right" in cases involving discrimination against Roma children in schools and that Roma children "are further discriminated against by the Court because of the overriding focus on their parents' rights."[123] Regarding the cases of *G.L. v. Italy* and *Stoian v. Romania*, involving disability rights in schools, Marie Spinoy and Kurt Willems—himself an educational court judge in Belgium—claimed that the ECtHR conflates reasonable accommodation with inclusive education, thus creating negative incentives for states.[124] Moria Paz also critiqued the ECtHR's four cases involving language rights, all of which fall within Strasbourg's schools jurisprudence. Paz described "[t]he model of linguistic accommodation developed by the ECtHR" as "minimal and transitional" and one in which "[m]inority speakers are accommodated in the public school system, but only to promote their assimilation into the state and the market."[125] And Ioanna Tourkochoriti, discussing, among other cases, *Dogru v. France*,[126] *Kervanci v. France*,[127] and *Dahlab v. Switzerland*,[128] argued that:

> The case law of the European Court of Human Rights (ECHR) regarding headscarf prohibitions reflects an understanding of the role of the state that legitimizes it in limiting freedom of religion rights for teachers and students. By deferring to the judgment of the member states of the European Convention of Human Rights as to the proper way of implementing secularism, the ECHR created a situation which allows the state to dictate the proper content of religious liberty, even in cases where no harm to others exists.[129]

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[122] FIONA DE LONDRAS & KANSTANTSIN DZEHTSIAROU, GREAT DEBATES ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 100 (2018).

[123] Peleg, *supra* note 18, at 111.

[124] *See* Marie Spinoy & Kurt Willems, G.L. v. Italy*: The Ambiguous Role of Article 14 European Court of Human Rights in Inclusive Education Cases*, 22 INT'L J. DISCRIM. & L. 192, 192 (2022). For critique of the *Stoian* case, see Constantin Cojocariu, Stoian v. Romania*: The Court's Drift on Disability Rights Intensifies*, STRASBOURG OBSERVERS (Sept. 5, 2019), https://perma.cc/CY9X-6PXT.

[125] Moria Paz, *The Tower of Babel: Human Rights and the Paradox of Language*, 25 EUR. J. INT'L L. 473, 487 (2014).

[126] Dogru v. France, 2008 Eur. Ct. H.R.

[127] Kervanci v. France, 2009 Eur. Ct. H.R.

[128] Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 429 (declaring the application inadmissible).

[129] Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.*, 20 WM. & MARY BILL RTS. J. 791, 804 (2012).

Even some education scholars have entered the debate regarding Strasbourg's schooling cases. Nigel Fancourt of Oxford has stated regarding the educational competence of ECtHR judges:

> Different judges hint at different pedagogies, but they do not do so consistently. These pedagogical variations are problematic since they mean that the judgements are educationally inconsistent, whatever their jurisprudential logic, and decisions affecting the whole of Europe have been based on often unquestioned assumptions about contextual and cultural variations across schools.[130]

Finally, even where academic commentators agree with a line of reasoning introduced in school cases of the ECtHR, commentators sometimes discuss the risks involved in the court's approach.[131] As this brief literature overview indicates, academic commentary on Strasbourg's schooling cases is sometimes harsh and at times deeply divided, signaling that the school context provides a key forum of discussion and debate over the proper interpretation of the ECHR.

C. Strasbourg's Role in Diverse Schooling Matters Across the Council of Europe

The jurisprudential sketch above illustrates that the school context plays an important, if debated, role in how the ECtHR interprets the Convention. Yet, it also shows that the ECtHR plays an important role in schooling matters across the Council of Europe. The Strasbourg Court's role in schooling issues is neither limited to cases coming from only one state or region of the Council of Europe nor to cases concerning only one or even a few Convention rights. The geographical dispersion of Strasbourg's schools jurisprudence is reasonably uniform across the Council of Europe. The judgments comprising Strasbourg's schools jurisprudence relate to twenty-three different countries,[132] spanning Western Europe, Northern Europe, Southern Europe, Central Europe, Eastern Europe, and the edges of the Asian continent. It is not true that Strasbourg's schools jurisprudence is dominated by one or even a few Council of Europe countries' education systems. Strasbourg's schools jurisprudence cannot be reduced to cases arising in connection with schoolhouse gates in only France, Turkey, or Greece; the jurisprudence is dispersed enough to argue convincingly that it involves all of Europe's schoolhouse gate.

Further, Strasbourg's schooling cases do not only concern one type of human rights conflict or only one article or a few articles of the Convention. Rather, the

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[130] Nigel Fancourt, *The Educational Competence of the European Court of Human Rights: Judicial Pedagogies of Religious Symbols in Classrooms*, 48 OXFORD REV. EDUC. 131, 142 (2022).

[131] *See, e.g.*, Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. CONST. L. 1056, 1057 (2013) (discussing the concept of vulnerable groups, including in Roma school discrimination cases and arguing that "the emergence of the concept represents a positive development in the Court's case law. Yet, for all its power to further substantive equality, the concept also risks sustaining the very exclusion and inequality it aims to redress").

[132] They are Austria, Italy, Norway, Sweden, Belgium, Denmark, the United Kingdom, Ireland, Greece, Turkey, Croatia, Poland, Czechia, Hungary, Bulgaria, France, Switzerland, Russia, Cyprus, Moldova, Albania, Romania, and North Macedonia.

ECtHR's cases have involved diverse disputes concerning fundamentally important issues in European societies such as sex, race, crime, safety, terrorism, equality, religion, free speech, and language rights. Strasbourg's schools jurisprudence spans at least eight different Convention rights.[133] In sum, the geographical distribution of Strasbourg's schools jurisprudence, the diversity and importance of factual issues involving schooling, and the numerous Convention rights involved in schooling cases suggest that the Strasbourg Court has a role to play at the intersection of various human rights and diverse schooling matters across *all* of the Council of Europe.

