

## IS CIRCUMCISION LEGAL?

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### INTRODUCTION

An important, divisive,<sup>1</sup> and unanswered question of American law – and indeed of international law – is whether it is legal to circumcise healthy boys.

American medical associations<sup>2</sup> and experts assert that circumcision is a common,<sup>3</sup> safe,<sup>4</sup> and relatively painless<sup>5</sup> procedure with many medical benefits<sup>6</sup> that exceed the risks.<sup>7</sup> They argue that insurance should pay for it.<sup>8</sup> Some religious organizations argue that circumcision is a sacred religious ritual.<sup>9</sup> In any event, proponents claim that parents have a general and religious right to make the circumcision decision.<sup>10</sup> They can point to

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Disclosure: no ethical conflict.

1. Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. POL'Y & L. 497, 497 (2002).

2. American medical associations have published numerous circumcision policy statements since 1971. These associations include the American Academy of Pediatrics (“AAP”), American Medical Association (“AMA”), American Academy of Obstetricians and Gynecologists (“ACOG”), and American Academy of Family Physicians. *E.g.*, American Academy of Pediatrics, *Male Circumcision*, 130 PEDIATRICS, no. 3, 2012, at e756, <http://pediatrics.aappublications.org/content/130/3/e756.full>. The ACOG has endorsed the 2012 AAP Report. *Id.* at e757.

3. *Id.* at e757.

4. David Perlstein, *Circumcision: The Surgical Procedure*, MEDICINET, [http://www.medicinenet.com/circumcision\\_the\\_surgical\\_procedure/article.htm](http://www.medicinenet.com/circumcision_the_surgical_procedure/article.htm) (last visited Nov. 16, 2012).

5. *Male Circumcision*, *supra* note 2, at e757 (“Analgesia is safe and effective in reducing the procedural pain associated with newborn circumcision.”); *Male Circumcision*, *supra* note 2, at e770–71 (describing subcutaneous ring block injections and dorsal penile nerve block injections as effective techniques in mitigating pain and its consequences during circumcision of newborns).

6. *Id.* at e756 (“Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some sexually transmitted infections, and penile cancer.”).

7. *Id.* at e772 (citing two large U.S. hospital-based studies estimating “the risk of significant acute circumcisions in the United States to be between 0.19% and 0.22%”).

8. *Id.* at e757 (“The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure.”).

9. *E.g.*, *In re Marriage of Boldt*, 176 P.3d 388, 393–94 (Or. 2008) (accepting the arguments of the American Jewish Congress and the Union of Orthodox Jewish Congregations of America that a father has the right under the freedom of religion clause to make the circumcision decision).

10. *Male Circumcision*, *supra* note 2, at e778 (“Parents should weight the health benefits and risks in

the fact that no physician has ever been held liable by an American court for a properly performed circumcision.<sup>11</sup>

Legal scholars,<sup>12</sup> foreign medical associations,<sup>13</sup> intactivist organizations,<sup>14</sup> and increasing numbers of men<sup>15</sup> claim the opposite, namely that circumcision is painful,<sup>16</sup> risky,<sup>17</sup> harmful, irreversible surgery<sup>18</sup> that benefits few men, if any.<sup>19</sup> These opponents of circumcision argue that, in any event, boys have a right to be left genitally intact,<sup>20</sup> like girls under federal law,<sup>21</sup> and to make the circumcision decision for themselves as adults.<sup>22</sup> These opponents of circumcision can point to a June 2012 decision by a court in Cologne, Germany, which held that non-

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light of their own religious, cultural, and personal preferences, as the medical benefits alone may not outweigh these other considerations for individual families.”).

11. *But see* Joe Kennedy, *Man Takes on Circumcision as His Cause Celebre*, THE ROANOKE TIMES, Apr. 23, 2005, <http://www.roanoke.com/columnists/kennedy/wb/xp-22348> (recounting how, in 2003, William Stowell settled a lawsuit arising from a properly performed circumcision in part by claiming that it is unlawful for physicians and hospitals to circumcise healthy, non-consenting minors).

12. R.S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 BRIT. J. UROLOGY 63, 63 (Supp. I 1999) (“Recently, legal scholars have challenged the legality of neonatal circumcision.”).

13. *See generally, e.g.*, Symposium, *The Law & Ethics of Male Circumcision – Guidance for Doctors*, 30 J. MED. ETHICS 259 (2004); *see also* Fetus and Newborn Comm. of the Canadian Paediatric Soc’y, *Neonatal Circumcision Revisited*, 154 CAN. MED. ASS’N J.1996 769, 769–80; Austl. Med. Ass’n, *Circumcision Deterred*, 6-20 AUSTL. MED., 1997, at 1, 5, available at <http://www.cirp.org/library/statements/ama2/>; Royal Australasian Coll. of Physicians, *Circumcision of Male Infants*, PEDIATRICS & CHILD HEALTH DIV., Sept. 2010; Royal Dutch Med. Ass’n, *Non-Therapeutic Circumcision of Male Minors* (2010), <http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Nontherapeutic-circumcision-of-male-minors-2010.htm>.

14. *E.g.*, *Deciding Whether or Not to Circumcise Your Son*, INTACT AMERICA, <http://intactamerica.org/resources/decision> (last visited Nov. 17, 2012); Dan Bollinger, *Position Paper on Neonatal Circumcision and Genital Integrity*, INT’L COAL. FOR GENITAL INTEGRITY 1, 1 (Sept. 24, 2007), <http://www.icgi.org/Downloads/ICGIoverview.pdf>; MOTHERS AGAINST CIRCUMCISION, <http://www.mothersagainstcirc.org/> (last visited Nov. 16, 2012); JEWS AGAINST CIRCUMCISION, <http://www.jewsagainstcircumcision.org>.

15. Darcia Navarez, *More Circumcision Myths You May Believe: Hygiene and STDs, Is Circumcision Cleaner and Healthier?*, PSYCHOLOGY TODAY (Sept. 13, 2011), <http://www.psychologytoday.com/blog/moral-landscapes/201109/more-circumcision-myths-you-may-believe-hygiene-and-stds> (claiming if boys could talk while being circumcised, they would be adamant opponents).

16. INTACT AMERICA, *supra* note 14.

17. *Id.*

18. *Id.*

19. Royal Dutch Med. Ass’n, *supra* note 13 (“There is no convincing evidence that circumcision is useful or necessary in terms of prevention or hygiene . . . KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications.”).

20. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to Surgical Amputation of Normal, Healthy Tissue in their Newborn Children?*, 7 AM. U. J. GENDER SOC. POL’Y & L. 87, 88 (1998).

21. Female Genital Mutilation 18 U.S.C. § 116 (2006).

22. *See generally* Povenmire, *supra* note 20, at 88.

therapeutic circumcision for religious reasons is criminal assault.<sup>23</sup> The German court reasoned that circumcision causes grievous bodily harm,<sup>24</sup> and that boys have a fundamental right to genital integrity that supersedes their parents' religious rights.<sup>25</sup>

Thus, a battle is unfolding in courts and legislatures<sup>26</sup> as to the legality of circumcision. Amidst all of the divisiveness and hyperbole, we need to ask, what are the relevant facts, legal issues, and what is the applicable law?

## I. THE FACTS

### A. Origins

Almost all mammals have foreskins.<sup>27</sup> The male and female genitalia, which are identical in early gestation,<sup>28</sup> have evolved to function together during sexual intercourse over sixty-five to one hundred million years.<sup>29</sup> Male and female circumcisions have been practiced for thousands of years,<sup>30</sup> usually for religious, cultural, and personal reasons.<sup>31</sup> Male circumcision has been performed as a religious ritual,<sup>32</sup> a painful obligatory rite of passage,<sup>33</sup> to mark or brand slaves and members of religious or tribal groups,<sup>34</sup> and to suppress sexuality.<sup>35</sup> American physicians introduced the

23. *German Court Rules Circumcision is 'Bodily Harm'*, BBC NEWS EUROPE, June 26, 2012, <http://www.bbc.co.uk/news/world-europe-18604664>.

24. Nicholas Kulish, *German Ruling Against Circumcising Draws Criticism*, N.Y. TIMES, June 26, 2012, <http://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html>.

25. BBC, *supra* note 23.

26. See Religious and Parental Rights Defense Act of 2011, H.R. 2400, 112th Cong. (2011) (prohibiting states from adopting any law or regulation restricting a parent's right to circumcise their male children). MGMBill.Org sent a proposed bill to Congress and fifteen states that would extend the same protection to boys from genital cutting as girls enjoy. *State MGM Bills*, MGMBILL.ORG, <http://mgmbill.org/statemgmbills.htm> (last visited Feb. 6, 2013); *US MGM Bill*, MGMBILL.ORG, <http://mgmbill.org/usmgmbill.htm> (last visited Feb. 6, 2013). Currently, it has not been sponsored by any member of Congress. *US MGM Bill Status*, MGMBILL.ORG, <http://www.mgmbill.org/usmgmbillstatus.htm> (last visited Feb. 6, 2013).

27. See *History and Biology: Evolutionary Perspectives on the Foreskin*, HISTORY OF CIRCUMCISION, <http://www.historyofcircumcision.net/index.php?option=content&task=view&id=15> (last visited Feb. 6, 2013).

28. Steve Scott, *The Anatomy and Physiology of the Human Prepuce*, MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL, AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 9–10 (George C. Denniston et al. eds., 1999).

29. C.J. Cold & J.R. Taylor, *The Prepuce*, 83 BRIT. J. UROLOGY 34, 34 (Supp. 1 1999).

30. W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROLOGY 1, 1 (Supp. 1 1999) (stating that circumcision was customary in Egypt several thousand years before 2300 BCE).

31. See, e.g., AM. MED. ASS'N, CSA REP. 10, I-99, 17 (1999), available at [www.cirp.org/library/statements/ama2000/](http://www.cirp.org/library/statements/ama2000/) (“[P]arental decision-making [about circumcision] is based on social or cultural expectations, rather than medical concerns.”).

32. Dunsmuir & Gordon, *supra* note 30, at 1-2.

33. *Id.* at 1.

34. *Id.*

35. M. Fox & M. Thomson, *A Covenant with the Status Quo? Male Circumcision and the New BMA*

practice in the late 1800s in an unsuccessful effort to prevent masturbation.<sup>36</sup> For the following century, American physicians claimed that circumcision prevented or cured a long list of diseases such as epilepsy, paralysis, hip-joint disease, bad digestion, inflammation of the bladder, and tuberculosis; in fact, an uncircumcised penis was “seen as the cause of most human diseases and socially unacceptable behaviours.”<sup>37</sup>

### B. Medical Opinion

A large number of medical associations decline to recommend circumcision.<sup>38</sup> In 1971, the American Academy of Pediatrics (“AAP”) stated there was no valid medical rationale for routine neonatal circumcision.<sup>39</sup> In its 1999 policy report, reaffirmed in 2005,<sup>40</sup> the AAP stated: “Existing scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data not sufficient to recommend routine neonatal circumcision.”<sup>41</sup> Even in its comparatively pro-circumcision statement in 2012, the Academy did not recommend circumcision.<sup>42</sup> Some foreign medical associations also actively discourage the practice.<sup>43</sup>

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*Guidance to Doctors*, 31 J. MED. ETHICS 463, 464 (2005) (“Significantly, both male and female circumcision were justified in terms of managing sexuality.”).

36. *Id.*

37. See MALE AND FEMALE CIRCUMCISION 39–42, 259 (George C. Denniston et al. eds. 1999); *Position Paper on Neonatal Circumcision and Genital Integrity*, INT’L COALITION FOR GENITAL INTEGRITY 1, 1 (Sept. 28, 2007), <http://www.icgi.org/Downloads/ICGIoverview.pdf>; see also Fox & Thomson, *supra* note 35.

38. See *Circumcision: Medical Organization Official Policy Statement*, CIRCUMCISION INFO. AND RESOURCE PAGES, <http://www.cirp.org/library/statements/> (last visited Nov. 15, 2012) (listing “official policy statements of various medical organizations regarding non-therapeutic male circumcision;” none of the policy statements in the CIRP.Org library recommends non-therapeutic child circumcision.).

39. See Ellen Shapiro, *American Academy of Pediatrics Policy Statements*, 1 REVIEWS IN UROLOGY 154, 154 (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1477524>.

40. AAP *Publications Retired and Reaffirmed*, AM. ACAD. PEDIATRICS, <http://pediatrics.aappublications.org/content/116/3/796.full> (last visited Nov. 20, 2012).

41. Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS, no. 9, 1999, at 686, available at <http://pediatrics.aappublications.org/content/103/3/686.full>.

42. *Id.*

43. See, e.g., E. Outerbridge, *Neonatal Circumcision Revisited*, 154 CAN. MED. ASSOC. J., no. 6, 1996, at 769–80, available at <http://www.cps.ca/en/documents/position/circumcision> (last visited Nov. 15, 2012) (“[The Canadian Paediatric Society] does not support recommending circumcision as a routine procedure for newborns”); ROYAL DUTCH MEDICAL ASSOCIATION, NON-THERAPEUTIC CIRCUMCISION OF MALE MINORS (2010), <http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Nontherapeutic-circumcision-of-male-minors-2010.htm> (last visited Nov. 15, 2012) (“KNMG is therefore urging a strong policy of deterrence. KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications. Non-therapeutic circumcision of male minors conflicts with the child’s right to autonomy and physical integrity.”).

### C. Parental Consent

Although the national American medical associations have never recommended non-therapeutic circumcision, since 1971 they have continuously asserted that parents have the right to make the circumcision decision for religious, cultural, or personal reasons<sup>44</sup> (which is to say for any reason). Some American physicians may solicit consent to the circumcision operation from vulnerable<sup>45</sup> and usually uninformed parents.<sup>46</sup> They sometimes badger and pressure parents to give their consent.<sup>47</sup> Some American physicians recommend circumcision even though their medical associations do not.<sup>48</sup> In soliciting circumcision, doctors may mention cancer, sexually transmitted diseases, and HIV to parents,<sup>49</sup> may claim that circumcision has medical benefits,<sup>50</sup> or tell parents that it is legitimate for them to make the circumcision decision for religious, cultural, and personal reasons.<sup>51</sup> Physicians may not mention any risks, and if they do, they may take the same position as the AAP: that the risks are very low.<sup>52</sup> After obtaining parental consent, American physicians circumcise more than one million American boys each year, usually within one to two days of their

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44. See *Male Circumcision*, *supra* note 2, at e756 (“Parents should weigh the health benefits and risks in light of their own religious, cultural, and personal preferences, as the medical benefits alone may not outweigh these other considerations for individual families.”).

45. See, e.g., Kennedy, *supra* note 11 (recounting how, in 2003, William Stowell settled a lawsuit arising from a properly performed circumcision in part by claiming that it was unlawful for the physician to solicit consent from his mother while she was under the influence of anesthesia).

46. See, e.g., Mark Jenkins, *Separated At Birth: Did Circumcision Ruin Your Sex Life?*, MEN’S HEALTH, July/Aug. 1998, 130, available at <http://www.noharmm.org/separated.htm> (“Most parents don’t know what circumcision really is, and yet 65 percent of them still allow doctors to do the surgery.”).

47. A woman reports that her brother was circumcised in a Canadian hospital without consent. When she herself was pregnant, and after the birth of her son, she was “constantly pressured” by physicians, midwives, an ultra-stenographer, her husband, and in-laws, to circumcise him. Physicians gave her many arguments (e.g., so he would look like the father, reduce risk of UTIs, improve sex). The pressure was so great that she marked his card “Do not Circ” and left the hospital one day early out of fear that the hospital might circumcise him anyway. She states, “I met a neighbor who was as against circ as I was and had relented to [the] pressure and they cut the tip of her son’s penis off!” Email from Annette B. of Elmira, New York, to the writer (October 20, 2012) (on file with author).