This broad view of Strasbourg's school cases illustrates that although the ECtHR has a key role to play in educational matters through its role as ultimate interpreter of Convention rights, the precise scope of its role in schooling matters remains debated. More specifically, there is an inherent tension in many of Strasbourg's school cases between the margin of appreciation due to member states in the education realm and the effective protection of human rights, sometimes leading to unpredictability and inconsistency in judicial reasoning in schooling cases. Naturally, schooling cases often involve delicate judicial balancing of competing interests, rights, and values, not to mention the best interests of the child. The Strasbourg Court has played a strong role in combatting discrimination in schools and in upholding safety in schools, but it is not always consistent in its reasoning as to why. Moreover, the freedom of religion cases seem to be somewhat of an enigma, as the educational context is generally considered deserving of a wide margin of appreciation where there is no European consensus on the relationship between religion and the state. Nonetheless, the religious education exemption cases show the ECtHR taking a different stance, extensively examining school curricula and exemption criteria, and finding violations of the Convention in all those cases. What is the precise scope of the margin of appreciation in schooling matters before the European Court of Human Rights? And how do the Strasbourg Court's other interpretation doctrines such as effective protection, living instrument, and European consensus interact in different spheres of schooling cases with the subsidiarity principle? As this Article's main argument is the broader importance of the school as a site of human rights conflict, it leaves the precise contours and nature of the deeper jurisprudential debate for future scholarship.[134]

III. STRASBOURG, SCHOOLS, AND EUROPEAN SOCIETIES

The second tier of this Article's analysis focuses on societal aspects of schooling in Europe, concentrating on both the Council of Europe countries specifically and the implications of the ECtHR's schooling cases more generally. This Part presents quantitative and qualitative arguments for viewing the nexus between schools in the Council of Europe and the Strasbourg Court as important for European societies, thus supporting the Article's central claim that schools are critical forums for human rights conflict and ECHR application in Europe.

A. The Number of People and Magnitude of Interests Involved in Primary and

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[133] They include EHCR Articles 2, 3, 8, 9, 10, and 14, as well as P1-2 and Article 1 of Protocol No. 12.

[134] See *infra* Part IV for suggested future research directions.

Secondary Education

On any given school day, from Reykjavík to Kyiv, Madrid to Ankara, Prague to Athens, vast numbers of school-age children attend schools across the countries that make up the Council of Europe. My own estimate indicates that approximately ninety-three million pupils attend primary and secondary schools in the Council of Europe.[135] This estimate corresponds to approximately one-seventh of the 675 million people living in the Council of Europe countries being primary or secondary school students. Despite the significant differences in education systems across the Council of Europe, the vast majority of the schools in the region are provided for by the relevant state.[136] Moreover, the ECtHR has found that the Convention also applies in private schools[137] and in institutions where schooling arrangements are not purely run by the state.[138] Therefore, across the Council of Europe countries, the school is likely the most populous institution that Europeans inhabit (both over a sustained period of their life and for significant hours during the school-week and school-year), in which their rights under the ECHR protect them from abuses by the state.[139]

Moreover, these ninety-three million students are not the only persons active on school premises during school days and school hours. Schools also employ teachers, administrators, leadership staff, and other support staff to function. Some schools hire employees with specific functions, like psychologists, nurses or doctors, librarians, food preparation staff (e.g., cooks and nutritional experts), school social workers, maintenance workers and custodial staff, and even safety personnel. The estimated ninety-three million students attending school in the Council of Europe does not account for these numerous individuals that work in schools.

Widening further the number of interests involved in primary and secondary schooling in the Council of Europe, outside interests accompany the panoply of individuals that either work at or attend schools. Most prominently are the interests of the parents of children who attend school—parents who remain in charge of the

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[135] I used a media-based data collection methodology to arrive at this figure. This data was very difficult to collect because national school systems are all different across the Council of Europe, there are many different languages in the Council of Europe, and different terminology is used to describe education systems (e.g., folk schools in Finland). In my data collection, I erred on the side of caution and reported the lowest numbers available where there were multiple figures available. I did not report on private schools as part of this figure.

[136] *See* EURYDICE NETWORK, PRIVATE EDUCATION IN THE EUROPEAN UNION: ORGANISATION, ADMINISTRATION AND THE PUBLIC AUTHORITIES' ROLE 13 (2000) ("In all European Union countries, more than 90% of primary and lower secondary school pupils attend public sector institutions or those of the grant-aided private sector. Public authorities thus finance the compulsory schooling of the majority of pupils in the European Union."). My media-based data collection on the number of schools and pupils in the Council of Europe leads me to believe this figure remains consistent not only across the European Union, but the wider Council of Europe as well.

[137] *See* Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A), para. 27 (1993) ("The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two.").

[138] *See generally* O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155, para. 151 ("The State cannot be released from its positive obligation to protect simply because a child selects one of the State-approved education options, whether a national school, a fee-paying school or, indeed, home schooling.").

[139] By comparison, in 2020 there were 1,528,343 inmates in the Council of Europe countries. *See* Marcelo F. Aebi & Mélanie M. Tiago, *Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I Report*, 2020 COUNCIL EUR. ANN. PENAL STATISTICS ON PRISON POPULATIONS, at 1, 2, fig.1 (June 29, 2021). The number of incarcerated people in Europe is likely closer to the number of schools in Europe than the number of students.

education of their children according to the ECtHR[140] and whose interests must be respected under the text of the Convention. Finally, the fact that schools can influence the direction of society more generally[141] lends support to the idea that, in the Council of Europe countries, all people have some interest in how the ECHR is interpreted to apply within the schoolhouse gate.

Additional considerations support the contention that Strasbourg's judgments relating to the primary and secondary school context carry important weight for human rights in Europe. First, many of Strasbourg's school cases include a very large number of applicants. The *Belgian Linguistics* case had over 800 applicants,[142] *Tagayeva and Others v. Russia*—a case arising from the Beslan school siege that is considered the deadliest school shooting in human history[143]—had over 400 applicants,[144] *Catan and Others v. Moldova and Russia* had 170 applicants,[145] and *Sampani v. Greece* had 140 applicants.[146] Approximately one third of Strasbourg's school cases have had more than eight applicants, and Strasbourg's school judgments have involved in total over eighteen hundred applicants. Moreover, this number does not include the case of *Cyprus v. Turkey*,[147] which concerned the Turkish invasion of Cyprus and involved schooling issues for Greek Cypriot children living in the nearly entirely Turkish-speaking Northern Cyprus.[148] Thus, the number of applicants in Strasbourg judgments involving primary and secondary schools far outpaces the number of judgments.

Moreover, many of Strasbourg's school cases carry significant import for individuals beyond only those applicants directly involved in the case. Louise O'Keeffe, in her press conference after winning her case against Ireland before the ECtHR's Grand Chamber in 2014, said, "It's such good news for the children of Ireland . . . It's not just me, it's the children attending our schools at the moment, children who will attend the schools in the future and also those who did attend in the past."[149] Moreover, the Czech Judge Jungwiert said in *D.H. II* that the judgment was not just about the rights of the eighteen applicants from Ostrava, but about the "country's entire education system."[150] It is safe to say that in many of Strasbourg's school

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[140] *See* Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 711, para. 52 (1976) ("It is in the discharge of a natural duty towards their children—parents being primarily responsible for the 'education and teaching' of their children—that parents may require the State to respect their religious and philosophical convictions.").

[141] *See* DRIVER, *supra* note 8, at 62.

[142] *See* "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits), 6 Eur. Ct. H.R. (ser. A), para. 2 (1968).

[143] *See Russian Children Return to School on 'Day of Knowledge'*, MOSCOW TIMES (Sept. 1, 2021, 4:27 PM), https://perma.cc/2V74-S5RP. *See generally* TIMOTHY PHILLIPS, BESLAN: THE TRAGEDY OF SCHOOL NO. 1 (2007) (providing an in-depth account of the Beslan school siege).

[144] *See* Tagayeva and Others v. Russia, App. Nos. 25662/07 et al., (Apr. 13, 2017), https://perma.cc/EMD6-5WMN.

[145] *See* Catan and Others v. Republic of Moldova and Russia, App. Nos. 43370/04 et al., 57 Eur. H.R. Rep. 99, 149 (2013).

[146] *See* Sampani v. Greece, 2013 Eur. Ct. H.R., at 1.

[147] For more on this case by a former ECtHR judge, see Loukis G. Loucaides, *The Judgment of the European Court of Human Rights in the Case of* Cyprus v. Turkey, 15 LEIDEN J. INT'L L. 225 (2002).

[148] *See* Cyprus v. Turkey, 2014-II Eur. Ct. H.R. 245.

[149] Niall Murray, *Louise O'Keefe: 'The Case Should Never Have Gone This Far'*, IRISH EXAMINER (Jan. 29, 2014), https://perma.cc/K7GA-4APN.

[150] D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, para. 2 (J. Jungwiert, dissenting).

cases, the "footprint" of the case is felt by far more individuals than only those applicants directly involved in the proceedings.

Finally, the trend over time has seen an exponential increased in school cases, which is in line with the general increase of the caseload of the Strasbourg Court. Therefore, it is at the very least safe to say that Strasbourg's schools jurisprudence has been on the rise, and given the number of interests and people involved, the trend may continue to increase.

B. Schooling Cases Beyond the Council of Europe

Cases arising in the primary and secondary school setting frequently involve apprehensions about broader membership in the European supranational system of human rights protections. Wider misgivings emerge from this specific body of jurisprudence that reflect both shared concerns across the Council of Europe and the tensions inherent in belonging to an international human rights regime. One of the Council of Europe's stated goals is to "foster European identity and unity, based on shared fundamental values, respect for our common heritage and cultural diversity."[151] Despite the definitional difficulties relating to European identity, a significant number of cases involving primary and secondary schools before the Strasbourg Court appear to encapsulate these dynamics in a way worth examining.

Consider six concerns relating to membership in an international human rights protection regime that have arisen in Strasbourg's schools jurisprudence: (1) sovereignty;[152] (2) linguistic diversity;[153] (3) the individual-religion-state relationship;[154] (4) immigration[155] and integration[156] in diverse societies; (5) individual and

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[151] *Warsaw Declaration*, COUNCIL OF EUR. (May 17, 2005), https://perma.cc/D4LK-B3MN; *see also* Kanstantsin Dzehtsiarou & Vassilis P. Tzevelekos, *The Conscience of Europe That Landed in Strasbourg: A Circle of Life of the European Court of Human Rights*, 1 EUR. CONVENTION HUM. RTS. L. REV. 1, 5 (2020) (arguing that the ECHR is "a vehicle for the integration of the national legal orders of the 47 parties in the areas of human rights, democracy, and the rule of law" and that "[t]he establishment of common standards across Europe is a means of integration").

[152] *See infra* text accompanying notes 160–64.

[153] *See* "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits), 6 Eur. Ct. H.R. (ser. A) (1968); Oršuš and Others v. Croatia, 2008 Eur. Ct. H.R.; Catan and Others v. Republic of Moldova and Russia, App. Nos. 43370/04 et al., 57 Eur. H.R. Rep. 99 (2013); Cyprus v. Turkey, 2014-II Eur. Ct. H.R. 245.

[154] *See, e.g.*, Valsamis v. Greece, App. No. 21787/93, 24 H.R. Rep. 294 (1997); Efstratiou v. Greece, App. No. 24095/94, 24 Eur. H.R. Rep. 294 (1997); Folgerø and Others v. Norway, 2007-III Eur. Ct. H.R. 51; Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61; Grzelak v. Poland, 2010 Eur. Ct. H.R.; Dogru v. France, 2008 Eur. Ct. H.R.; Papageorgiou and Others v. Greece, App. Nos. 4762/18 et al. (Jan. 31, 2020), https://perma.cc/86UE-DKG2; Perovy v. Russia, App. No. 47429/09 (Apr. 19, 2021), https://perma.cc/YWR8-RNE7.

[155] *See, e.g.*, Ponomaryovi v. Bulgaria, 2011-III Eur. Ct. H.R. 366; Timishev v. Russia, 2005-XII Eur. Ct. H.R. 169.

[156] *See, e.g.*, D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241; Sampani v. Greece, 2013 Eur. Ct. H.R.; Sampanis and Others v. Greece, 2008 Eur. Ct. H.R.; Lavida v. Greece, 2013 Eur. Ct. H.R.; Horváth v. Hungary, 2013 Eur. Ct. H.R.; Elmazova and Others v. North Macedonia, App. Nos. 11811/20 & 13550/20, (Dec. 13, 2022), https://perma.cc/CNG6-DHNH; X and Others v. Albania, App. Nos. 73548/17 & 45521/19, (Aug. 31, 2022), https://perma.cc/7YMQ-WS48.

family autonomy vis-à-vis collective interests;[157] and (6) peace, order, and safety.[158] These apprehensions—intertwined with an international human rights protection regime—have often flashed where law and education intersect. Thus, Strasbourg's schools jurisprudence may be illustrative of broader, foundational questions relating to membership in an international human rights regime.