48. See, e.g., Jonathan Freedman, *Doctors’ Circumcision Recommendations Influenced by Personal Factors, Study Finds*, INTACTNEWS (Oct. 16, 2011, 11:52 PM), <http://intactnews.org/node/135/13188-23579/doctors039-circumcision-recommendations-influenced-personal-factors-study-finds>.

49. See, e.g., *Circumcision*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/labornbirth/-circumcision.html> (last visited Nov. 15, 2012) (mentioning cancer prevention and reduced risk of sexually transmitted diseases as benefits of circumcision).

50. See, e.g., *Where We Stand: Circumcision*, HEALTHYCHILDREN.ORG, <http://www.healthychildren.org/-English/ages-stages/prenatal/decisions-to-make/Pages/Where-We-Stand-Circumcision.aspx> (last visited Nov. 15, 2012) (claiming undefined medical benefits from circumcision).

51. *Circumcision Policy Statement*, *supra* note 41; American Academy of Family Physicians, *Position Paper on Neonatal Circumcision*, CIRCUMCISION INFO. & RESOURCE PAGES (2002) <http://www.cirp.org/library/statements/aafp2002/>.

52. *Circumcision Policy Statement*, *supra* note 41.

birth.<sup>53</sup> The best predictor of whether a given boy will be circumcised is the circumcision status of his father.<sup>54</sup>

#### D. The Surgery

American medical associations have stated that neonatal circumcision is elective, non-therapeutic surgery.<sup>55</sup> It is irreversible surgery<sup>56</sup> that removes approximately one-half of the covering of the penis.<sup>57</sup> Newborn boys must first be immobilized on a board.<sup>58</sup> The surgery is invasive.<sup>59</sup> The foreskin is fused to the glans penis at birth, and that the two must be forced apart.<sup>60</sup> Then a clamp may be used or a device attached to stop blood flow to the foreskin until it dies.<sup>61</sup> These clamps have been blamed for serious injuries.<sup>62</sup> Throughout the first half of the twentieth century, the prevailing medical opinion was that infants do not feel pain, or not to the same degree as adults, and operations on children without anesthesia were commonplace;<sup>63</sup> in 1999, however, some American medical associations stated that neonatal circumcision is painful and that anesthesia should be used.<sup>64</sup> At that time, however, only forty-five percent of physicians were using anesthesia;<sup>65</sup> additionally, anesthesia may be ineffective.<sup>66</sup> Boys

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53. *Circumcision, the Ultimate Parenting Dilemma*, BBC, <http://www.bbc.co.uk/news/magazine-19072761> (last visited Nov. 15, 2012) (“Three-quarters of American adult men are circumcised. There are over one million procedures each year, or around one every 30 seconds.”).

54. Mark S. Brown & Cheryl A. Brown, *Circumcision Decision: Prominence of Social Concerns*, 80 PEDIATRICS, no. 2, 1987, at 215–19, <http://pediatrics.aappublications.org/content/80/2/215.abstract>.

55. AM. MED. ASS’N, NEONATAL CIRCUMCISION (2000), available at <http://www.cirp.org/library/statements/ama2000>.

56. BRITISH MEDICAL ASSOC., THE LAW AND ETHICS OF MALE CIRCUMCISION – GUIDANCE FOR DOCTORS (2003), available at <http://www.cirp.org/library/statements/bma2003/>.

57. T. Hammond, *A Preliminary Poll of Men Circumcised in Infancy or Childhood*, 83 BJU INT’L, Supp. 1, at 85, 86 (1999), available at <http://onlinelibrary.wiley.com/doi/10.1046/j.1464-410x.1999.0830s1085.x/pdf>.

58. *The Facts Behind Circumcision*, INTACT AMERICA, <http://intactamerica.org/learnmore> (last visited Feb. 13, 2013).

59. *Id.*

60. *Id.*

61. See Stephanie Pappas, *5 Things You Didn’t Know About Circumcision*, DISCOVERY NEWS (Aug. 27, 2012, 3:00 AM), <http://news.discovery.com/human/circumcision-facts-120827.html>.

62. See, e.g., *Injuries Linked to Circumcision Clamps*, LOS ANGELES TIMES (Sept. 26, 2011), available at <http://articles.latimes.com/2011/sep/26/health/la-he-circumcision-20110926>.

63. Doris K. Cope, *Neonatal Pain: The Evolution of an Idea*, AM. ASS’N OF ANESTHESIOLOGISTS NEWSLETTER, September 1998, available at [http://anestit.unipa.it/mirror/asa2/newsletters/1998/09\\_98/Neonatal\\_0998.html](http://anestit.unipa.it/mirror/asa2/newsletters/1998/09_98/Neonatal_0998.html).

64. *Circumcision Policy Statement*, *supra* note 41 (“[T]here is considerable evidence that newborns who are circumcised without analgesia experience pain and physiologic stress”); Cynthia R. Howard et al., *Acetaminophen Analgesia in Neonatal Circumcision: The Effect on Pain*, 93 PEDIATRICS, no. 4, 1994 at 641–46, available at <http://pediatrics.aappublications.org/content/93/4/641.abstract>; see also B.R. Paix & S.E. Peterson, *Circumcision of Neonates and Children without Appropriate Anaesthesia is Unacceptable Practice*, 40 ANAESTH INTENSIVE CARE, no. 3, 2012 at 511–16, available at <http://www.ncbi.nlm.nih.gov/pubmed/22577918>.

65. NEONATAL CIRCUMCISION, *supra* note 55.

scream, try to escape, their heart rates, blood pressure, and cortisol levels (stress indicators) rise markedly,<sup>67</sup> and they may perceive the experience to be terrifying.<sup>68</sup>

#### E. Risks

Circumcision surgery carries a risk of many minor and major complications.<sup>69</sup> The only debate concerns the extent of the risk. The AAP calls the risk of serious complications very low, but it cites studies showing a complication rate of 3.1% in Atlanta and of 1.2% to 3.8% in European centers, and another study of 214 boys showing a 25.6% rate of adhesions, 20.1% risk of redundant prepuce, 15.5% risk of balanitis, 4.1% risk of skin bridge, and 0.5% risk of meatal stenosis.<sup>70</sup> The AAP later states, inconsistently, that the risks are unknown: “[I]t is difficult, if not impossible, to adequately assess the total impact of complications, because the data are scant and inconsistent regarding the severity of complications.”<sup>71</sup> If American medical associations do not know the risks that circumcisions pose to boys after so many years, they should.

In any event, risks include serious injuries, such as the loss of part or all of the penis.<sup>72</sup> A significant percentage of visits to pediatric urology clinics are to repair or attempt to repair injuries caused by circumcision.<sup>73</sup>

66. Janice Lander et al., *Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision*, 278 J. AM. MED. ASS’N, no. 24, 1997 at 2157, 2157 (finding that some forms of anesthesia provided relief of pain for only part of the circumcision procedure); Cold & Taylor, *supra* note 29, at 37–38.

67. *Circumcision Policy Statement*, *supra* note 41.

68. Paul M. Fleiss & Frederick M. Hodges, WHAT YOUR DOCTOR MAY NOT TELL YOU ABOUT CIRCUMCISION (“We know that circumcision is a terrifying, painful, and traumatic event.”).

69. N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231 (1993), available at <http://cirp.org/library/complications/williams-kapila/>; NEONATAL CIRCUMCISION, *supra* note 55. The American Medical Association lists the following complications and “untoward events” as potential side effects of circumcision:

Bleeding and infection, occasionally leading to sepsis, taking too much skin from the penile shaft causing denudation or rarely, concealed penis, or from not removing sufficient foreskin, producing an unsatisfactory cosmetic result or recurrent phimosis, formation of skin bridges between the penile shaft and glans, meatitis and meatal stenosis, chordee, inclusion cysts in the circumcision line, lymphedema, hypospadias and epispadias, and urinary retention. [Also] other rare but severe events including scalded skin syndrome, necrotizing fasciitis, sepsis and meningitis, urethrocutaneous fistulas, necrosis (secondary to cauterization), and partial amputation of the glans penis.

NEONATAL CIRCUMCISION, *supra* note 55.

70. *Male Circumcision*, *supra* note 2.

71. *Id.* at e775.

72. N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231, 1232 (1993).

73. Aaron J. Krill et al., *Complications of Circumcision*, 11 Sci. World. J. 2458, 2458 (2011); Rafael V. Pieretti et al., *Late Complications of Newborn Circumcision: A Common and Avoidable Problem*, PEDIATRIC SURGERY (Berlin), May 2010, <http://www.springerlink.com/content/9w834626551u8087/> (last visited Nov. 1, 2012) (explaining that at Massachusetts General Hospital between 2003 to 2007, 4.7% of operations on children and 7.4% of cases at a pediatric urology outpatient clinic resulted from complications from a previous neonatal circumcision; see also Michael Miller, *Couple Sues Doctor*

Research also suggests that more than one hundred American boys per year die from complications related to circumcision such as bleeding and infections.<sup>74</sup>

#### F. Harm

Circumcision harms all boys and the men they will become. It cuts into and removes functional, living tissue, including thousands of nerve endings,<sup>75</sup> creates a wound, causes operative and post-operative pain, and interferes with feeding<sup>76</sup> and maternal bonding.<sup>77</sup> Circumcised boys show increased sensitivity to pain at six months of age, suggesting that the procedure has long-term effects on brain function.<sup>78</sup> The surgery leaves a scar,<sup>79</sup> irreversibly removes parts of the penis which normally function together,<sup>80</sup> dramatically changes its appearance,<sup>81</sup> causes the penis to hang at a greater angle,<sup>82</sup> and causes the glans to become calloused over time.<sup>83</sup> Some scholars claim that circumcision can also cause post-traumatic stress syndrome.<sup>84</sup>

Circumcision also changes and impairs men's sex lives.<sup>85</sup> As the AAP acknowledged in 1999, it changes sexual behavior.<sup>86</sup> The removal of the

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*Over Botched Circumcision That Left Son's Penis "Unseen,"* MIAMI NEW TIMES, May 23, 2012, available at [http://blogs.miaminewtimes.com/riptide/2012/05/couple\\_sues\\_miami\\_doctor\\_over.php](http://blogs.miaminewtimes.com/riptide/2012/05/couple_sues_miami_doctor_over.php) (stating that corrective surgery could not correct the mistake). Complications from circumcision include penile adhesions, skin bridges, meatal stenosis, redundant foreskin, buried penis and penile rotation. I.O.W. Leitch, *Circumcision - A Continuing Enigma*, 6 AUST. PAEDIATRIC. J. 59 (stating that 8.5% of circumcisions are recircumcisions); *The Case Against Neonatal Circumcision*, 6172 BRIT. MED. J. 1163, 1163 (1979) (stating that as many as 10% of babies require a second circumcision).

74. Dan Bollinger, *Lost Boys: An Estimate of U.S. Circumcision-Related Infant Deaths*, 4 THYMOS: J. OF BOYHOOD STUD. 78, 83 (2010). The 2012 AAP Report does not mention this study.

75. See Cold & Taylor, *supra* note 29, at 41.

76. Comm. on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *The Assessment and Management of Acute Pain in Infants, Children, and Adolescents*, 108 PEDIATRICS 793, 794 (2001), available at <http://pediatrics.aappublications.org/content/108/3/793.full.html>.

77. *Circumcision vs. Child Health, Breastfeeding and Maternal Bonding*, CIRCUMCISION INFO. & RESOURCE PAGES (Dec. 30, 2007), <http://www.cirp.org/library/birth/>.

78. Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599, 602 (1997).

79. Cold & Taylor, *supra* note 29, at 41.

80. *Id.* at 34.

81. See *id.* at 41.

82. *Id.*

83. *Id.*

84. RONALD F. GOLDMAN, *CIRCUMCISION: THE HIDDEN TRAUMA* (1997); Taddio et al., *supra* note 78 ("infants circumcised without anaesthesia may represent an infant analogue of a post-traumatic stress disorder triggered by a traumatic and painful event.").

85. Morten Frisch et al., *Male Circumcision and Sexual Function in Men and Women: A Survey-Based, Cross-Sectional Study in Denmark*, 40 INT'L J. EPIDEMIOLOGY, 1367, 1375 (2011).

86. *Male Circumcision*, *supra* note 41 (suggesting more varied sexual practice among uncircumcised adult males); Cold & Taylor, *supra* note 29, at 41 ("The increased frequency of masturbation, anal intercourse and fellatio reported by circumcised men in the USA may possibly be due to the sensory



foreskin also indisputably prevents normal sexual function.<sup>87</sup> In the intact male, the highly elastic foreskin, a moist and sensitive mucous membrane like lips and eyelids,<sup>88</sup> moves freely back and forth in a virtually frictionless gliding action.<sup>89</sup> The foreskin, consisting of several parts, such as the dartos muscle, ridged band, and frenulum, which function together, is replete with blood vessels and specialized nerve endings including stretch receptors.<sup>90</sup> Research shows that the foreskin is the most sensitive part of the penis.<sup>91</sup> Some men also report that the surgery leaves insufficient skin and mucosa for a comfortable erection.<sup>92</sup> Thus, circumcision may reduce sexual pleasure for men, and also for their female partners, which in turn may impair relationships.<sup>93</sup> The complete extent of the harm that circumcision causes remains unknown.<sup>94</sup> Increasing numbers of boys and men are angry at both physicians and their parents for having circumcised them without their consent,<sup>95</sup> and have foreskin envy.<sup>96</sup> Even though

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imbalance caused by circumcision.”). *But see* Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 JAMA, no. 13, 1997, at 1052, 1054 (indicating that uncircumcised men tend to display a slightly greater percentage of sexual dysfunction).

87. Frisch, *supra* note 85; Cold & Taylor, *supra* note 29, at 41. *See also* *How the Foreskin Works*, CIRCUMCISION INFO. & RESOURCE PAGES, <http://www.circumstitions.com/Works.html> (last visited October 29, 2012) (providing an animated depiction of circumcision).

88. Cold & Taylor, *supra* note 29, at 34.

89. S. Lakshmanan & S. Prakash, *Human Prepuce: Some Aspects of Structure and Function*, 44 IND. J. SURGERY 134, 134–37 (1980), available at <http://www.cirp.org/library/anatomy/lakshmanan>; John P. Warren & Jim Bigelow, *The Case Against Circumcision*, BRIT. J. SEXUAL MED., SEPT.–OCT. 1994, at 6, 8.

90. *See generally* Cold & Taylor, *supra* note 29, at 34.

91. Morris L. Sorrells et al., *Fine-Touch Pressure Thresholds in the Adult Penis*, 99 BJU INT. 864, 864 (2007) (“The glans of the circumcised penis is less sensitive to fine touch than the glans of the uncircumcised penis. The transitional region from the external to the internal prepuce is the most sensitive region of the uncircumcised penis and more sensitive than the most sensitive region of the circumcised penis. Circumcision ablates [removes] the most sensitive parts of the penis.”); Cold & Taylor, *supra* note 29, at 41. (“The prepuce is primary, erogenous tissue necessary for normal sexual function.”). A 2013 study also found that male circumcision decreases penile sensitivity. *See generally* Guy A. Bronselaer et al., *Male Circumcision Decreases Penile Sensitivity as Measured in a Large Cohort*, BJU INT’L, Feb. 2013.