Let us examine three prominent examples of this observation. In the arguments in the *Belgian Linguistics* case—perhaps the most well-known international legal case involving schooling[159]—the Belgian government argued vehemently that the case was outside the ECtHR's jurisdiction and was not covered by the Convention. It stated:

> [L]inguistic and educational legislation is to a large extent an integral part of the State's political and social structure, which belongs pre-eminently to the reserved domain [of the Belgian State]; that the Convention, as a declaration of rights, is not concerned with the organisation [sic] of governmental authorities; that the Belgian conseil d'état and Parliament understood it this way when the question of ratification arose . . . that, therefore, there is in this case an inherent limit to the exercise of the Court's jurisdiction, this limit being so evident that it depends neither on an explicit clause of the Convention nor on a reservation under Article 64.[160]

In other words, states' social and political decisions, of which schooling nearly always forms a part, were internal issues and therefore not covered under the Convention. However, Belgium went further and warned of "rashly extensive interpretations that would jeopardize not only internal peace in Belgium, but also the legal security of all the High Contracting Parties and, thereby, the very fabric of this work, based on the loftiest political ideals, that we Europeans have managed to construct."[161] The case was not just about language in Belgium or language rights under the Convention, but about the legal security of the Council of Europe as well as national sovereignty and peace since "[l]anguage wars lie at the heart of Belgian history."[162] Strasbourg disavowed this stance in its *Belgian Linguistics* decision, emphasizing that state regulation "must never injure the substance of the right to education nor conflict with

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[157] *See, e.g.*, Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 711 (1976); Osmanoğlu and Kocabaş v. Switzerland, App. No. 29086/12 (Apr. 10, 2017), https://perma.cc/9SAZ-C8J2; Dogru v. France, 2008 Eur. Ct. H.R.; Memlika v. Greece, 2015 Eur. Ct. H.R.

[158] *See, e.g.*, Kayak v. Turkey, 2012 Eur. Ct. H.R.; Ali v. United Kingdom, 2011 Eur. Ct. H.R.; Kemaloğlu v. Turkey, 2012 Eur. Ct. H.R.; O'Keeffe v. Ireland, 2014-I Eur. Ct. H.R. 155; F.O. v. Croatia, App. No. 29555/13, (Sept. 6, 2021), https://perma.cc/L36Z-QX6U; Tagayeva and Others v. Russia, App. No. 26562/07 (Apr. 13, 2017), https://perma.cc/EMD6-5WMN; *Kurt v. Austria*, App. No. 62903/15 (June 15, 2021), https://perma.cc/C8RB-KJG5.

[159] *See* Paz, *supra* note 117, at 181.

[160] "Related to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Judgment on Preliminary Objection), 5 Eur. Ct. H.R. (ser. A), para f. (1967).

[161] BATES, *supra* note 4, at 226 (citation omitted).

[162] Philippe Van Parijs, *Bruxelles Capitale de l'Europe: Les Nouveaux Défis Linguistiques* [*Brussels, the Capital of Europe : The New Linguistic Challenges*], 6 BRUSSELS STUD. 1, 1 (2007) ("La guerre des langues est au cœur de l'histoire de [la] Belgique.").

other rights enshrined in the Convention,"[163] while at the same time outlining for the first time the foundational principles of primarity and subsidiarity in ECHR interpretation.[164] In short, the case is emblematic of broader concerns common to Europe concerning retained sovereignty.

Consider two cases from Psari, Aspropyrgos in Greece involving the "Aspropyrgos Roma ghetto school,"[165] which illustrate how Strasbourg's schooling cases sometimes involve important questions related to immigration, integration, and order in society. On September 13, 2005, about two hundred non-Romani parents protested outside the Aspropyrgos primary school in an effort to block Roma pupils from accessing the school.[166] Roma students at times could only access their school with police escorts.[167] As a result, Roma students were often educated in an annex to the regular school. The case eventually ended up before the ECtHR, which unanimously found a violation in the 2008 *Sampanis and Others v. Greece* judgment. However, the judgment did not end the tense situation in the community. The annex was transformed into a new school, known as the 12th primary school of Aspropyrgos, which only Roma students attended.

Despite a meeting "organized by the Ombudsman [a Greek government mediator], between the direction of this school, the prefecture, the association of parents of (non-Romani) students and the Ombudsman" with the purpose of convincing "the parents to renounce their opposition to the integration of Romani students in ordinary classes," no community consensus was found.[168] Moreover, in response to an invitation by the Greek Ministry of Education to merge the 11th and 12th primary schools of Aspropyrgos, the Mayor of Aspropyrgos and the parents of non-Romani students stated in a joint letter:

> The creation of the 12th primary school did not aim to . . . segregate Romani students from other students in the district schools. It has, however, become an inevitable necessity because Gypsies living in tents have chosen to live a nomadic life, in dumps they have created themselves, without worrying about basic standards of hygiene, and indulging in illegal activities which have a negative impact on vulnerable social groups and, more generally, on the inhabitants of Aspropyrgos . . . in spite of all this, [the Romani children] dare to demand to share the same classrooms as the other students of Aspropyrgos, a considerable percentage of whom are sensitive social groups or children of economic immigrants . . . .[169]

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[163] "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits), 6 Eur. Ct. H.R. (ser. A), para. 5 (1968).

[164] *See* JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2019).

[165] Sarah Montgomery, *Case Watch: Take Two on Greek Roma School*, OPEN SOC'Y JUST. INITIATIVE (Apr. 11, 2011), https://perma.cc/4TXS-593S.

[166] *See* Sampanis and Others v. Greece, 2008 Eur. Ct. H.R., para. 21.

[167] *See id.*

[168] Sampani v. Greece, 2013 Eur. Ct. H.R., para. 11.

[169] *Id.* at para. 19.

Given the intense community disagreement over integration of the Roma community, many of the same allegations made in the 2008 *Sampanis* case were repeated when, unusually, a follow-up case ended up before the ECtHR during the implementation phase of the prior *Sampanis* judgment. This case was entitled *Sampani v. Greece*. Four years after its original judgment, the ECtHR again unanimously found a violation of the Convention. It was not until 2017 that Strasbourg's Committee of Ministers was satisfied with the implementation of the judgment and closed the follow-up examination.[170] In broad terms, these two cases are illustrations of Strasbourg's school cases involving bitter contestation at the community level over immigration and integration, individual and family autonomy, and order in society.