92. Hammond, *supra* note 57, at 87.

93. Frisch et. al., *supra* note 85.

94. W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROLOGY INT’L, Supp. 1, at 1 (1999) (“[D]espite the billions of foreskins that have been severed over thousands of years, it is only recently that efforts have been made to understand the prepuce.”); *see also* David Gisselquist & Joseph Sonnabend, *Have We Ignored a Very Simple Procedure That Could Significantly Reduce the Risk of Heterosexual Transmission of HIV to Men?*, AIDS PERSPECTIVE (May 8, 2012), <http://aidsperspective.net/blog/?p=860> (describing a study that, surprisingly, shows that uncircumcised men who washed their genitals within ten minutes of sexual intercourse are more likely to contract HIV.).

95. Taddio et al., *supra* note 98, at 602 (“infants circumcised without anaesthesia may represent an infant analogue of a post-traumatic stress disorder triggered by a traumatic and painful event.”).

96. *See* Richard Hyfler, *Circumcision: You Can’t Have It Both Ways*, FORBES, <http://www.forbes.com/sites/richardhyfler/2011/05/26/circumcision-you-cant-have-it-both-ways/> (last viewed November 1, 2012) (referring to foreskin envy and stating that an estimated one-quarter million men worldwide are attempting to restore their foreskins to the extent possible, though some parts are

circumcision is common in America, intact men here rarely choose it for themselves.<sup>97</sup>

### G. Benefits

In 1999, the American Medical Association stated that circumcision has *potential* medical benefits, specifically a reduction in the risk of infant urinary tract infections, penile cancer in adult males, and possibly certain sexually transmissible diseases (“STDs”), including the human immunodeficiency virus (“HIV”).<sup>98</sup> Despite these possible benefits, the AMA concluded that the “data are not sufficient to recommend routine neonatal circumcision.”<sup>99</sup> It reasoned that urinary tract infections in uncircumcised males and penile cancer are rare.<sup>100</sup> As to STDs, the AMA stated, “behavioral factors are far more important risk factors for acquisition of HIV and other sexually transmissible diseases than circumcision status, and *circumcision cannot be responsibly viewed as ‘protecting’ against such infections.*”<sup>101</sup> In its 2012 circumcision report, however, the American Academy of Pediatrics (“AAP”) asserts that the “health benefits of newborn male circumcision [no longer ‘potential benefits’] outweigh the risks.”<sup>102</sup> In its *Circumcision Speaking Points* for members, however, the AAP states that the health benefits of circumcision include a lower *risk* of various diseases.<sup>103</sup> Thus, in its 2012 circumcision report, the AAP is now claiming as actual benefits what it concedes are still only *potential* benefits or slightly reduced risks.

The truth is that infants and boys rarely if ever benefit from circumcision. They will not be at risk of STDs for many years. It is contested whether circumcision reduces the risk of urinary tract infections or penile cancer.<sup>104</sup> Even if it does, it would be necessary to circumcise between 100 and 200 boys to prevent one case of urinary tract infection,<sup>105</sup> which could be treated easily and safely with oral antibiotics.<sup>106</sup> Also,

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irrevocably lost); Personal communication from Ronald Low (August 6, 2012).

97. EDWARD WALLERSTEIN, CIRCUMCISION: AN AMERICAN HEALTH FALLACY 128 (1980) (estimated that three men per 1,000 in the United States undergo circumcision after infancy).

98. AM. MED. ASS’N, *supra* note 31.

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

102. Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS, no. 3, 2012, at 585, available at <http://pediatrics.aappublications.org/content/130/3/585.full.pdf+html>.

103. *Newborn Male Circumcision*, AM. ACAD. OF PEDIATRICS (Aug. 27, 2012).

104. AM. MED. ASS’N, *supra* note 31.

105. *Id.*

106. Alejandro Hoberman et al., *Oral Versus Initial Intravenous Therapy for Urinary Tract Infections in Young Febrile Children*, 104 PEDIATRICS, no. 1, 1999, at 79; George H. McCracken, *Options in Antimicrobial Management of Urinary Tract Infections in Infants and Children*, 8 PEDIATRIC INFECTIOUS DISEASE J., no. 8, 1989, at 552, 553.

physicians do not perform preemptive genital surgery on girls to reduce the risk of urinary tract infections. Finally, circumcision may cause more infections than it prevents.<sup>107</sup>

Men also rarely benefit from circumcision. For example, even if circumcision reduces the risk of penile cancer, which is debated,<sup>108</sup> penile cancer is a rare disease in America that generally occurs in old age and is often a byproduct of poor hygiene,<sup>109</sup> in contrast to breast cancer in women, which is many times more common and occurs at a younger age.<sup>110</sup> In addition, penile cancer may be prevented by washing and not smoking.<sup>111</sup>

A few studies suggest that circumcision reduces the risk of STDs, but they have been criticized as flawed.<sup>112</sup> Other studies have found no effect,<sup>113</sup> and several studies have found circumcised men may be at greater risk for sexually transmitted urethritis and chlamydial infection.<sup>114</sup> Circumcision also does not prevent HIV and AIDS, which are more common in the United States, where a high percentage of men have been circumcised, than in Europe, where circumcision is relatively rare.<sup>115</sup> Three African studies suggest that circumcision may reduce the risk of African men contracting HIV during unprotected sex with infected female partners by up to 60%, but this is only a 1.3% absolute reduction, and only during

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107. Herman A. Cohen et al., *Postcircumcision Urinary Tract Infection*, 31 CLINICAL PEDIATRICS, no. 6, 1992 at 322, 324; Task Force on Circumcision, American Academy of Pediatrics, *supra* note 49, at 687 (“[c]ircumcised infant boys had a significantly higher risk of penile problems (such as meatitis) than did uncircumcised boys.”); Dario Prais et al., *Is Ritual Circumcision a Risk Factor for Neonatal Urinary Tract Infections?*, 94 ARCHIVES OF DISEASE IN CHILDHOOD 191, 194 (2009); Jacob Amir et al., *Circumcision and Urinary Tract Infection in Infants*, 140 AM. J. DISEASES IN CHILDREN 1092, 1092 (1986).

108. Am. Acad. of Pediatrics, *supra* note 41, at 690.

109. Gustavo C. Guimarães et al., *Penile Cancer: Epidemiology and Treatment*, 13 CURRENT ONCOLOGY REP. 231, 231 (2011).

110. *Compare* Am. Acad. of Pediatrics, *supra* note 41, at 690, with *Breast Cancer Risk in American Women*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/detection/probability-breast-cancer>.

111. M.C.G. Bleeker et al., *Penile Cancer: Epidemiology, Pathogenesis and Prevention*, 27 WORLD J. UROLOGY 141, 147–48 (2009).

112. Gregory J. Boyle & George Hill, *Sub-Saharan African Randomised Clinical Trials Into Male Circumcision and HIV Transmission: Methodological, Ethical and Legal Concerns*, 19 J.L. & MED. 316, 317 (2011). African men who are circumcised may also mistakenly believe that circumcision prevents HIV. *Id.* at 328.

113. *See, e.g.*, Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 J. OF THE AM. MED. ASSOC., no. 13, 1997 at 1052, 1052 (“We find no significant differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases.”).

114. *See, e.g.*, Robert S. Van Howe, *Genital Ulcerative Disease and Sexually Transmitted Urethritis and Circumcision: A Meta-Analysis*, 18 INT’L J. OF STD & AIDS 799, 804–06 (2007).

115. *See* Ali A. Rizvi, *Male Circumcision and the HIV/AIDS Myth*, HUFFINGTON POST (Aug. 3, 2009, 04:16 PM), [http://www.huffingtonpost.com/ali-a-rizvi/male-circumcision-and-the\\_b\\_249728.html](http://www.huffingtonpost.com/ali-a-rizvi/male-circumcision-and-the_b_249728.html).

the period of a short study.<sup>116</sup> Moreover, the validity of these findings has been challenged.<sup>117</sup> The operation may actually *increase* HIV infections,<sup>118</sup> and it also may increase the absolute risk of HIV transmission from infected, circumcised men to their female partners by 61%.<sup>119</sup> In America, sexually active men must still practice safe sex to avoid STDs,<sup>120</sup> and so long as they do, circumcision does not confer any additional benefit.<sup>121</sup>

#### H. Profits

Circumcision is uncommon in many parts of the world.<sup>122</sup> Outside the United States, it is usually performed for religious reasons,<sup>123</sup> and rarely on infants, who are more vulnerable than young men,<sup>124</sup> except in America,<sup>125</sup> Israel,<sup>126</sup> and South Korea.<sup>127</sup> As stated, many foreign medical associations have stated that circumcision has little medical value and should be deterred.<sup>128</sup> Outside the United States, some governments have stopped paying for it.<sup>129</sup> In America, by contrast, circumcision is a highly profitable,<sup>130</sup> vertically integrated business, in which physicians and hospitals charge for the procedure, and the government has funded it through the Medicaid program since 1965.<sup>131</sup> In addition, foreskins are sometimes sold to pharmaceutical and cosmetics companies.<sup>132</sup>

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116. Boyle & Hill, *supra* note 112, at 316, 326.

117. *Id.* at 326–27.

118. Robert S. Van Howe & Michelle R. Storms, *How the Circumcision Solution in Africa Will Increase HIV Infections*, 2 J. PUB. HEALTH AFR. 11 (2011).

119. Boyle & Hill, *supra* note 112, at 317.

120. Boyle & Hill, *supra* note 112, at 330–331; *see also* AM. MED. ASS'N, *supra* note 31 (“behavioral factors appear to be far more important risk factors in the acquisition of HIV infection than circumcision status, and circumcision cannot be responsibly viewed as ‘protecting’ against such infections”).

121. Boyle & Hill, *supra* note 112, at 331.

122. *See* Helen Weiss et al., *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability*, WORLD HEALTH ORGANIZATION (2007), [http://apps.who.int/iris/bitstream/10665/43749/1/9789241596169\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/43749/1/9789241596169_eng.pdf).

123. D.S. Kim et al., *Male Circumcision: A South Korean Perspective*, 83 BRIT. J. UROLOGY INT'L, Supp. 1, 1999, at 28.

124. Am. Acad. of Pediatrics, *supra* note 41, at 686.

125. *See* Weiss, *supra* note 122, at 1.

126. *Id.*

127. Kim et al., *supra* note 144, at 28; *see also* Weiss, *supra* note 122, at 8–9.

128. *See, e.g.*, Royal Dutch Med. Assoc., *Non-Therapeutic Circumcision of Male Minors* 4 (2010).

129. Matthew R. Giannetti, *Circumcision and the American Academy of Pediatrics: Should Scientific Misconduct Result in Trade Association Liability?*, 85 IOWA L. REV. 1507, 1510 (2000).

130. Paul M. Fleiss, *The Case Against Circumcision*, MOTHERING: THE MAGAZINE OF NATURAL FAMILY LIVING, Winter 1997, at 36–45, available at <http://www.cirp.org/news/Mothering1997/>; *see also* Am. Acad. of Pediatrics, *supra* note 41, at 686.

131. Robert S. Van Howe, *A Cost-Utility Analysis of Neonatal Circumcision*, 24 MED. DECISION MAKING 584, 585 (Nov.–Dec. 2004).

132. *See e.g.*, LORI ANDREWS & DOROTHY NELKIN, BODY BAZAAR: THE MARKET FOR HUMAN TISSUE IN THE BIOTECHNOLOGY AGE 2 (2001) (noting that pieces of people are used in a variety of ways, including the use of infant foreskin removed in circumcisions.). A book review of *Body Bazaar*, written

## II. LEGAL ISSUES

The fact that circumcision is commonplace, asserted by proponents of circumcision in legal briefs,<sup>133</sup> is not in and of itself a valid legal argument. Slavery was once commonplace,<sup>134</sup> as was drilling holes in the brain to cure epilepsy and mental disorders,<sup>135</sup> the use of leeches to remove blood,<sup>136</sup> and the use of unsterile instruments in surgery.<sup>137</sup> In addition, even if circumcision has potential or actual medical benefits (which is debated), it does not necessarily follow that it is a legal practice. Removing any body part, if removed to prevent it from becoming diseased, would be medically beneficial, yet this would not justify amputating a leg, for example, to prevent an infection that could be treated with antibiotics. Physicians do not routinely remove healthy body parts from children other than the male foreskin.<sup>138</sup> The fact that there is legislation against cutting girls' genitals<sup>139</sup> but not boys' genitals also does not resolve whether or not male circumcision is legal.<sup>140</sup> As legal scholars have noted, he who avers must prove;<sup>141</sup> thus, physicians who circumcise have the burden of proving that the surgery is legal.<sup>142</sup>

Circumcision raises one principal issue for its opponents: do boys, like girls, have a right to genital integrity, and, if so, where is the right found? The surgery raises many troublesome legal issues for proponents. Is invasive surgery on boys' genitals legal when cutting girls' genitals is a

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by Elizabeth Whelan, states, "Andrews and Nelkin make it clear that body parts from the living and the dead are gold mines for pharmaceutical development." Elizabeth Whelan, *Biomedical Prostitution?*, 17 INSIGHT ON THE NEWS, issue 20, 2001, at p. 27; see also *The Skinny on Miracle Wrinkle Cream*, INFINITE UNKNOWN (2009), <http://www.infiniteunknown.net/2008/02/20/the-skinny-on-miracle-wrinkle-cream/>.

133. Brief for Petitioner at 7, *Boldt v. Boldt*, 555 U.S. 814 (2008) (No. 07-1348) 2008 WL 1866959, at \*7.

134. See *Prigg v. Pennsylvania*, 41 U.S. 539, 594 (1842).

135. Charles G. Gross, *A Hole in the Head*, 5 THE NEUROSCIENTIST, no. 4, 1999, at 265–68, available at [http://www.princeton.edu/~cggross/neuroscientist\\_99\\_hole.pdf](http://www.princeton.edu/~cggross/neuroscientist_99_hole.pdf).

136. *Leech Therapy*, BLOODY SUCKERS, <http://www.pbs.org/wnet/nature/bloodysuckers/leech.html> (last visited Feb. 27, 2013). But see Rita Rubin, *Maggots and Leeches: Good Medicine*, USA TODAY (July 7, 2004, 11:46 PM), [http://usatoday30.usatoday.com/news/health/2004-07-07-leeches-maggots\\_x.htm](http://usatoday30.usatoday.com/news/health/2004-07-07-leeches-maggots_x.htm).

137. HISTORY OF ASEPTIC TECHNIQUE, <http://jace.myweb.uga.edu/MiboWebsite/MiboWebHist.htm> (last visited Nov. 26, 2012).

138. Tom Gualtieri, *Our Bodies, Our Choice Part I*, THE WEEKLINGS (Aug. 31, 2012), <http://www.theweeklings.com/tgualtieri/2012/08/31/our-bodies-our-choices-part-i/>.

139. Female Genital Mutilation, 18 U.S.C. § 116 (2006).

140. In banning female genital mutilation, Congress made findings that such mutilation violates federal and state statutory and constitutional law. *Id.*

141. *Equity Aviation Services (Pty) Ltd v. SA Transport & Allied Workers Union & Others*, 30 INDUS. L.J. 1997, 2043 (2009).

142. Brief Submitted to the Law Commission of England and Wales, Christopher Price, *Male Circumcision: A Legal Affront* § 1.1 (December 1996), available at <http://www.cirp.org/library/legal/price-uklc/>.

federal crime?<sup>143</sup> How can it be legal to remove boys' foreskins to reduce the risk of penile cancer,<sup>144</sup> but not girls' breasts, which are many times more likely to become cancerous?<sup>145</sup> Can physicians lawfully endanger and harm boys without benefiting most of them? Do physicians have the right to operate on healthy boys, against their own recommendation,<sup>146</sup> at the request of parents for reasons having nothing to do with medicine,<sup>147</sup> usually without fully informing parents of the risks?<sup>148</sup> Is it lawful to circumcise healthy boys when intact men rarely choose it for themselves?<sup>149</sup> Do parents have the right to make the circumcision decision for religious reasons or any reason? To summarize these issues and the analysis to follow:

1. Do boys have a legal right to genital integrity? If not,
2. Do physicians have the legal right to circumcise healthy boys? If so,
3. Do parents have the legal authority to make the circumcision decision? If so,
4. Is it lawful to use Medicaid to pay for circumcision, for companies to buy and sell foreskins, and for trade associations to be held liable for circumcision?