Finally, consider the case of *Catan and Others v. Republic of Moldova and Russia*, decided in 2012. In that case, the Grand Chamber considered possible violations to P1-2, Article 8, and Article 14. These violations arose from the Moldovan Republic of Transdniestria's (MRT) adoption of a policy requiring all schools in MRT to use Cyrillic instead of Latin script and the intimidation and violence that took place against some of those schools when they refused to comply. Though the case proved complex in its jurisdictional and attributional aspects, the Strasbourg Court found that Russia had violated its obligations under P1-2. The ECtHR stated:

> Indeed, it appears that the [MRT's] language policy, as applied to these schools, was intended to enforce the Russification of the language and culture of the Moldovan community living in Transdniestria, in accordance with the [MRT's] overall political objectives of uniting with Russia and separating from Moldova. Given the fundamental importance of primary and secondary education for each child's personal development and future success, it was impermissible to interrupt these children's schooling and force them and their parents to make such difficult choices with the sole purpose of entrenching the separatist ideology.[171]

This passage encapsulates an overlapping set of concerns common to European countries more generally. The case focused on language and education rights under the Convention, but it also involved other important concerns like sovereignty, cultural preservation, language, peace, and safety. The Council of Europe was created in the aftermath of World War II. As noted by Federico Fabbrini, "The memory of the tragedies of the twentieth century had made crystal clear to Europe's political elites that the protection of fundamental rights could not be confined solely to the states and that additional norms and institutions *beyond the state* were necessary to ensure liberty and peace in the European continent."[172] Still, Strasbourg's school cases are illustrative of foundational expectations and misgivings related to belonging to an international human rights mechanism in a region with incredible linguistic, cultural, historical, and geographic diversity that was the primary locus of much of the fighting in the two World Wars.

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[170] *See* Execution of the Judgment of the European Court of Human Rights, Final Resolution CM/ResDH (2017) 96, Sampani and Others v. Greece (App. No. 59608/09) (March 10, 2017), https://perma.cc/MYF8-T6E9.

[171] Catan and Others v. Republic of Moldova and Russia, App. Nos. 43370/04 et al., 57 Eur. H.R. Rep. 99, 145 (2013).

[172] FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE 13 (2014).

C. Strasbourg's Schooling Cases and European Societies

Professors Abdurrahman Hendek and Nigel Fancourt claim that in England and Turkey's religious education spheres, the ECtHR's "decisions are deployed as catalysts for change as well as bulwarks of the status quo."[173] Expanding this hypothesis, one possible way of organizing Strasbourg's schools jurisprudence is the division of judgments into those that catalyzed change and those that preserved the status quo, either in the specific country concerned in the case or beyond. In several of Strasbourg's schooling cases, the ECtHR's ruling served as a catalyst for both small and large domestic change. In a few cases, the rulings catalyzed change beyond the country in which a particular case had its roots. Some Strasbourg judgments have also preserved the status quo in the schools where the cases arose and in other European countries. Below, I consider a few examples of this typology as applied to Strasbourg's schooling cases. The baseline claim is that Strasbourg's schools jurisprudence has served sometimes as a catalyst and other times as a hindrance to broader legal, political, and social change in European societies.

Before diving into this typology, a preliminary word regarding existing terminology is necessary. As a formal matter, the Committee of Ministers under the text of the ECHR supervises the domestic execution of ECtHR judgments.[174] Many scholars have studied domestic compliance with ECtHR judgments, focusing on, for example, the factors that lead to domestic compliance with ECtHR judgments against certain countries.[175]

Beyond compliance, some scholars note that ECtHR judgments sometimes produce ripple effects, influencing domestic judiciaries and administrations beyond those involved directly in the case.[176] While as a factual matter, ECtHR judgments only have *inter partes* effect,[177] in certain circumstances, the Strasbourg Court's rulings do have effects beyond only those countries and parties involved in the dispute, effects which look more like *erga omnes* effects.[178] Moreover, the domestic diffusion of ECtHR caselaw, connected with the *res interpretata* principle, shows that ECtHR

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[173] Abdurrahman Hendek & Nigel Fancourt, *The Effects of Judgements by the European Court of Human Rights on Religious Education in England and Turkey*, 48 RELIGION & EDUC. 436, 436 (2021).

[174] *See* European Convention on Human Rights, *supra* note 4, art. 46. Some argue that the ECtHR itself plays a bigger role in the execution of its judgments. *See, e.g.*, Helen Keller & Cedric Marti, *Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments*, 26 EUR. J. INT'L L. 829, 830 (2015); Lize R. Glass, *The European Court of Human Rights Supervising the Executing of Its Judgments*, 37 NETH. Q. HUM. RTS. 228, 228 (2019).

[175] *See, e.g.*, Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25 EUR. J. INT'L L. 205, 207 (2014); Courtney Hillebrecht, *The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change*, 20 EUR. J. INT'L REL. 1100, 1106–08 (2014).

[176] *See* Laurence R. Helfer & Erik Voeten, *Walking Back Human Rights in Europe?*, 31 EUR. J. INT'L L. 797, 824–25 (2020) ("When the ECtHR expounds the meaning of a particular right or freedom, its interpretation has ripple effects across the 47 member states, all of which have incorporated the Convention into domestic law, and across national judiciaries, many of whose members give significant weight to ECtHR rulings when interpreting rights or freedoms in their respective constitutions.").

[177] *See* Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359, 378 (2005).

[178] *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 78 (2014).

judgments often make their way into domestic jurisdictions not directly involved as respondent states.[179]

Beyond the legal effects (both narrow and broad) of ECtHR judgments, recent socio-legal scholarship emphasizes that the shadow of the Strasbourg Court extends well beyond the legal arena. This scholarship notes that ECtHR judgments have indirect effects stemming from the fact that courts produce not just decisions, but also messages.[180] Looking narrowly at compliance therefore misses "the inherent ambiguity, diversity and the strong contestation that often surrounds how international norms are translated into national policy and practice [and] the wide range of possible effects that international rulings and norms may have in domestic state law and policy but also in the mobilization and empowerment of rights advocates."[181] ECtHR judgments may indirectly affect "public consciousness, change how social actors perceive and articulate their grievances and claims, empower national rights institutions, or prompt mobilization among civil society and other rights advocates."[182] Importantly, these indirect effects may be more important than formal legal and administrative implementation.[183]

My formulation below, borrowing the framework of Professors Hendek and Fancourt and focusing on ECtHR judgments as catalysts of change and bulwarks of the status quo, is necessarily broad and includes elements of domestic compliance, legal ripple effects, and indirect effects. Finally, the typology presented is meant as a suggestive framework, not a comprehensive study of Strasbourg's schools jurisprudence's effect on Europe's schools and societies more generally. That I leave to future scholarship.

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One example from Strasbourg's schools jurisprudence of the ECtHR spurring on domestic change comes from *Campbell and Cosans v. United Kingdom*. In that case, the ECtHR held that the existence of corporal punishment in their children's schools violated the P1-2 rights of two Scottish mothers. Moreover, the Strasbourg Court found that Jeffrey Cosans had had his P1-2 rights violated by being suspended from school for refusing to submit to corporal punishment. While the judgment did not rule that corporal punishment was in all circumstances contrary to the Convention, the judgment did motivate important domestic legislative change. Four years after the case, the Education Act of 1986 preventing corporal punishment in state-funded schools was passed as "a direct response by the British Government to the

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179 *See, e.g.*, DAVID KOSAŘ ET AL., DOMESTIC JUDICIAL TREATMENT OF EUROPEAN COURT OF HUMAN RIGHTS CASE LAW: BEYOND COMPLIANCE 4, 8 (2020) (offering the "first comprehensive empirical analysis of the use of Strasbourg case law and its effect on the reasoning of domestic courts" in the Czech Republic and showing that "domestic courts act as norm diffusers, often pushing for the direct implementation of principles delivered in judgments issued against other CoE member countries").