### III. THE LAW

#### A. Do Boys Have a Right to Genital Integrity?

The question should be stated more broadly: does every American citizen – whether young or old, male or female – have a right to personal security or bodily integrity and hence to genital integrity? If boys do not, adults and girls do not, either. Congress stated in banning non-therapeutic female genital cutting that it “infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional.”<sup>150</sup>

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143. 18 U.S.C. § 116.

144. *Penile Cancer*, AM. CANCER SOCIETY, <http://www.cancer.org/acs/groups/cid/documents/webcontent/003132-pdf.pdf>.

145. *Id.*; *Breast Cancer*, AMERICAN CANCER SOC'Y, <http://www.cancer.org/acs/groups/cid/documents/webcontent/003090-pdf.pdf>.

146. Am. Acad. of Pediatrics, *supra* note 41, 691.

147. *Circumcision*, HEALTHY CHILDREN.ORG, <http://www.healthychildren.org/English/agesstages/-prenatal/decisions-to-make/pages/Circumcision.aspx> (last visited Nov. 15, 2012).

148. *Are You Fully Informed?*, PEACEFUL PARENTING (Jan. 1, 2008) <http://www.drmmomma.org/2010/01/are-you-fully-informed.html>.

149. Rob Jordan, *Adult Circumcision: Cutting the Rate of HIV Transmission*, AM. ASS'N. MED. ASSISTANTS (Mar.– Apr. 2009), <http://www.aamantl.org/CMAToday/archives/quickclinic/details.aspx?ArticleID=645>.

150. 18 U.S.C. § 116.

That is to say, cutting girls' genitals already violated many federal and state statutes and constitutions. What are those laws?

### 1. The Common Law

In 1791, the United States passed a constitutional amendment that adopted British common law.<sup>151</sup> The first chapter of Blackstone's *Commentaries*, "Of the Absolute Rights of Persons," states that the rights of the people are to be preserved inviolate.<sup>152</sup>

#### a. *The Right to Personal Security*

The principal purpose of the law, Blackstone wrote, is to protect the right of all people to personal security:

1. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health... 2. [Man's rights] include a prohibition not only of killing, and maiming, but also of torturing... and... no man shall be forejudged of life or limb contrary to... the law of the land.... 3. [A man's] person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member. 4. The preservation of a man's health from such practices as may prejudice or annoy it.<sup>153</sup>

The U.S. Supreme Court acknowledged this concept in 1997, citing the Magna Carta: "Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security."<sup>154</sup> Circumcision interrupts a boy's and a man's enjoyment of his limbs, body, and health, maims and wounds him,<sup>155</sup> and violates his common law right to personal security.

#### b. *The Right to Liberty*

After discussing personal security, Blackstone wrote that the law of England preserved the personal liberty of individuals:

The absolute rights of man... [include the] power of choosing those measures which appear to him to be most desirable... This natural liberty

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151. See Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline of the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 183 (2010).

152. U.S. CONST. amend. IX ("[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); 1 WILLIAM BLACKSTONE, COMMENTARIES \*129. See generally Jackson, *supra* note 151.

153. 1 WILLIAM BLACKSTONE, COMMENTARIES \*129, \*133-34.

154. *Ingraham v. Wright*, 430 U.S. 651, 673 (1997) (citing Magna Carta Art. 39; 1 WILLIAM BLACKSTONE, COMMENTARIES, \*134).

155. DaiSik King & Myung-Geol Pang, *The Effect of Male Circumcision on Sexuality*, 99 B.J.U. INT'L 619, 622 (2006).

consists properly in a power of acting as one thinks fit, without any restraint or control.”<sup>156</sup>

In 1891, the Supreme Court in *Union Pacific Railway Company v. Botsford* affirmed the paramount importance of freedom and personal security as derived from the common law:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.... “The right to one’s person may be said to be a right of complete immunity; to be let alone.”<sup>157</sup>

Circumcision violates a boy’s right to be let alone, free from interference, and to control his own person in the future. These fundamental common law rights to personal security and liberty became enshrined in the Declaration of Independence<sup>158</sup> and, as discussed below, in the United States Constitution<sup>159</sup> and state constitutions<sup>160</sup> and numerous other provisions of law.

## 2. Constitutional Law

The Bill of Rights to the United States Constitution was adopted to protect individuals.<sup>161</sup> As the Supreme Court has stated, “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”<sup>162</sup> Constitutional rights are “fundamental” and “may not be submitted to vote.”<sup>163</sup> Accordingly, legislation that violates constitutional rights is legally invalid.<sup>164</sup> Since Congress found non-therapeutic female genital cutting to violate girls’ federal and state constitutional rights,<sup>165</sup> what are the rights to which the Supreme Court was referring? It should be asked first, though,

156. 1 WILLIAM BLACKSTONE, COMMENTARIES \*121, \*125.

157. *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

158. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

159. U.S. CONST. pmb1.

160. See, e.g., MASS. CONST. art. 1, (West, Westlaw through Nov. 2012 amendments) provides: “All men are born free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying and defending their lives and liberties . . . [and] that of seeking and obtaining their safety and happiness.”

161. See *Adamson v. California*, 332 U.S. 46, 51 (1947).

162. See *Bellotti v. Baird*, 443 U.S. 622, n.12 (1979) (citing *Planned Parenthood of Ctr. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

163. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

164. See *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

165. 18 U.S.C. § 16.



whether boys have a right to the same protection against genital cutting as girls?

*a. The Right to Equal Protection*

Shea Lita Bond addressed this issue in her 1999 article, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*.<sup>166</sup> Congress and sixteen states have banned female genital cutting except when medically necessary.<sup>167</sup> The American Academy of Pediatrics briefly recommended that its physicians perform a ritual pinprick of a girl's genitals if that might prevent more harmful genital cutting, even though this would have violated federal law.<sup>168</sup> This ignited a storm of protest, and the policy was quickly retired.<sup>169</sup> Thus, even a pinprick of girls' genitals is a federal crime. Physicians likewise cannot cut adults' genitals without their consent (an adult subjected to this could use force in self-defense, call the police, or successfully bring suit).<sup>170</sup>

The Fourteenth Amendment to the United States Constitution prohibits states from enforcing laws that “deny to any person... equal protection of the laws”.<sup>171</sup> State constitutions also contain equal protection clauses.<sup>172</sup> Bond concluded in her article that state statutes protecting females but not males from genital cutting violate the constitutional guarantee that similarly situated males and females should be treated equally before the law.<sup>173</sup> She reasoned that when state laws discriminate on the basis of gender, as here, the governments must show an “exceedingly persuasive justification” for doing so,<sup>174</sup> which they cannot do. As stated, the male and female

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166. See generally Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*, 32 J. MARSHALL L. REV. 353 (1999).

167. *Female Genital Mutilation in the U.S. Factsheet*, EQUALITYNOW, <http://www.equalitynow.org/node/866> (last visited on Nov. 19, 2012).

168. Karen Glennon, *How I Became An Intactivist*, ATTORNEYS FOR THE RIGHTS OF THE CHILD NEWSLETTER, Summer, 2010, at 6.

169. Robert S. Van Howe, *The American Academy of Pediatrics and Female Genital Cutting: When National Organizations are Guided by Personal Agendas*, 27:3 ETHICS & MED. 165, 165 (2011).

170. See, e.g., BLACK'S LAW DICTIONARY (9th ed. 2009). Black's Law Dictionary defines tortious “battery” as “[a]n intentional and offensive touching of another without lawful justification.” BLACK'S LAW DICTIONARY 173 (9th ed. 2009). “Self-defense” is defined generally as a “justification for the use of a reasonable amount of force in self-defense if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger.” BLACK'S LAW DICTIONARY 1481 (9th ed. 2009). Circumcision without the permission of the person circumcised would almost certainly qualify as an “offensive” and tortious bodily contact that would warrant the use of self-defense.

171. U.S. CONST. amend. XIV, § 1.

172. See Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 106–07 n.168 (2003).

173. Bond, *supra* note 165, at 380.

174. Bond, *supra* note 165, at n.151 (“[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”) (quoting *United States v.*

genitalia are identical in early gestation, are erogenous, and have evolved to function together.<sup>175</sup> Male and female circumcision are usually medically unnecessary,<sup>176</sup> are usually performed for religious and cultural reasons,<sup>177</sup> inflict serious pain,<sup>178</sup> risk medical complications and death,<sup>179</sup> and harm their victims.<sup>180</sup> Bond concluded that states must strike down statutes protecting girls from circumcision as unconstitutional or extend equal protection to boys.<sup>181</sup> As discussed below, however, both male and female circumcision is unconstitutional. Thus, boys have a right to the same protection from genital cutting as girls.

*b. The Right to Privacy*

In 2010, the Royal Dutch Medical Association issued a policy statement that non-therapeutic circumcision violates children's rights to physical integrity and autonomy under the Dutch Constitution.<sup>182</sup> Article 10 thereof states, "Everyone shall have the right to respect for his privacy,"<sup>183</sup> while Article 11 provides, "Everyone shall have the right to inviolability of his person."<sup>184</sup> As discussed below, non-therapeutic male circumcision similarly violates the privacy clauses of the United States Constitution and state constitutions.

The United States Supreme Court held that the protections given by the Bill of Rights imply a constitutional personal right to privacy.<sup>185</sup> In *Roe v. Wade*, for example, the Supreme Court held that a woman has a

Virginia, 518 U.S. 515, 531 (1996)).

175. Cold & Taylor, *supra* note 29; *Androgen Insensitivity Syndrome*, NAT'L HEALTH SERVICE, <http://www.nhs.uk/conditions/Androgen-insensitivity-syndrome/Pages/Introduction.aspx> (last visited Nov. 28, 2012).

176. Bond, *supra* note 165, at 366.

177. Bond, *supra* note 165, at 360.

178. Bond, *supra* note 165, at 362.

179. Bond, *supra* note 165, at 369.

180. Bond, *supra* note 165, at 362.

181. Bond, *supra* note 165, at 380; *see also* Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?*, 7 AM. U. J. GENDER, SOC. POL'Y & THE L. 87, 120 (1998-1999) ("Overbroad distinctions between 'genital mutilation' and 'circumcision' cannot obscure the unconstitutional and discriminatory effect of the Anti-FGM Act.")

182. *Non-Therapeutic Circumcision of Male Minors*, ROYAL DUTCH MED. ASSOC. 5 (2010), <http://knmg.artsennet.nl/web/file?uuid=579e836d-ea83-410f-9889-feb7eda87cd5&owner=a8a9cc0e-f42b-47a5-960e-be08025b7b04&contentid=77976>.

183. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] Sept. 22, 2008, Ch. 1, art. 10 (Neth.), *available at* <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

184. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] Sept. 22, 2008, Ch. 1, art. 11 (Neth.), *available at* <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

185. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a right to privacy is implied by the 1st, 3rd, 4th, 5th, and 9th Amendments).

constitutional right of privacy to make her own decisions about her body and pregnancy, independent of her parents' beliefs and desires.<sup>186</sup> A few state constitutions also expressly guarantee their citizens the right to privacy.<sup>187</sup> State privacy rights are broader than their federal counterpart, and are not limited to "state action," but also apply to private individuals.<sup>188</sup> As the California Court of Appeals held in *American Academy of Pediatrics v. Lungren*, citing United States Supreme Court decisions,<sup>189</sup> individuals have an inalienable constitutional right of privacy or liberty to make their own decisions in matters related to sex, life, and health.<sup>190</sup> In *Eisenstadt v. Baird*, the United States Supreme Court stated, "[i]f the right of privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion" into matters fundamentally affecting a person.<sup>191</sup> The California court stated that bodily intrusions violate the privacy right, which includes "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." <sup>192</sup> The California court called the right of a minor female to make important choices about her own body "clearly among the most intimate and fundamental of all constitutional rights."<sup>193</sup>

Interpreting the privacy clause in the Montana constitution, the Supreme Court of Montana similarly stated that "few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health."<sup>194</sup> The court stated that bodily autonomy is violated by a surgical operation ("invasion") imposed against a person's will.<sup>195</sup> The court cited Professor Joel Feinberg: "For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide."<sup>196</sup> The court cited a federal case involving acupuncture:

Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease... who must undergo or forego the treatment... [and] who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision

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186. *Roe v. Wade*, 410 U.S. 113, 153 (1972).

187. *See, e.g.*, ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

188. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 810 (Cal. 1997).

189. *Id.* at 803–04.

190. *Id.* at 814.

191. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

192. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (Cal. 1994).

193. *Lungren*, 940 P.2d at 812.

194. *Armstrong v. Montana*, 989 P.2d 364, 378 (Mont. 1999).

195. *Id.*

196. *Id.*

of how to treat that possession is of a no less personal nature.... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.<sup>197</sup>

Most men consider their genitals to be highly personal and private. Indeed, genitalia are often called "private parts," and indecent exposure of them is a crime.<sup>198</sup> Circumcision is manifestly an important and irreversible decision<sup>199</sup> central to the safety, health, personal dignity, and autonomy of men. Since boys and men rarely choose circumcision for themselves,<sup>200</sup> and it impairs men's sex lives (the only question is to what extent),<sup>201</sup> the decision to remove a foreskin is of profound importance. Under the privacy clauses of federal and state constitutions,<sup>202</sup> boys have a constitutional or absolute right to make a choice about circumcision without government interference.

*c. The Right to Life, Liberty, Property, and the Pursuit of Happiness*

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>203</sup> State constitutions sometimes contain similar language, and sometimes add that there is a right to the pursuit of happiness.<sup>204</sup> Circumcision violates the right of every boy to life (it can be fatal),<sup>205</sup> to personal security (it is invasive, risky, and harmful),<sup>206</sup> to liberty (the autonomy to make the circumcision decision for himself as an adult), to property (one's body parts are surely one's property), and to pursue happiness however he chooses. Thus, boys have absolute constitutional

197. See *Andrews v. Ballard*, 498 F. Supp. 1038, 1046–48 (S.D. Tex. 1980).

198. See, e.g., ARIZ. REV. STAT. ANN. § 13-402A (1996).

199. The British Medical Association has noted that courts have described circumcision as an "important and irreversible decision." *The Law and Ethics of Male Circumcision: Guidance for Doctors*, 30 J. MED. ETHICS 259, 261 (2004).

200. *Id.* at 261.

201. Rita Carter & Anna Rockall, *How to Reverse the Irreversible*, THE INDEPENDENT (June 25, 1996), <http://www.independent.co.uk/life-style/health-and-families/health-news/how-to-reverse-the-irreversible-1338650.html>.

202. See, e.g., U.S. CONST. amend. XIV, § 1; CAL. CONST. ART. I, § 1.

203. U.S. CONST. amend. XIV, § 1.

204. See, e.g., ILL. CONST. art. 1, § 1 (West 2006) ("Inherent and Inalienable Rights: All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness.").

205. See, e.g., Gregory J. Boyle, J. Steven Svoboda, Christopher P. Price & J. Neville Turner, *Circumcision of Healthy Boys: Criminal Assault?*, 7 J.L. & MED. 301 (2000), available at <http://www.cirp.org/library/legal/boyle1/>.

206. See, e.g., *id.*

rights under various provisions of the Fourteenth Amendment to be free from government interference in their decision to be left intact.