180 *See* Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, 4 OXFORD J.L. & RELIGION 54, 71–72 (2015) (citation omitted).

181 DIA ANAGNOSTOU, THE EUROPEAN CONVENTION OF HUMAN RIGHTS REGIME: REFORM OF IMMIGRATION AND MINORITY POLICIES FROM AFAR 163 (2022).

182 Dia Anagnostou & Effie Fokas, *The "Radiating Effects" of the ECtHR on Social Mobilizations Around Religion and Education in Europe: An Analytical Frame*, 12 POL. & RELIGION 9, 10 (2019).

183 *See id.*

decision of the European Court in *Campbell and Cosans*."[184] This is particularly significant as contemporaneous evidence suggests that broader Scottish society at the time accepted the use of corporal punishment in schools.[185] The judgment indicated that the majority of Scottish parents supported the use of corporal punishment in schools, and reportedly some pupils even preferred it to other forms of punishment.[186] *Campbell and Cosans* therefore suggests that the Strasbourg Court does sometimes act as a counter-majoritarian institution and can bring about domestic legislative change, despite opposition from segments of society.

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An example from Strasbourg's schools jurisprudence of the ECtHR spurring on both domestic change and international change is *D.H. II*. To be clear, other scholarship has addressed the extent to which a court like the ECtHR can push through *systemic* change such as that at play in the *D.H. II* case.[187] The claim here is broader and relates not to the success with which the Strasbourg Court can achieve systemic change and the factors that help or hinder this process, but rather the claim is that the ECtHR's judgments do in fact catalyze some important change.

In the *D.H. II* Grand Chamber judgment, the ECtHR held in favor of eighteen Roma applicants from Ostrava who argued that their placement in special schools violated their rights under Article 14 and P1-2 of the ECHR.[188] This judgment has catalyzed important change in the Czech Republic, albeit slowly and on its own trajectory. Though the judgment is still being implemented some fifteen years later, the 2020 report of the Committee of Ministers welcomed several positive developments regarding the situation of Roma in education, particularly following legislative reform in the Czech Republic in 2016.[189] As Hubert Smekal and Katarína Šipulová pointed out in 2014, the ability of the ECtHR to push for the overhaul of a domestic education system is as complicated as it is difficult and depends on many factors.[190] Moreover, in a study about domestic compliance with international human rights bodies' decisions including the *D.H. II* case, David Kosař and Jan Petrov have noted that "the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance, on the one hand, with the international reputational costs of non-compliance, on the other."[191] What is clear from this scholarship, and compliance scholarship more generally, is that domestic compliance with rulings of the ECtHR is complex and context-dependent. Nonetheless, while the Czech Republic has far from perfectly

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184 Ralph Beddard, *Corporal Punishment in Schools: Recent Decisions from Strasbourg*, 6 EDUC. & L. 27, 28 (1994).

185 *See How the Tawse Left its Mark on Scottish Pupils*, BBC NEWS (Feb. 22, 2017), https://perma.cc/3CQC-K5HJ (noting that up until the 1980s, the culture of Scottish society completely accepted the use of corporal punishment).

186 *See* Campbell and Cosans v. U.K., 48 Eur. Ct. H.R. (ser. A), para. 18 (1982).

187 *See* Smekal & Šipulová, *supra* note 114; ANAGNOSTOU, *supra* note 181, at 143.

188 D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, para. 210.

189 Communication DH(2020)24 of 7 October 2020, para. 4.

190 Smekal & Šipulová, *supra* note 114, at 304–12.

191 David Kosař & Jan Petrov, *Determinants of Compliance Difficulties Among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic*, 29 EUR. J. INT'L. L. 397, 422 (2018).

integrated the Roma minority into mainstream Czech education, it is reasonable to say that the *D.H. II* judgment has spurred on important change at the domestic level.[192] As one commentator has written, "Through successive iterations and exchanges between the supervisory bodies, state authorities and non-governmental actors, the *D.H.* implementation process led to incremental, nonetheless important legislative, administrative and policy changes."[193] In other words, despite the fact that "there is much work to be done,"[194] the ECtHR's *D.H. II* ruling was an important—and catalytic—first step towards change for the Roma within the Czech educational system.

One commentator, writing after the *D.H. II* judgment was released, said that "[t]hough the decision in D.H. and Others is binding only on the Czech Republic, in the months following the decision it has become clear that it is having an immediate and tangible effect on legal systems throughout Europe."[195] Empirically, this is a very difficult claim to assess. What may be said about the *D.H. II* case within the framework of Strasbourg's schools jurisprudence is that the reasoning and holding in the case pushed the door wide open for others, including strategic litigators, to challenge discriminatory practices against Roma in the rest of Europe, thereby spurring on change beyond the Czech Republic. The Grand Chamber in *D.H. II* made several specific findings that propped open the door for future Roma discrimination cases. First, it charted a new course by introducing a statistical burden-shifting standard in Roma indirect discrimination cases. Second, it emphasized the importance of the educational context for combatting discrimination against Roma pupils. Third, the case introduced a positive obligation on states to introduce safeguards in schools to protect Roma pupils from discrimination.

These findings served as the foundation on which strategic litigators brought cases in other European countries that ultimately ended up before the ECtHR. In all seven other cases involving discrimination against Roma in schools,[196] the ECtHR found a violation of Article 14 taken together with P1-2 based on at least one of the three findings in *D.H. II* mentioned above.

Hence, the subsequent set of Roma discrimination cases in schools are, in a sense, the progeny of *D.H. II*. These later cases have suffered from similar implementation difficulties, setbacks, and lackluster progress.[197] Despite implementation

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[192] One such indirect but important change was an apparent confidence that the ECtHR's judgment imparted to the Roma Community itself. *See* Filip Sys, D.H. v. Czech Republic, *Roma Educational Equality and the Vulnerability of Strategic Litigation*, 20 ACTA UNIVERSITATIS CAROLINAE STUDIA TERRITORIALIA 71, 88 (2020).

[193] ANAGNOSTOU, *supra* note 181, at 150–51.

[194] Sys, *supra* note 192, at 95.