*d. The Right to Freedom of Religion*

The First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>207</sup> Every individual, including every boy, has a right to freedom of religion.<sup>208</sup> Once a boy reaches the age of reason, he has the constitutional right to choose his parents’ religion, a different religion, or no religion.<sup>209</sup> Although parents can permanently disfigure their own bodies or faces for religious reasons, it violates a boy’s right to freedom of religion to brand him permanently as belonging to a religion that he may choose to renounce.<sup>210</sup> In fact, many adults do not follow the religion in which they were raised.<sup>211</sup> For example, 15% of those raised in the Jewish faith no longer follow it,<sup>212</sup> and some Jews are opposed to circumcision.<sup>213</sup> Boys have a constitutional right under the Freedom of Religion clause to make the choice to be left genitally intact without government interference.

3. Criminal Law

*a. The Child Abuse Statutes*

In a 1985 law review article, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, William Brigman called routine neonatal circumcision the most widespread form of child abuse in society today.<sup>214</sup> Every state has statutes and policies designed to prevent and punish child neglect and abuse.<sup>215</sup> In California, for example, cutting a girl’s genitals is

207. U.S. CONST. amend. I.

208. *See, e.g.*, ILL. CONST. art. 1, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion.”); *see also* COLO. CONST. art. 2, § 4.

209. *See, e.g.*, R. Van Howe, J. Svoboda, J. Dwyer & C.P. Price, *Involuntary Circumcision: The Legal Issues*, 83 BRIT. J. UROLOGY, Supp. 1, 1999, at 63, 67.

210. *Id.* at 68 (“Parents choosing circumcision for religious reasons may in fact be violating the child’s own religious freedom, including the freedom to change religious beliefs.”).

211. The Pew Forum on Religion & Public Life, *Changes in Americans’ Religious Affiliation*, U.S. REL. LANDSCAPE SURV. 22–24 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-chapter-2.pdf>.

212. *Id.* at 22.

213. *See generally*, JEWS AGAINST CIRCUMCISION, <http://www.jewsgainstcircumcision.org/> (last visited Nov. 1, 2012).

214. William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 U. LOUISVILLE J. FAM. L. 337, 338 (1985). Brigman wrote that it might not be viewed as such because it is so common, but called it “as barbarous as female circumcision, the removal of earlobes, fingers or toes, the binding of infant female feet or other disfiguring practices around the world.” *Id.*

215. The Child Welfare Information Gateway provides detailed information on child abuse policies and

expressly listed as child abuse and is classified as a felony.<sup>216</sup> Male circumcision appears to meet California's general definitions of and therefore constitutes criminal child abuse,<sup>217</sup> as well as assault,<sup>218</sup> battery,<sup>219</sup> and sexual abuse and sexual assault ("[a]ny intrusion by one person into the genitals... of another person... [except] for a valid medical purpose").<sup>220</sup> The California Penal Code also prohibits willfully harming, injuring, or endangering a child,<sup>221</sup> inflicting any cruel or inhuman injury upon a child resulting in a traumatic condition,<sup>222</sup> inflicting physical injury or death other than by accidental means upon a child,<sup>223</sup> and mayhem ("unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless").<sup>224</sup> Similarly, under the Massachusetts child abuse statute, it is criminal assault and battery to intentionally touch a child in a way that causes bodily injury or substantial bodily injury without justification or excuse,<sup>225</sup> as circumcision does. Thus, physicians and Jewish mohels who circumcise, along with the parents who authorize it, commit criminal child abuse and are subject to the applicable fines and imprisonment.<sup>226</sup>

A 2010 Texas appellate case, *Williamson v. State*, confirms that any unnecessary surgery on children constitutes statutory child abuse.<sup>227</sup> The *Williamson* court held a mother criminally liable for unnecessary surgery that caused serious bodily injury to her son,<sup>228</sup> defined in Texas as "an injury that creates a substantial risk of death or that causes death, serious

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statutes throughout the country. U.S. Dept. Health & Human Serv., *State Statutes Search*, CHILD WELFARE INFORMATION GATEWAY, [https://www.childwelfare.gov/systemwide/laws\\_policies/state/index.cfm](https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm) (last visited March 1, 2013).

216. CAL. PENAL CODE ANN § 273.4 (West 2008).

217. *Id.* at § 273.

218. *Id.* at § 240.

219. *Id.* at § 242.

220. *Id.* at § 11165.1.

221. *Id.* at §§ 11165.2-5.3.

222. CAL. PENAL CODE ANN. § 273(d).

223. *Id.* at § 11165.6.

224. *Id.* at §203. This assumes that unnecessary surgery meets the statutory definition of "malicious." *Id.* at § 220(a) ("[A]ny person who assaults another with intent to commit mayhem . . . shall be punished by imprisonment . . . for two, four, or six years.").

225. MASS. GEN. LAWS ch. 265 § 13J(a)-(b) (2012) (stating that "[p]hysical injury" includes "swelling, bruising, impairment of any organ, and any other such nontrivial injury" and "[s]ubstantial bodily injury" is defined as a bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death"), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartIV/Title1/Chapter265/Section13J>.

226. See 110 MASS. CODE REGS. § 2.00 (2008) (stating "[a]buse" in Massachusetts includes an intentional act by a caretaker "upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury".), available at <http://www.lawlib.state.ma.us/source/mass/cmr/110cmr.html>.

227. *Williamson v. State*, 356 S.W.3d 1, 5 (Tex. Crim. App. 2010).

228. *Id.* (affirming the judgment of the trial court).

permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”<sup>229</sup> A physician testified that unnecessary surgery does not constitute reasonable medical care.<sup>230</sup> The court also found a scalpel to meet the definition of a “deadly weapon” as it can cause death or serious bodily injury.<sup>231</sup> Circumcision, whether male or female, is thus criminal child abuse.

*b. Criminal Assault*

As stated in the Introduction, in June 2012, a court in Cologne, Germany, held that non-therapeutic circumcision causes grievous bodily harm without legal justification.<sup>232</sup> In a 1999 law review article, *Male Non-Therapeutic Circumcision: The Legal and Ethical Issues*, Christopher Price wrote that lawyers in four common-law jurisdictions (the United States, England, Canada, and Australia) agree that non-therapeutic circumcision constitutes criminal assault, even though it has not been prosecuted.<sup>233</sup> Boyle<sup>234</sup> and Somerville<sup>235</sup> reached the same conclusion the following year. Under the common law, battery and false imprisonment coupled with force and violence are criminal as well as civil injuries.<sup>236</sup> Any application of force is prima facie an assault.<sup>237</sup> Consent is a defense only to assaults that do not inflict actual bodily harm.<sup>238</sup> Medical treatment is an exception to assaults causing bodily harm,<sup>239</sup> but non-therapeutic circumcision is not medical treatment.<sup>240</sup> American courts also have noted that children, and particularly very young children, are especially vulnerable, require protection under criminal law, and that crimes against them are morally outrageous.<sup>241</sup>

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229. TEX. PENAL CODE ANN. § 1.07(a)(46) (West 2011).

230. *Williamson*, 356 S.W.3d at 15.

231. TEX. PENAL CODE ANN., at § 1.07(a)(17); *see also Williamson*, 356 S.W.3d at 20.

232. BBC NEWS EUROPE, *supra* note 23.

233. Christopher P. Price, *Male Non-Therapeutic Circumcision: The Legal and Ethical Issues*, in MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL, AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 425, 437 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).

234. BOYLE ET AL., *supra* note 204.

235. MARGARET SOMERVILLE, THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT 202–19 (2000), *excerpt available at* <http://www.circumstitions.com/Canary.html#cv>.

236. 3 WILLIAM BLACKSTONE, COMMENTARIES, \*617, \*673–4.

237. *See, e.g., Boyle et al.*, *supra* note 204.

238. *Id.*

239. *Id.*

240. *See* J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL’Y 61, 89–90, 94 (2000).

241. *Henderson v. State*, 962 S.W.2d 544, 562 (Tex. Crim. App. 1997) (“Children are deemed to warrant protection because of their inexperience, lack of social and intellectual development, moral innocence, and vulnerability. These characteristics apply with the greatest force to the youngest children. Moreover, the fact that crimes directed toward young children are necessarily targeted at the most innocent and vulnerable members of society makes such crimes among the most morally outrageous.”)

A 2006 Washington appeals court decision, *State v. Baxter*, held that circumcision by a parent constitutes criminal assault.<sup>242</sup> The court upheld the conviction of a father for assault for attempting to circumcise his eight year-old child.<sup>243</sup> The court reasoned that “the harm Baxter inflicted on his son triggered the State’s right to impose criminal liability.”<sup>244</sup> Insofar as circumcision harms all boys and men, even when performed by physicians, the same reasoning that applies to parents should apply to physicians. In summary, circumcision constitutes statutory assault and battery, child abuse, sexual assault, child endangerment, and mayhem, and even manslaughter when it results in accidental death.<sup>245</sup> These rights derive from and exist today under the criminal common law.

#### 4. Tort Law

Blackstone noted that, insofar as every man’s person is sacred, the least touching of it willfully without legal authority to do so is an unlawful battery.<sup>246</sup> A person is liable to another for civil battery for intentionally causing any harmful or offensive contact.<sup>247</sup> Even a surgeon is liable for a battery absent the patient’s consent or the valid consent of a third person.<sup>248</sup> As argued below, however, parental consent to circumcision is invalid.<sup>249</sup> Margaret Somerville concluded in 2000, “[p]hysicians who undertake infant male circumcision could be legally liable for medical malpractice (civil liability in battery or negligence), which can result in an award of damages simply for carrying out the circumcision even if it was competently performed.”<sup>250</sup> Circumcision also constitutes the dignitary tort of false imprisonment.<sup>251</sup> Damages for torts include pain and suffering, and thus would include surgical and post-surgical pain, loss of sexual function and

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[E]xpression of society’s moral outrage at particularly offensive conduct ... is essential in an ordered society. . . .” (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

242. *State v. Baxter*, 141 P.3d 92, 93 (Wash. App. Div. 2 2006).

243. *Id.*

244. *Id.* at 99.

245. See SOMERVILLE, *supra* note 234.

246. BLACKSTONE, *supra* note 235, at \*120 (“[t]he least touching of another’s person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.”).

247. See RESTATEMENT (SECOND) OF TORTS § 13(a) (1965).

248. *Id.* at § 13 comment (c). *But see* *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 768 (Tex. 2003) (noting that a physician who provides emergency, life-saving medical treatment to a child without parental consent is not liable for battery); *Montgomery v. Bazaz-Sehgal*, 742 A.2d 1125, 1131 (Pa. Super. Ct. 1999).

249. See SOMERVILLE, *supra* note 234.

250. *Id.*

251. RESTATEMENT (SECOND) OF TORTS § 35 (1965).



pleasure, and psychological harm, to the extent demonstrable by a preponderance of the evidence.<sup>252</sup>

### 5. Human Rights Law

Several United Nations documents together form the “International Bill of Rights.”<sup>253</sup> The U.N. Charter requires member states to promote human rights and fundamental freedoms without distinction as to race, sex, or religion.<sup>254</sup> The Charter specifies that children have the same human rights as adults,<sup>255</sup> and special rights arising from their need for protection during minority.<sup>256</sup> The 1948 Universal Declaration of Human Rights recognizes every person’s right to life, liberty, and security of the person, and to freedom from cruel or degrading treatment.<sup>257</sup> The 1996 International Covenant on Civil and Political Rights gives minors the right to protection from family, society, and the state.<sup>258</sup> The 1989 Convention on the Rights of the Child, although ratified by every nation except the United States and Somalia,<sup>259</sup> establishes international law applicable to children worldwide.<sup>260</sup> Article 3 requires member states’ legal institutions to make their primary consideration the best interests of the child, and to ensure the child such protection and care as is necessary for his or her well-being.<sup>261</sup> Article 6 recognizes that every child has the inherent right to life.<sup>262</sup> Article 19 recognizes children’s rights to special protection from mental or physical violence or abuse, by parents or anyone caring for the child.<sup>263</sup> Article 24.3 requires abolishing traditional practices prejudicial to the health of

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252. RESTATEMENT (SECOND) OF TORTS § 903 (1979).

253. *See generally* International Bill of Rights, G.A. Res. 217 (III), GAOR, 183d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

254. *See* U.N. Charter pmbl., available at <http://www2.ohchr.org/english/docs/UNcharter.pdf>; *see also* *Id.* art. 55.

255. *See* Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 20 (Dec. 10, 1959).

256. *See id.*

257. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), GAOR, 183d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

258. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art 5, ¶ 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 10, 1948).

259. *Protect Children’s Human Rights*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child> (last visited Nov. 16, 2012).

260. *Id.*

261. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989).

262. *Id.* at 168.

263. *Id.* at 169.

children.<sup>264</sup> Article 34 protects children from sexual abuse.<sup>265</sup> Article 36 protects children from exploitation prejudicial to the child's welfare.<sup>266</sup>

The Royal Dutch Medical Association,<sup>267</sup> the South African Medical Association,<sup>268</sup> the Tasmania Law Reform Institute,<sup>269</sup> the Slovenian human rights ombudsman,<sup>270</sup> and the Norwegian ombudsman<sup>271</sup> all have concluded that male circumcision constitutes a human rights violation. In an article published by the Netherlands Institute of Human Rights,<sup>272</sup> Jacqueline Smith wrote,

The focus must be placed on the children who are forced to suffer without consent. Male circumcision is, like female genital mutilation, a "harmful traditional practice" and as such is in violation with the rights of the child. It is necessary to advocate full respect for these human rights for all children, boys and girls alike.<sup>273</sup>

The British Medical Association has also stated that if circumcision is prejudicial to a child's health and wellbeing, which it is, it is likely that a legal challenge on human rights grounds will be successful.<sup>274</sup> Thus, circumcision is a human rights violation.

#### 6. Public Policy

In *State v. Baxter*,<sup>275</sup> the Washington appeals court stated, "[c]utting a child's genitalia is also disfavored in public policy,"<sup>276</sup> citing the federal

264. *Id.* at 169–70.

265. *Id.* at 171.

266. *Id.*

267. See ROYAL DUTCH MEDICAL ASSOCIATION (KNMG), *Circumcision Policy*, (May 27, 2010), KNMG-viewpoint-Non-therapeutic-circumcision-of-male-minors-27-05-2010-v2.pdf (adopting a policy of strong deterrence due in part to the increasing emphasis on children's rights).

268. See Jonathan Friedman, *South African Medical Association Denounces Circumcision of Infants*, 9 ATT'YS FOR THE RTS. OF THE CHILD, NO. 1, June 2, 2011, available at <http://arclaw.org/newsletter/vol-9/no-1/news/south-african-medical> (denouncing male infant circumcision as "unethical" and "illegal").

269. See TASMANIA L. REFORM INST., *Non-Therapeutic Male Circumcision Final Report 17 22* (Aug. 2012), [http://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0006/302829/Non-Therapeutic-Circ\\_Final-Report-August-2012.pdf](http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf).

270. See generally *Circumcision of Boys for Non-Medical Reasons is a Violation of Children's Rights Says Slovenia's Human Rights Ombudsman*, NAT'L COAL. FOR MEN, Feb. 16, 2012, <http://ncfm.org/2012/02/news/circumcision-news/circumcision-of-boys-for-non-medical-reasons-is-a-violation-of-childrens-rights-says-slovenias-human-rights-ombudsman/>.

271. Norway: *Ombudsman Proposes Setting Minimum Age for Male Circumcision*, CHILD RTS. INT'L NETWORK (Feb. 09, 2011), <http://www.crin.org/violence/search/closeup.asp?infoID=25991>.

272. See generally Jacqueline Smith, *Male Circumcision and the Rights of the Child*, CIRCUMCISION REFERENCE LIBR. (Jan. 3, 2008), <http://www.cirp.org/library/legal/smith/>.

273. *Id.* at 10.

274. See generally *The Law & Ethics of Male Circumcision - Guidance for Doctors*, CIRCUMCISION REFERENCE LIBR., (June 15, 2006), <http://www.cirp.org/library/statements/bma2003/>.

275. *State v. Baxter*, 141 P.3d 92 (Wash. App. Div. 2, 2006).

276. *Id.* at 93.

and state laws prohibiting female circumcision.<sup>277</sup> Thus, male circumcision is also unlawful as contrary to public policy.

In summary, under numerous provisions of American law and international law, boys, like girls, have the right to genital integrity and to be free from harm. Children also have a special right to freedom from harmful practices like ritual or routine circumcision by reason of their vulnerability.

#### B. Do Physicians Have the Legal Right to Circumcise Healthy Boys?

As shown in Part A, above, boys have the absolute right under the common law and federal and state constitutional law, and under the criminal law, tort law, and human rights law, to be left genitally intact. The rules of medical ethics also require physicians to respect human dignity and rights.<sup>278</sup> Therefore, one does not even reach the question of whether physicians can lawfully perform non-therapeutic circumcisions. If one did reach the question, however, there are various additional legal reasons why they cannot.

##### 1. Physicians Cannot Discriminate Against Boys

The American Academy of Pediatrics calls non-therapeutic female genital cutting potentially fatal<sup>279</sup> and child abuse,<sup>280</sup> and acknowledges that even a pinprick of a girl's genitals is a federal crime.<sup>281</sup> As discussed above, under the Equal Protection Clause of the federal and state constitutions, and under international law, physicians must treat boys the same way that they treat girls.<sup>282</sup> The rules of medical ethics similarly prohibit physicians from discriminating on the basis of sex.<sup>283</sup> American Medical Association Policy H-65.992 is "to oppose any discrimination based on an individual's sex,"<sup>284</sup> and the association's long-standing Policy H-65.990 is that no human being shall be denied equal rights due to an individual's sex, gender, religion, or origin.<sup>285</sup> A 2001 American Academy of Pediatrics committee report reaffirms that pediatricians cannot

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277. *Id.*

278. AMA Code of Med. Ethics, Principles of Medical Ethics, Rule I (2001).

279. Press Release, American Academy of Pediatrics (May 27, 2010), available at <http://www2.aap.org/advocacy/releases/fgc-may27-2010.htm> (retrieved November 1, 2012).

280. American Academy of Pediatrics, *Female Genital Mutilation*, 102 PEDIATRICS, no. 1, 1998, at 156, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153>.

281. Press Release, *supra* note 278 ("The AAP does not endorse the practice of offering a 'clitoral nick'").

282. U.S. CONST. amend. XIV, § 1.

283. AMA Code of Medical Ethics, Op. 9.122 (2001).

284. AMA Code of Medical Ethics, AMA Policies on GLBT Issues, No. H-65.992.

285. *Id.* at H-65.990.

discriminate against children in pediatric health care.<sup>286</sup> Circumcision also discriminates against boys on the basis of age, since physicians do not circumcise men or women against their will.

## 2. Physicians Cannot Lawfully Operate on Healthy Boys

In 2010, the Royal Dutch Medicine Association stated that the rule for physicians is “do not operate on healthy children.”<sup>287</sup> As discussed below, that is the ethical and legal rule for American physicians, as well.

### a. *Healthy Boys Are Not Patients*

Insofar as the physician-patient relationship is contractual and consensual,<sup>288</sup> physicians must have a patient before they can provide medical services. “Patient” includes a person suffering or needing medical or surgical treatment,<sup>289</sup> and those needing medical advice or preventive medicine.<sup>290</sup> Initially, newborn boys are patients: their health status is evaluated, and they are given interventions such as eye drops and vaccinations to protect them from disease.<sup>291</sup> Thereafter, however, physicians do not have the right to perform unnecessary cosmetic medical procedures on them.<sup>292</sup>

In New Hampshire, for example, before a physician can perform a procedure, patients (or their proxies) must “be fully informed in writing by a health care provider of his or her medical condition, health care needs, and diagnostic test results,”<sup>293</sup> and be given the opportunity to participate in his or her care and medical treatment and to exercise the right to refuse treatment.<sup>294</sup> A circumcision consent form, by contrast, describes the initial diagnosis or condition as “uncircumcised newborn male.”<sup>295</sup> A healthcare cost review organization states that the most common diagnosis and condition in hospitals is “newborn infant,”<sup>296</sup> for whom the most common

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286. Am. Acad. of Pediatrics, *Nondiscrimination in Pediatric Health Care*, 108 J. OF THE AM. ACAD. OF PEDIATRICS 1215 (2001).

287. Press Release, Royal Dutch Med. Ass’n (2010), available at [http://www.circinfo.org/Dutch\\_circumcision\\_policy.html](http://www.circinfo.org/Dutch_circumcision_policy.html).

288. See generally 70 C.J.S. *Physicians* § 76.

289. *Id.* § 1 n. 25 (citing *Glatzmayer v. U.S.* 84 F.2d 192 (5th Cir. 1936)).

290. *Id.* § 1.

291. *Id.* § 76.

292. *Id.* § 79.

293. N.H. REV. STAT. ANN. § 332-I:2(e).

294. *Id.*

295. See, e.g., Consent Form, Univ. of Va. Health Sys., available at <http://www.virginia.edu/uvaprint/HSC/pdf/040162.pdf> (retrieved May 9, 2012).

296. ELIZABETH STRANGES, LAUREL HOLMQUIST & ROXANNE M. ANDREWS, STATISTICAL BRIEF 85: INPATIENT STAYS IN RURAL HOSPITALS, 2007 (2010), available at <http://hcup-us.ahrq.gov/reports/statbriefs/sb85.jsp>.

treatment is “circumcision.”<sup>297</sup> “Healthy newborn” and “uncircumcised newborn male” are not diagnoses, circumcision is not treatment, and children pronounced to be healthy are not legitimate candidates for unnecessary surgery. AMA Ethical Rule 8.03 also states:

Under no circumstances may physicians place their own financial interests above the welfare of their patients. ... For a physician to unnecessarily hospitalize a patient... for the physician’s financial benefit is unethical. If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.<sup>298</sup>

Once newborn boys are pronounced healthy and immunized, physicians have no more right to operate on them than they would on boys outside the hospital.

*b. Circumcision Is Not Within the Scope of Medicine*

Physicians are licensed to practice medicine only within the scope of their state medical licenses.<sup>299</sup> A physician is a person responsible for the treatment and care of patients.<sup>300</sup> Medicine is “to treat diseases and restore or preserve health.”<sup>301</sup> In regards to surgery, a Mississippi appeals court stated,

[s]urgery deals with the diagnosis and treatment of *injury, deformity, and disease* through an operation or procedure. A patient sees a surgeon because there is *the need for an invasive procedure*.... [T]he surgeon determines whether a surgical procedure is *medically necessary*.<sup>302</sup>

Some state regulations, such as those in Massachusetts,<sup>303</sup> prohibit physicians from practicing medicine “beyond its authorized scope” at the risk of the loss of their licenses.<sup>304</sup> Likewise, California medical licenses authorize the holder to “sever or penetrate the tissues of human beings and to use any and all other methods in the *treatment* of diseases, injuries, deformities, and other physical and mental conditions.”<sup>305</sup> Physicians also

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297. *Id.*

298. AMA CODE OF MED. ETHICS, Op. 8.03 (1994).

299. Am. Med. Ass’n, *Medical Licensure*, available at <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician/medical-licensure.page> (last visited March 4, 2013).

300. *See, e.g.*, MICH. COMP. LAWS § 333.20102 (2010).

301. *Medicine Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/medicine> (last visited Nov. 19, 2012).

302. *Meeks v. Miller*, 956 So. 2d 942, 947 (Miss. App. 2006) (emphasis added).

303. 243 MASS. CODE REGS. § 2.01 (2012).

304. MASS. GEN. LAWS ch. 112, § 5.

305. CAL. BUS. & PROF. CODE § 2051 (West 2012), available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=02001-03000&file=2050-2079> (emphasis added).

have an ethical duty to combat assaults on the health and wellbeing of humankind, and to ameliorate suffering and contribute to human wellbeing.<sup>306</sup>

Circumcision is non-therapeutic and usually performed for non-medical reasons.<sup>307</sup> The diagnostic code for non-therapeutic circumcision is ritual or routine elective surgery in the absence of medical need.<sup>308</sup> Circumcision is not preventive medicine like immunizations either: it does not benefit the vast majority of boys or men.<sup>309</sup> Simply stated, circumcision is not medical care, health care, or medicine. It is unlawful as beyond the scope of medicine.

*c. Unnecessary Surgery on Children Is Unlawful*

It is unethical and a conflict of interest for physicians to unnecessarily hospitalize or operate upon a patient purely for the physician's benefit:<sup>310</sup> "If a conflict develops between the physician's financial interest and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit."<sup>311</sup> The AMA Rules of Medical Ethics also prohibit American physicians from providing or charging for unnecessary services.<sup>312</sup> Urologists likewise pledge, "I will condemn unnecessary surgery as an extremely serious ethical violation."<sup>313</sup>

In many jurisdictions, this is a legal as well as an ethical rule. In *Williamson v. Texas*, a physician testified that unnecessary surgeries on children do not constitute reasonable medical care.<sup>314</sup> In fact, they do not constitute medical care at all. Florida medical guidelines, for example, prohibit "a procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or medical condition."<sup>315</sup> Massachusetts regulations similarly require reporting of physicians "who have engaged in a pattern of abuse such as... [u]nnecessary surgery."<sup>316</sup> Illinois law provides

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306. Frank A. Riddick, Jr., *A Declaration of Professional Responsibility*, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REPORT 5-1-01 (2001), available at <http://www.ama-assn.org/resources/doc/ethics/decofprofessional.pdf> (last retrieved Nov. 1, 2012).

307. *Circumcision-Why It May Be Done*, WEBMD, <http://children.webmd.com/tc/circumcision-why-it-is-done?> (last visited Nov. 19, 2012).

308. *Circumcision Diagnosis Code*, ICD9DATA.COM, <http://www.icd9data.com/2012/Volume1/V01-V91/V50-V59/V50/V50.2.htm> (last visited Nov. 19, 2012).

309. *Circumcision-Why It May Be Done*, WEBMD, <http://children.webmd.com/tc/circumcision-why-it-is-done?> (last visited Nov. 19, 2012).

310. AMA CODE OF MED. ETHICS, Op. 8.03 (1994).

311. *Id.*

312. *Id.* at 2.19.

313. AM. UROLOGICAL ASS'N CODE OF ETHICS, Rule 8.

314. *Williamson v. State*, 356 S.W.3d 1, 15 (Tex. App. 2010).

315. FLA. ADMIN. CODE ANN. r. 64B8-8.001 (2012).

316. 243 MASS. CODE REGS. § 2.14(5)(k) (2012).

a form to make claims against physicians for unnecessary surgery.<sup>317</sup> Thus, the rules of medical ethics and the laws of many states prohibit physicians from performing unnecessary surgery on healthy children.

### 3. Physicians Cannot Endanger or Harm Boys Unnecessarily

As discussed above, child abuse statutes in every state prohibit physicians from endangering or harming a child except in the presence of a valid medical purpose.<sup>318</sup> As courts have noted, unnecessary surgery is inherently harmful.<sup>319</sup> For example, in 2006, in *Tortorella v. Castro*, a doctor misread an MRI scan and removed healthy tissue.<sup>320</sup> In holding him liable, the California appeals court stated, “it seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm...”<sup>321</sup> The court stated further, “the patient needlessly has gone under the knife and has been subject to pain and suffering.”<sup>322</sup> In addition, the most fundamental ethical rule for physicians is, “first, do no harm.”<sup>323</sup> The American Academy of Pediatrics Committee on Bioethics also acknowledges that children deserve effective medical treatment that is likely to prevent substantial harm or suffering or death.<sup>324</sup> Circumcision, by contrast, is not medical treatment, benefits few men, if any, and causes substantial harm, suffering, and occasionally death.<sup>325</sup>

### 4. A Physician’s Legal Duty Is to the Patient

The American Academy of Pediatrics Ethics Committee wrote in 1995,

“[P]roxy consent” poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients *to render competent medical care based on what the patient needs, not what someone else expresses....* [T]he pediatrician’s responsibilities to his or her patient exist independent of parental desires or proxy consent. <sup>326</sup>

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317. ILL. ADMIN. CODE tit. 50, § 928 Exh. B (2006).

318. See CAL. PENAL CODE ANN., *supra* note 247.

319. See *Tortorella v. Castro*, 43 Cal. Rptr. 3d 853, 860 (Cal. Dist. Ct. App. 2006).

320. *Id.* at 855–56.

321. *Id.* at 860.

322. *Id.* at 862. See also *Dilieto v. Cnty. Obstetrics & Gynecology Grp.*, 297 Conn. 105 (2010) (physician liable for unnecessary removal of patient’s reproductive organs); *Murphy v. Blau*, 2010 WL 745056 (Conn. 2010) (doctor negligent in performing unnecessary surgery and failing to communicate the risks to the patient).

323. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 120 (3d ed. 1989).

324. Am. Acad. of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS 279, 279–81 (1997).

325. *Circumcision Policy Statement*, *supra* note 41; Bond, *supra* note 177.

326. Am. Acad. of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric*

Similarly, the AAP advocates legal intervention whenever children are endangered or might be harmed due to a parent's religious beliefs, and acknowledges that the law prohibits physicians and parents from harming children for religious reasons.<sup>327</sup> Thus, it is unethical and unlawful for physicians to perform unnecessary surgery on children that they do not recommend, and to take orders from parents for personal, religious, or cultural reasons having nothing to do with health.

#### 5. Circumcision Violates the Rule of Proportionality

As surgical consent forms show, physicians have a legal duty to offer patients alternative medically reasonable courses of treatment, including no treatment, and to consider and disclose the related risks of each to patients or their proxies.<sup>328</sup> The ethical rule of proportionality likewise requires that physicians weigh the risks and rewards of alternative treatments and of no treatment.<sup>329</sup> Given that American medical associations call circumcision unnecessary,<sup>330</sup> it is risky and harmful, few men benefit from it, and diseases can be prevented more effectively without it, circumcision violates the rule of proportionality. As the British Medical Association concluded, “[t]o circumcise for therapeutic reasons where medical research has shown other techniques to be at least as effective and less invasive would be unethical and inappropriate”.<sup>331</sup>

#### 6. Circumcision Violates the Best Interests Rule

Pediatric physicians have an ethical<sup>332</sup> and legal<sup>333</sup> duty to act in the best interests of each child patient who needs medical care. Circumcision violates the “best interests of the child” rule. First, it precludes physicians

*Practice*, 95 PEDIATRICS 314, 315 (1995) (emphasis added).

327. Am. Acad. of Pediatrics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169, 170–71 (1988) (“[T]he constitutional guarantees of freedom of religion do not sanction harming another person in the practice of one's religion, and they do not allow religion to be a legal defense when one harms another.”).

328. See *Matthies v. Mastromonaco*, 733 A.2d 456, 460 (N.J. 1999); *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C.C. 1972).

329. See Tetsuro Shimizu, *Non-Consequentialist Theory of Proportionality: With Reference to the Ethical Controversy Over Sedation in Terminal Care*, 2 JOURNAL OF PHILOSOPHY AND ETHICS IN HEALTH CARE AND MED., 4, 12 (Jul. 2007).