[195] Jennifer Devroye, *The Case of* D.H. and Others v. the Czech Republic, 7 NW. J. INT'L HUM. RTS. 81, 100 (2009) ("*D.H. and Others* is also likely to compel national constitutional courts across Europe to examine *de facto* situations of discrimination, rather than simply analyzing whether a law was facially neutral and being followed to the letter . . . .").

[196] These cases are *Horváth v. Hungary*, 2013 Eur. Ct. H.R.; *Sampanis and Others v. Greece*, 2008 Eur. Ct. H.R.; *Sampani v. Greece*, 2013 Eur. Ct. H.R.; *Lavida v. Greece*, 2013 Eur. Ct. H.R.; *Oršuš and Others v. Croatia*, 2010-II Eur. Ct. H.R. 247; *X and Others v. Albania*, App. Nos. 73548/17 & 45521/19 (Aug. 31, 2022), https://perma.cc/7YMQ-WS48; and *Elmazova and Others v. North Macedonia*, App. Nos. 11811/20 & 13550/20, (Dec. 13, 2022), https://perma.cc/CNG6-DHNH.

[197] *See* Smekal & Šipulová, *supra* note 114, at 301 ("It is claimed that ECtHR judgments concerning the Roma have the worst track record of implementation.") (citations omitted).

difficulties, however, these subsequent cases that rely on *D.H. II* have catalyzed change for Roma pupils beyond the borders of the Czech Republic.[198]

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One instance within Strasbourg's schools jurisprudence of the ECtHR preserving the domestic status quo relates to mandatory sex education classes. In *Kjeldsen v. Denmark*, mentioned above, and several follow-up admissibility decisions, the Strasbourg Court held that mandatory sex education classes, even in the case of young children, do not violate the Convention. Studies revealed that prior to the *Kjeldsen* case, in Western and Northern Europe, "[w]ith the exception of the Republic of Ireland (Eire), all countries of this region have accepted the need for sex education in schools in the interest of children's mental and physical health and of human rights."[199] Some countries introduced compulsory sexual education across the country and some left the decision to the local education authorities.[200] Denmark's legislature, concerned about the health of its young people, passed a law making sex education compulsory. Three sets of parents challenged this law, arguing that it infringed upon their right to educate their children according to their religious convictions.

The *Kjeldsen* court upheld Denmark's legislation, finding that the legislation "in itself in no way offends the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol (P1-2), interpreted in the light of its first sentence and of the whole of the Convention."[201] In particular, the ECtHR placed the emphasis on the fact that:

> The public authorities wish to enable pupils, when the time comes, "to take care of themselves and show consideration for others in that respect", "not . . . to land themselves or others in difficulties solely on account of lack of knowledge."[202]

The Danish sex education legislation, passed with domestic democratic imprimatur, withstood a reasonable claim under the Convention. In rejecting the Christian parents' attempt to exempt their children from sex education, the Strasbourg Court preserved the newfound status quo in Denmark in which pupils had to attend sex education classes to prepare them for and protect them from possible harms.[203]

In three follow up admissibility decisions, the Strasbourg Court upheld national decisions that had made sex education mandatory, even for very young pupils. In *Dojan and Others v. Germany*, Christian Evangelical Baptist Church parents with

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198 *See* ANAGNOSTOU, *supra* note 181, at 159 (noting that one apparent effect of the *D.H.* case and its progeny was their role as "catalysts for domestic follow-on litigation").

199 Edmund H. Kellogg & Jan Stepan, *Legal Aspects of Sex Education*, 26 AM. J. COMP. L. 573, 576 (1978).

200 *Id.* at 576–77.

201 Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 711, para. 54 (1976).

202 *Id.* (citation omitted).

203 This may be particularly important, as "[t]he school is likely the first place where students may witness first-hand the state's role in shaping attitudes toward sex, defining the parameters of acceptable sex and sexuality, and cultivating a robust understanding of sexual rights." Murray, *supra* note 40, at 1485.

children in school in Salzkotten, Germany objected to compulsory sex education classes on account of their religious beliefs, amongst other reasons. In upholding Germany's compulsory classes as consistent with the Convention, the ECtHR reasoned that the sex education classes' purpose was the "neutral transmission of knowledge . . . with a view to enabling children to deal critically with influences from society[,] instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society."[204] As such, Germany had not overstepped its margin of appreciation in the educational realm. Moreover, in *A.R. and L.R. v. Switzerland*, the ECtHR declared inadmissible the request of a mother to have her seven-year-old daughter exempted from the mandatory sex education class in her primary school in Basel.[205] The ECtHR again upheld the decision of the domestic authorities, despite the sensitive nature of the case, in part to protect children's physical and mental health. Finally, in *Alonso and Merino v. Spain*, the ECtHR also declared inadmissible the application of a father and his daughter who, amongst other things, objected to the teaching of human sexuality as part of a natural science class in a state school in Treceño.[206] This string of cases saw the Strasbourg Court refuse to overturn democratic decisions made at the national or local levels regarding mandatory sex education, even in the case of young children. In doing so, the ECtHR preserved the national status quo with respect to mandatory sex education in the schools of the countries concerned.

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Another illustration from Strasbourg's schools jurisprudence of the ECtHR preserving the status quo, with important implications for the rest of the countries in the Council of Europe, is the Grand Chamber's judgment in *Lautsi II*. In that case, the Grand Chamber had to decide whether the presence of crucifixes on the wall of Italian classrooms violated the Lautsi family's religious rights under the Convention.[207] Eight governments intervened in the case and emphasized that the case went beyond just crucifixes in Italian classrooms.[208] According to them, the "huge diversity of Church-State arrangements in Europe" meant that extending the Chamber's view "to the whole of Europe would represent the 'Americanisation' of Europe in that a single and unique rule and a rigid separation of Church and State would be binding on everyone."[209] In other words, precisely because the Council of Europe consists of sovereign nations, each with its own history, culture, religious personality, and language, the Strasbourg Court must tread very carefully and respect sovereign decisions of member states where the case is not extreme and there is no European consensus on the matter.

Likewise, Joseph Weiler, who represented those eight states in *Lautsi II*, elucidated in a speech before the Grand Chamber:

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204 Dojan and Others v. Germany, 2011 Eur. Ct. H.R., at 14–15.

205 A.R. and L.R. v. Switzerland (dec.), App. No. 22338/15, para. 53 (Dec. 19, 2017), https://perma.cc/WJU4-NEM9.

206 Alonso and Merino v. Spain, 2000-VI Eur. Ct. H.R. 465, 479.

207 Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61, para. 57.