330. *AMA Adopts New Policies During Final Days of Semi-Annual Meeting*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/news/news/2011-11-15-ama-adopts-new-policies.page> (last visited Nov. 15 2011).

331. British Med. Ass'n, *The Law & Ethics of Male Circumcision - Guidance for Doctors*, 30 J. MED. ETHICS 259, 259–63 (2004), available at <http://jme.bmj.com/content/30/3/259.full.pdf+html>.

332. See *id.*

333. See *In re Richardson*, 284 So.2d 185, 187 (La. Ct. App. 1973) (The law protects a minor's right to be free in his person from bodily intrusion to the extent of loss of an organ, unless this loss be in the best interest of the minor).



from operating on many boys to benefit only a few.<sup>334</sup> For example, one study suggests that it would be necessary to circumcise 322,000 boys to prevent one case of penile cancer,<sup>335</sup> which would result in 644 complications.<sup>336</sup> Physicians cannot lawfully sacrifice the many to benefit the few. Second, the best interests rule requires physicians to choose whatever medical treatment a child would choose for himself, when that can be determined.<sup>337</sup> The circumcision choice of newborn boys can be inferred based on the overwhelming preferences of adult men, as intact men rarely volunteer to be circumcised and adults only rarely request the amputation of functional body parts. Third, American medical associations do not recommend circumcision;<sup>338</sup> in 1999, the AMA called it medically unjustified,<sup>339</sup> and in 2012, the AAP acknowledged that at best, circumcision slightly reduces the risk of diseases.<sup>340</sup> Thus, the professional opinion of the AMA seems to be that circumcision is not in the best interest of boys. Due to the many disadvantages to circumcision, and the fact that intact men rarely choose it for themselves, physicians would be unable to prove by a preponderance of the evidence that it is in the best interest of boys.

#### 7. Is Circumcision a Fraud and an Unfair and Deceptive Act and Practice?

Some physicians no doubt mistakenly believe that circumcision will benefit every boy and man. Some physicians who circumcise, however, do not disclose the truth about it. In the late 1800s and early 1900s, physicians claimed falsely that circumcision prevents a succession of diseases.<sup>341</sup> American physicians who circumcise often solicit parental consent to circumcision<sup>342</sup> even though their national medical associations do not recommend it.<sup>343</sup> In doing so, physicians may appear to endorse circumcision. They sometimes approach uninformed parents at their most vulnerable time instead of in advance, contrary to American medical

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334. See, e.g., *Circumcision: Position Paper on Neonatal Circumcision*, AM. ACAD. OF FAMILY PHYSICIANS (Aug. 2007), <http://www.aafp.org/online/en/home/clinical/clinicalrecs/guidelines/Circumcision.html>.

335. *Id.*

336. Task Force on Circumcision, *Male Circumcision*, 130 PEDIATRICS e756, e768 (2012), <http://pediatrics.aappublications.org/content/130/3/e756.full.pdf+html>.

337. R.S. Van Howe, J.S. Svoboda, J.G. Dwyer & C.P. Price, *Involuntary Circumcision: The Legal Issues*, 83 BJU INT'L SUPP. 1, 63–73 (1999) available at <http://www.cirp.org/library/legal/vanhowe5..>

338. *Circumcision Policy Statement*, *supra* note 102, at 585.

339. COUNCIL ON SCI. AFF., SUMMARIES AND RECOMMENDATIONS OF COUNCIL OF SCI. AFF. REP. 2, 17 (1999), <http://www.ama-assn.org/resources/doc/csaph/csai-99.pdf>.

340. *Circumcision Policy Statement*, *supra* note 102 at 585.

341. See *supra* note 37; see also *supra* Part II.

342. PEDIATRICS, *supra* note 325, at 314.

343. *Circumcision Policy Statement*, *supra* note 102, at 585.

policy.<sup>344</sup> Physicians may mention penile cancer, STDs, and HIV to the parents of newborns,<sup>345</sup> which may frighten them and falsely imply that circumcision will prevent those diseases.<sup>346</sup> Physicians may not mention that circumcision is a painful surgery that requires forcing the foreskin apart from the glans, or that it risks the loss of part or all of the penis, and death.<sup>347</sup>

The AAP has publicized its claim in 2012 that the benefits of circumcision outweigh the risks,<sup>348</sup> which is false. The AAP concedes that it does not know the risks<sup>349</sup> and that circumcision rarely benefits any boy or man.<sup>350</sup> The AAP also fails to disclose the disadvantage that circumcision harms all boys and men.<sup>351</sup> Physicians introduced circumcision to America to cure masturbation by reducing pleasure,<sup>352</sup> but the AAP now contends the opposite,<sup>353</sup> that it does not reduce pleasure. The AAP does not mention studies showing that circumcision reduces sexual pleasure,<sup>354</sup> nor does it disclose that the foreskin has a sexual function.

Physicians have an ethical duty to reveal when they have made arrangements to sell a body part being removed.<sup>355</sup> But one would assume that they do not explain the details to parents<sup>356</sup> or that the hospital may sell the foreskins to pharmaceutical and cosmetics companies.<sup>357</sup> Importantly, since 1971, medical associations and physicians who circumcise also appear to have told parents that the circumcision decision is theirs to make for religious, cultural, or personal reasons.<sup>358</sup> The AAP's own Ethics

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344. Alicia Gallegos, *California Doctors Back Bill to Prevent Circumcision Ban*, AM. MED. NEWS (Aug. 22, 2011), <http://www.ama-assn.org/amednews/2011/08/22/gvsc0822.htm>.

345. *Circumcision Policy Statement*, *supra* note 102, at 585.

346. *Id.*

347. *See Male Circumcision*, *supra* note 2, at e756, e774; *Circumcision Policy Statement*, *supra* note 41, at 688; Council on Scientific Affairs, *supra* note 31.

348. *See Male Circumcision*, *supra* note 2, at e756, e761. *But see Male Circumcision*, *supra* note 2, at e759, e775.

349. *See id.* at e772, e775.

350. *See id.* at e775.

351. *See id.* at e760.

352. *See* M. Fox & M. Thomson, *supra* note 35, at 464.

353. *See Male Circumcision*, *supra* note 2, at e769.

354. *Id.*; *see supra*, notes 85-93.

355. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483-85 (Cal. 1990); AMA Code of Medical Ethics, Op. 2.08, Commercial Use of Human Tissue (1994) available at [http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion208.page?](http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion208.page) (“(3) Human tissue and its products may not be used for commercial purposes without the informed consent of the patient who provided the original cellular material”).

356. The consent form for the surgery is likely to disclose that the tissue removed may be used or sold, but parents are unlikely to read the form carefully. *See, e.g.*, Univ. of Va. Health Sys., *supra* note 294.

357. *Id.*

358. *See Male Circumcision*, *supra* note 2, at e757, e759, e763.

Committee correctly states the opposite:<sup>359</sup> that a physician's ethical and legal duty is to the child patient, regardless of his parents' beliefs.<sup>360</sup> If parents can prove that their consent to circumcision was obtained by fraud, even many years earlier, they may still have viable claims against physicians and hospitals since the statute of limitations for fraud begins upon the discovery of it.<sup>361</sup>

Parents who pay for circumcision also may have a cause of action for unfair and deceptive acts and practices under state Consumer Protection statutes that allow claims for the sale of services.<sup>362</sup> In 2008, for example, in *Reed v. ANM Health Care*<sup>363</sup> a Washington State appeals court noted that a doctor's entrepreneurial activities fall outside the ambit of health care.<sup>364</sup> In *Reed*, the court found that the physician's decision "was motivated by reasons other than her medical judgment."<sup>365</sup> The court held, "if a doctor is motivated to promote an unnecessary surgery for financial gain, an injured plaintiff can pursue a claim under the Consumer Protection Act."<sup>366</sup> Physicians may be motivated to perform this unnecessary, elective surgery, which medical associations generally do not recommend, for monetary gain.<sup>367</sup> Parents who can prove they have been subjected to unfair and deceptive practices may, in some states, have claims under their state's Consumer Protection Act.<sup>368</sup> Such claims might avoid the procedural obstacles and requirements of a medical malpractice claim, and could result in the award of multiple damages and attorneys' fees.<sup>369</sup>

### C. Do Parents Have the Right to Make the Circumcision Decision?

Since healthy boys have the right to be left bodily and genitally intact, and physicians do not have the right to circumcise them, one does not reach the question of parents' rights in the matter. But since American medical associations and some religious associations assert that parents have a religious right to cause their sons to be circumcised under the First

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359. See *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, *supra* note 325.

360. *Id.*

361. See, e.g., 54 C.J.S. *Limitations of Actions* § 277 ("[T]he statute of limitations generally begins to run when the fraud is discovered or with reasonable diligence should have been discovered"). Moreover, the failure of a defrauded person to discover "fraud may be excused where there exists a fiduciary or confidential relationship between the parties."; *id.*

362. See *Reed v. ANM Health Care*, 225 P.3d 1012, 1015–1016 (Wash. Ct. App. 2008).

363. *Reed v. ANM Health Care*, 225 P.3d 1012 (Wash. Ct. App. 2008).

364. *Id.* at 1014.

365. *Id.* at 1016.

366. *Id.* at 1014.

367. See Giannetti, *supra* note 129, at 1565; *Circumcision Policy Statement*, *supra* note 41, at 691.

368. See, e.g., *Reed*, 225 P.3d at 1014.

369. See Giannetti, *supra* note 129, at 1545–46, 1566 (arguing that American trade associations may be liable for circumcision as well).

Amendment free exercise of religion clause,<sup>370</sup> and a general right to do so, it should be asked whether parental consent to non-therapeutic circumcision is legally valid.

### 1. Boys' Rights to Genital Integrity Supersede Their Parents' Rights

A court in Cologne, Germany addressed this question in its June 2012 decision holding that circumcision is “grievous bodily harm.”<sup>371</sup> The court concluded that boys' rights to genital integrity supersede or trump their parents' religious and other rights.<sup>372</sup> American law compels the same conclusion. Constitutional rights in America adhere to individuals; here, they adhere to boys and men.<sup>373</sup> Moreover, Congress made the express finding that female genital mutilation “can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law.”<sup>374</sup> Thus, the rights of boys and girls to remain genitally intact do not unconstitutionally abridge their parents' legal rights.

### 2. Parents Have a Legal Duty to Protect Their Children From Harm

Blackstone wrote that parental power over children enables them to carry out their duties, including the duty to protect their children.<sup>375</sup> The British House of Lords affirmed this in 1985:

Nor has our law ever treated the child as other than a person with capacities and rights recognized by law. The principle of the law... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.<sup>376</sup>

In America, as well, “the duty of parents to provide for the safety and welfare of their children... has long been recognized by the common law and by statute.”<sup>377</sup> Parents “have the duty to take every step reasonably possible... to prevent harm to their children.”<sup>378</sup> For example, parents cannot consent to their child's participation in non-therapeutic research in

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370. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”); *see also In re Marriage of Boldt*, 176 P.3d 388, 393 (Or. 2008) (holding that the minor son's opinion about whether to be circumcised was valid evidence in the determination of a materials change in circumstances for the consideration of custody).

371. *See* Kulish, *supra* note 24; BBC, *supra* note 25.

372. *See* Kulish, *supra* note 24.

373. *See, e.g.,* *Adamson v. California*, 332 U.S. 46, 51 (1947) (“[T]he Bill of Rights, when adopted, was for the protection of the individual”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

374. 18 U.S.C. § 116 (2006).

375. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*160.

376. *Gillick v. W. Norfolk AHA*, [1985] UKHL 7, [1986] A.C. 112.

377. *North Carolina v. Walden*, 293 S.E.2d 780, 786 (N.C. 1982).

378. *Id.*

which there is any risk of injury or damage to health.<sup>379</sup> Both the common law and child abuse statutes prevent parents from endangering or injuring their children other than for a valid medical purpose.<sup>380</sup> Thus, parents are required by law to protect their sons from the risks of, and the harm caused by, circumcision.

### 3. Parents Have No Religious or Other Right to Order Circumcision

Parents have a complete right to freedom of religious belief, and the right to bring up their children in their own religion.<sup>381</sup> Nonetheless, laws do not violate the free exercise of religion clause so long as they are valid, neutral, and generally applicable.<sup>382</sup> For example, Native American Indians cannot smoke the illegal drug peyote in religious ceremonies.<sup>383</sup> The Supreme Court prohibited polygamy in *Reynolds v. United States*, explaining that to rule otherwise would be to “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>384</sup> Parents do not own their children or have the unfettered right to control their lives and bodies; this would constitute slavery, which was abolished by the 13th Amendment to the United States Constitution.<sup>385</sup>

As Ross Povenmire wrote, parents cannot risk harming their children or harm them for religious reasons.<sup>386</sup> The Supreme Court stated in *Wisconsin v. Yoder* that parental discretion may be challenged “if it appears that the parental decision will jeopardize the health and safety of the child”.<sup>387</sup> In *Prince v. Massachusetts* in 1944,<sup>388</sup> the controlling case, parents asked their children to distribute religious pamphlets on highways which was in

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379. See *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807, 856 (Md. 2001).

380. See, e.g., *Connecticut v. Maurice M.*, 975 A.2d 90, 101 (Conn. App. Ct. 2009) (“parents have a common-law duty to protect their children”); *In re S.D.*, 204 P.3d 1182, 1188 (Kan. Ct. App. 2009) (“parents have a natural, as well as common-law, duty to protect their children from abuse”); see also *supra*, Part III.A.3.a (discussing the child abuse statutes).

381. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)).

382. See *Huffman v. Alaska*, 204 P.3d 339, 344 (Alaska 2009) (holding the state can require parents to allow tuberculosis test on child over religious objection).

383. See Remy Maldigian, *Unequal Rites: Peyote Sacraments and the First Amendment*, IN THESE TIMES (Jan. 11, 2012), [http://www.inthesetimes.com/article/12429/unequal\\_rites\\_peyote\\_sacraments\\_and\\_the\\_first\\_amendment](http://www.inthesetimes.com/article/12429/unequal_rites_peyote_sacraments_and_the_first_amendment).

384. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

385. U.S. CONST. amend XIII, § 1.

386. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER, SOC. POL’Y & L. 87, 88–89 (1999).

387. *Wisconsin*, 406 U.S. at 234.

388. *Prince v. Massachusetts*, 321 U.S. 158, 159–162; accord *People in Interest of D.L.E.*, 645 P.2d 271 (1982).

violation of a state statute. Finding the statute constitutional despite the freedom of religion clause, the Supreme Court famously stated:

The right to practice religion freely does not include liberty to expose the... child to ill health or death.... The catalogue [of possible harms] need not be lengthened.... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, [including] matters of conscience and religious conviction.... Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.... Parents may be free to become martyrs themselves. But [they may not] make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>389</sup>

The *Prince* decision suggests that parents do not have the legal right to order the circumcision of their children for religious reasons. The surgery not only risks ill health and death but is certain to cause physical injury,<sup>390</sup> and possibly psychological injury as well.<sup>391</sup> *Prince* also makes clear that parents cannot force their children to undertake potentially harmful activities before their children become old enough to make an informed choice for themselves.<sup>392</sup> In *State v. Baxter*, a Washington case decided in 2006, the court concurred with the holding in *Prince*:

Both corporal punishment and religious practice are grounded in the parents' beliefs as to the best interests of the child, and as parental control over the child's upbringing does not justify cutting the child as punishment, it does not justify cutting the child as a religious exercise.<sup>393</sup>

Thus, parents do not have the right to circumcise their sons for religious reasons.