208 *See id.* at para. 47.

209 *Id.*

> This case is not only about the crucifix. It is also about the tension between individual rights and collective identity, the tension between the role of courts and of political democratic institutions, and the tension between the uniform values which the Convention system espouses, and the rich diversity which characterizes the European legal landscape.[210]

The undertone of these sentiments before the ECtHR suggests that the case had implications for a religiously diverse Europe. As such, by granting Italy a wide margin of appreciation and overturning the lower chamber judgment, the Grand Chamber in *Lautsi II* halted what would have been a cross-European reckoning on the place of religion in public schools, as well as in the public sphere more generally. During the case, questions arose regarding the judgment's ultimate effect on religious holidays in various European countries, the flag and national anthem of England, crosses on national currencies, reading the Irish or German constitution in classrooms, and the French conception of *laïcité*. In a concrete example, a Romanian activist brought a claim against the Romanian state regarding the presence of icons in public school classrooms, "but his lawyers were demobilized in the aftermath of the 2011 Grand Chamber decision."[211] And another study of the indirect effects of *Lautsi II* in Greece, Italy, Romania, and Turkey concluded that the judgment's "reverberations were powerful both across the four countries studied as well as across issue areas . . . [since] it encouraged majority actors seeking to preserve the status quo, and operated as a demobilizing factor for secularist actors in fields well beyond that of religion and education."[212] Thus, the Grand Chamber's judgment finding no violation of the Convention meant that no answer had to be provided for important questions in other countries. The ECtHR therefore preserved the status quo in Europe regarding religious symbols in schools specifically and in the public sphere more generally.

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Professor Justin Driver posits that both those U.S. constitutional scholars who believe that the U.S. Supreme Court can "achieve almost anything" and those who "suggest that it can accomplish virtually nothing" are incorrect.[213] His reading of the U.S. Supreme Court's jurisprudence concerning schools leads him to contend that the U.S. Supreme Court's school cases illustrate that it "is neither omnipotent nor impotent, but, simply, unambiguously potent."[214] A comprehensive reading of Strasbourg's schools jurisprudence might lead one to the same conclusion. The debate over the extent to which the ECtHR functions like a constitutional court continues.[215] Strasbourg's judgments do not have immediate and direct effect across the Council

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[210] Videotape: Crucifix in the Classroom - Joseph Weiler Before the European Court of Human Rights (2011), available at https://perma.cc/6TCC-6CET.

[211] Fokas, *supra* note 180, at 72.

[212] Anagnostou & Fokas, *supra* note 182, at 25.

[213] DRIVER, *supra* note 8, at 20.

[214] *Id.* at 22.

[215] *See* Wojciech Sadurski, *Quasi-Constitutional Court of Human Rights for Europe? Comments on Geir Ulfstein*, 10 GLOB. CONST. 175, 175 (2021).

of Europe, nor does the Strasbourg Court have robust enforcement powers.[216] At the same time, this does not mean that the ECtHR has no power in real terms. Strasbourg's schools jurisprudence illustrates the dynamic nature of the ECtHR's authority. Driver's claim is sufficiently broad to encompass "the capacious middle ground"[217] of the powers of both a national apex court and an international human rights court. As Strasbourg's schooling cases clearly demonstrate, the ECtHR does sometimes contribute in significant ways to the wider legal and social landscape of European societies.

In conclusion, when most people think of the contributions that the ECtHR has made to Europe, they are likely to think of foundational cases outside the school realm. They may think of end-of-life questions, voting rights, reproductive rights, gay marriage, or environmental issues. Going forward, cases arising within Europe's schoolhouse gate should also make the list.

IV. CONCLUSION

The school as a site of human rights conflict has been understudied in European human rights literature. By introducing "Strasbourg's schools jurisprudence" as a field of study, this Article has started to take steps towards bridging that gap, inspired by the arguments of Professor Driver's *The Schoolhouse Gate* in the United States context. In a sense, this Article is a call to arms for deeper consideration of the intersection between schools and human rights in Europe. More in-depth research about the knock-on effects—legal, political, and societal—of Strasbourg's schooling judgments would prove fruitful. Startlingly, in many of the legal discussions involving human rights at school, pedagogical experts and teachers are entirely left out of the discussion. Further academic research would do well to include their views on the intersection between pedagogy and rights in school. The relationship between schools, democracy, and the ECtHR could be further explored. This is particularly important given the history of the Council of Europe and what occurred with respect to youth and schools during the Third Reich.[218] And beyond Europe's historical context, some commentators have warned that "the rise of populistic-autocratic regimes" in Europe may have a big impact on the future of European schools and education.[219] The role of supranational rights protection in this changing context is worthy of scholarly attention. Finally, as stated in the Introduction, there are important insights to be gained by examining jurisprudence relating to specific institutions like schools. As this Article has suggested, it may not be unreasonable to think of "the Convention law of schools" as a distinct field of study. A domain-centered approach to judicial interpretation of the ECHR may allow scholars to better understand judicial

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[216] *See* Veronika Fikfak & Lora Izvorova, *Language and Persuasion: Human Dignity at the European Court of Human Rights*, 22 HUM. RTS. L. REV. 1, 3 (2022) ("[I]f the Court has the power to tell the state *what the law* is, as an international court it has very low enforcement authority and compliance with its decisions is always voluntary.").

[217] DRIVER, *supra* note 8, at 22.

[218] *See, e.g.*, Daniel Horn, *The Hitler Youth and Educational Decline in the Third Reich*, 16 HIST. EDUC. Q. 425, 425 (1976). The expansion of the Council of Europe following the fall of the Berlin Wall and the inclusion in the Convention system of schools that were formerly part of authoritarian regimes also forms an important part of Europe's historical trajectory.

[219] PETER RADO ET AL., ADAPTING TO FUTURE CHALLENGES TO EDUCATION: HUNGARY, POLAND, ROMANIA, SERBIA, AND SLOVAKIA 21–22 (2021).

interpretation in cases concerning specific institutional contexts. Likewise, further such study could help Strasbourg's judges craft a sharper and more consistent jurisprudence, clarifying how certain institutional characteristics interact with Convention interpretation.

Regardless of how the ECtHR has addressed human rights claims involving elementary and secondary schools in the past, this Article has shown that schools have acted as significant vectors of human rights contestation and Convention interpretation in the Council of Europe. Given the prevalence of cases in the Strasbourg Court involving the interpretation of the ECHR in schooling matters, as well as the high threshold in ECtHR caselaw with respect to discrimination and safety in schools, the suspicion is that the story of human rights within Europe's schoolhouse gate is not yet over.