#### 4. Parents Can Only Consent to Medical Care

Just as physicians cannot perform unnecessary surgery on children, parents cannot consent to it.<sup>394</sup> In 1979, a Texas appeals court considered whether parents could consent to remove and transplant a kidney from a daughter to a son to save his life, and held that they could not.<sup>395</sup> The court

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389. *Prince*, 321 U.S. at 166–167, 170; see also Am. Acad. of Pediatrics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169, 170–171 n. 2 (1988) (“[P]arents may not martyr their children based on parental beliefs”) (citing *Prince*, 321 U.S. 158).

390. See *supra* Part I.E.

391. See *Andrews*, 498 F. Supp. at 1047 (“[Medical treatment] decision[s] can either produce or eliminate physical, psychological, and emotional ruin.”).

392. *Prince*, 321 U.S. 170.

393. *State v. Baxter*, 141 P.3d 92, 99 (Wash. App. 2006).

394. AMA Code of Medical Ethics, Rule 2.19.

395. *Little v. Little*, 576 S.W.2d 493, 494, 500 (Tex. Civ. App. 1979).

noted that the power of parents to consent is limited to medical and surgical treatment.<sup>396</sup> The court defined treatment as “the steps taken to effect a cure of an injury or disease... including examination and diagnosis as well as application of remedies.”<sup>397</sup> Similarly, in *Williamson v. State*, a court found a mother guilty of felonious assault for requesting unnecessary surgery that injured her child.<sup>398</sup> The American Academy of Pediatrics Committee on Bioethics agrees that parents can only give informed consent for the diagnosis and treatment of children, adding that it should be with assent of the child whenever appropriate.<sup>399</sup> This is inconsistent with the 2012 AAP Task Force on Circumcision’s claim that parents have the right to make the circumcision decision.<sup>400</sup> No doubt parents can consent to safe, effective preventive medicine, such as eye drops for newborns, but they cannot consent to unnecessary surgery that is ineffective in preventing disease.

#### 5. Parents Must Act in Their Sons’ Best Interests

Even if circumcision had a valid medical basis, and parents had the right, as proxies, to make the circumcision decision, they would still be required by law, like physicians, to act in the best interests of their sons.<sup>401</sup> As Steven Svoboda writes, “[s]urrogates are expected to make decisions *based on what the incompetent patient would want for himself[;]*” “[i]t must be shown to a reasonable degree of certainty that *the child would*, upon attainment of the age of reason, *have desired the surgery for himself.*”<sup>402</sup> As discussed above, men rarely choose circumcision for themselves, and circumcision violates the best interests rule. The best interests rule also prohibits parents from making the circumcision decision for reasons such as religious belief or aesthetic preference which have nothing to do with their son’s health.<sup>403</sup>

#### 6. Parents Rarely Give Fully Informed Consent

Since parents do not have the right to make the circumcision decision, one does not reach the question of whether their consent is fully informed, as the law requires.<sup>404</sup> Before 1971, physicians reportedly often circumcised newborn boys without parental consent.<sup>405</sup> All such operations

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396. *Id.* at 495.

397. *Id.*

398. *Williamson v. State*, 356 S.W.3d 1, 14 (Tex. App. 2010).

399. *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, *supra* note 325, at 314.

400. *Circumcision Policy Statement*, *supra* note 41, at 585.

401. J.S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 *BJU INT’L* 63, 64, (1999).

402. *Id.* at 65, 70 (emphasis added).

403. *Id.* at 68.

404. *See Todd v. United States*, 570 F. Supp. 670, 678 (D.S.C. 1983).

405. *See Paul M. Fleiss, The Case Against Circumcision*, *MOTHERING: THE MAGAZINE OF NATURAL*

constituted an unlawful battery.<sup>406</sup> Physicians may fail to obtain fully informed consent to circumcision today, as well. For example, it is unlikely that physicians inform parents that the operation can be fatal<sup>407</sup> or prevents normal sexual function.<sup>408</sup> If physicians told parents the truth about the surgery, it is unlikely that roughly half of parents would agree to it, as they do today, except perhaps on religious grounds.<sup>409</sup>

#### D. Ancillary Legal Issues

The analysis above allows these ancillary issues to be resolved quickly.

##### 1. Is It Lawful to Use Medicaid to Pay For Circumcision?

Since 1965, tens of millions of boys have been circumcised under the jointly federal and state funded Medicaid program.<sup>410</sup> The fundamental principle of Medicaid law, however, repeated throughout the federal and state Medicaid statutes and regulations,<sup>411</sup> and affirmed by the United States Supreme Court,<sup>412</sup> is that Medicaid only covers necessary medical services.<sup>413</sup> Moreover, medical services must be reasonable and effective, and the least costly alternatives must be used whenever available.<sup>414</sup> Surgery is covered only after a physician or surgeon has diagnosed an illness or disease, and has determined that the surgery will be effective and is the only available treatment.<sup>415</sup> Unnecessary, elective, cosmetic surgery is not covered.<sup>416</sup> It has been unlawful since 1965 for physicians and hospitals to claim Medicaid reimbursement from the federal and state governments for circumcisions.<sup>417</sup> Every such claim is a false claim against the federal and state governments, and is subject to severe penalties.<sup>418</sup> In

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FAMILY LIVING, Winter 2007, available at <http://www.mothering.com/community/a/case-against-circumcision>.

406. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

407. Bollinger, *supra* note 74.

408. *See* Frisch, *supra* note 85.

409. *See generally* Svoboda, *supra* note 239, at 61.

410. *Cf. Medicaid Funding for Circumcision*, CIRCUMCISION RESOURCE CTR., <http://www.circumcision.org/medicaid.htm> (last visited March 6, 2013) (listing states in which Medicaid does not fund circumcision). *See generally* Peter W. Adler, *Is It Lawful to Use Medicaid to Pay for Circumcision?*, 19 J.L. & MED. 335–36 (2011).

411. Adler, *supra* note 410, at 336.

412. *Id.* at 343 n. 89.

413. *Id.* at 336.

414. *Id.* at 344.

415. *Id.*

416. *Id.*

417. *Id.* at 343.

418. *Id.* at 344.



urging Medicaid coverage of circumcision,<sup>419</sup> the AAP is advocating breaking the law.

## 2. Is It Lawful For Companies to Buy and Sell Boys' Foreskins?

Given that boys have a right to genital integrity, that physicians cannot lawfully operate on healthy children,<sup>420</sup> and that parental consent to circumcision is legally invalid, hospitals do not own the foreskins that they amputate. They are the property of the boys from whom they are unlawfully taken. Accordingly, hospitals cannot lawfully sell foreskins to pharmaceutical, cosmetics, or other companies, and the boys and men whose foreskins have been converted have claims against those companies.

## 3. Can Physicians' Trade Associations Be Held Liable For Circumcision?

In 2000, Matthew Giannetti considered whether the American Academy of Pediatrics could be subject to trade association liability for its 1989 report on circumcision.<sup>421</sup> He argued that trade association liability may be predicated on section 324A of the Restatement (Second) of Torts, which allows for the imposition of liability upon a trade association for gratuitous services, such as professional standard setting, if the association renders those services negligently.<sup>422</sup> Giannetti cited the 1996 New Jersey Supreme Court case of *Snyder v. American Association of Blood Banks*, which held a blood bank trade association liable to the recipient of blood platelet transfusions who contracted AIDS.<sup>423</sup> The court found that “[b]y words and conduct, the AABB [American Association of Blood Banks] invited blood banks, hospitals, and patients to rely on the AABB’s recommended procedures.”<sup>424</sup> Thus the court held that the American Association of Blood Banks (“AABB”) owed a duty of care to individuals like Snyder, because it was foreseeable that blood banks would follow the AABB’s recommended procedures.<sup>425</sup> In addition, the court also found that at the

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419. *Male Circumcision*, *supra* note 2, at 585; Am. Acad. of Pediatrics Task Force on Circumcision, *Technical Report: Male Circumcision*, 130 PEDIATRICS e756, e777 (2012) (“Hospitals in states where Medicaid covers routine newborn male circumcision have circumcision rates that are 24% higher than hospitals in states without such coverage . . . . Financial barriers that prevent parents from having the choice to circumcise their male newborns should be reduced or eliminated . . . . The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure”).

420. *See supra*, Part III.B.2.

421. *See generally* Giannetti, *supra* note 129.

422. *Id.* at 1513 nn. 24–25.

423. *Snyder v. Am. Ass'n of Blood Banks*, 676 A.2d 1036, 1036 (N.J. 1996).

424. Giannetti, *supra* note 150, at n. 28.

425. *Id.* at n.29.

time of Snyder's transfusions, ample evidence existed that blood products could transmit AIDS, and, therefore, the AABB was negligent.<sup>426</sup>

The American Academy of Pediatrics intends that hospitals, physicians, and parents (as well as the media, legislators and Medicaid officials) will rely upon its 2012 circumcision policy report.<sup>427</sup> Many of the AAP's assertions in the report appear to be false or misleading. These include especially the assertion that the benefits of circumcision exceed the risks,<sup>428</sup> that parents have the right to make the circumcision decision,<sup>429</sup> and that Medicaid should pay for it,<sup>430</sup> and also the claims that the circumcision is relatively painless,<sup>431</sup> that the risks are low,<sup>432</sup> and that circumcision does not affect sexual function.<sup>433</sup> Accordingly, hospitals, physicians, parents, and men may have claims against the AAP (and the American Congress of Obstetricians and Gynecologists, which endorsed the 2012 AAP report) for trade association liability.<sup>434</sup>

### III. REMEDIES

#### A. Rights

As shown, circumcision violates the rules of medical ethics and numerous provisions of law. Boys and men are entitled to full redress. First, as the American Medical Association has stated, regulatory agencies are required to take allegations of unethical conduct very seriously.<sup>435</sup> Unnecessary surgery on children is a serious ethical violation.<sup>436</sup> Physicians who circumcise should lose their licenses to practice medicine. Second, the federal and state child abuse statutes protecting children from harm and the criminal assault laws must be enforced. The penalty for violating these laws is imprisonment. Third, the federal and state statutes protecting girls from non-therapeutic circumcision must be extended to

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426. *Id.* at n.30.

427. See *Circumcision Policy Statement*, *supra* note 41, at 585. Indeed, the AAP issued *Circumcision Speaking Points* for members. See *supra* note 103.

428. See Part I.G, *supra*.

429. See Part III.C, *supra*.

430. See Part III.D.1, *supra*.

431. *Male Circumcision*, *supra* note 2, at e757. ("Analgesia is safe and effective in reducing the procedural pain associated with newborn circumcision.")

432. See *Circumcision Policy Statement*, *supra* note 41.

433. See *Male Circumcision*, *supra* note 2, at e769.

434. *New Evidence Points to Greater Benefits of Infant Circumcision, But Final Say Is Still Up to Parents, Says AAP*, AM. ACAD. OF PEDIATRICS (Aug. 27, 2012), <http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Press-Room.aspx> (types "new evidence points" into the search bar, follow first search result).

435. See Part III.D.3, *supra*.

436. See AM. UROLOGICAL ASS'N CODE OF ETHICS, *supra* note 312.

boys. The proposed federal law that would allow circumcision,<sup>437</sup> and laws blocking remedies, such as statutes of repose, would violate boys' rights and be invalid as unconstitutional. Fourth, federal and state Medicaid officials, legislators, and attorneys general all have the legal duty to end Medicaid funding of circumcision. Fifth, since physicians and hospitals do not have the legal authority to take boys' foreskins, they do not have the right to sell them, nor do the buyers, including pharmaceutical and cosmetics companies, have the right to use them.

### B. Reality

The reality is that regulatory, criminal, administrative, and legislative remedies have not been forthcoming for properly performed circumcision. Newborn boys cannot speak or vote, while physicians' associations and religious organizations can (and do) lobby legislators, contribute to campaigns, and put pressure on Medicaid officials. For example, in 2010, a Jewish senator in Massachusetts wrote to her constituents that she had blocked a bill from leaving her committee, which would have allowed only therapeutic circumcision.<sup>438</sup> In 2011, the president of the American Medical Association stated that the AMA would block all efforts to limit non-therapeutic circumcision,<sup>439</sup> a statement at odds with the official AMA policy that the "data are not sufficient to recommend routine [neonatal circumcision]." <sup>440</sup> Physicians' trade associations may also have influenced states to continue Medicaid coverage (when asked why they are continuing coverage, Medicaid officials uniformly respond by using medical terms).<sup>441</sup> Representatives of the American Academy of Pediatricians, having argued recently that Medicaid should cover circumcision,<sup>442</sup> may be trying to persuade the states that have ended Medicaid coverage to reinstate it, contrary to law.

### C. Remedies

Circumcision, one of the most common surgeries in American hospitals, will continue until public opinion has turned completely against it, or until

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437. See H.R. 2400, *supra* note 26.

438. See *State Senate Cuts Bill to Ban Circumcision*, UNIVERSAL HUB, <http://www.universalhub.com/2010/state-senate-cuts-bill-ban-circumcision> (last visited Nov. 14, 2012).

439. See Alicia Gallegos, *California Doctors Back Bill to Prevent Circumcision Ban*, AM. MED. NEWS (Nov. 14, 2012, 8:25 PM), <http://www.ama-assn.org/amendnews/2011/08/22/gvsc0822.htm> ("American Medical Association policy strongly opposes interference by the government or other third parties that 'causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient.'").

440. AM. MED. ASS'N, *supra* note 31, at 17.

441. See generally Adler, *supra* note 153.

442. See Sasha Emmons, *AAP: Health Benefits of Circumcision Outweigh the Risks*, CNN HEALTH, (Aug. 27, 2011), <http://www.cnn.com/2012/08/27/health/aap-circumcision-recommendation/index.html>.

courts rule, as in Germany, that circumcision is unlawful. The constitutional right of access to the courts guarantees every American speedy, adequate, effective, and meaningful judicial remedies.<sup>443</sup> Judges are sworn to uphold the Constitution and to grant those remedies. The 2012 German decision, this article, and those it cites, provide a blueprint for courts to hold physicians, hospitals, and parents liable to men for properly performed circumcisions.

#### CONCLUSION

This article has addressed whether circumcision is legal, and has shown that it is not. To summarize the law,<sup>444</sup> boys, like girls and adults, have absolute rights under the common law to personal security and bodily integrity, and to freedom or the autonomy to make important and irreversible decisions about their bodies that can be delayed, like circumcision, for themselves.<sup>445</sup> It is unconstitutional to protect girls from unnecessary genital cutting without extending equal protection of the law to boys.<sup>446</sup> In addition, boys and girls are protected from circumcision by the criminal child abuse statutes,<sup>447</sup> tort law,<sup>448</sup> and human rights law.<sup>449</sup>

One therefore does not reach the argument that physicians have the right to circumcise boys for religious, cultural, or personal reason, but if one did, it does not pass the blush test. A physician's legal duty is to provide competent medical care to pediatric patients independent of their parents' desires.<sup>450</sup> Thus, physicians cannot take orders from parents to operate on children for reasons having nothing to do with medicine. Parents' religious rights in turn are subordinate to their sons' absolute rights to genital integrity and autonomy,<sup>451</sup> and parents cannot risk harming their children, let alone actually harm them for religious reasons.<sup>452</sup> Furthermore, physicians and parents have a legal duty to *protect* boys from circumcision.<sup>453</sup>

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443. *Koutny v. Martin*, 530 F. Supp. 2d 84, 90 (D.D.C. 2007).

444. *See supra* Part III.

445. *See supra* Part III.A.1.

446. *See supra* Part III.A.2.a.

447. *See supra* Part III.A.3.

448. *See supra* Part III.A.4.

449. *See supra* Part III.A.5.

450. *See supra* Part III.B.4.

451. *See, e.g., German Court Rules Circumcision Is "Bodily Harm"*, BBC NEWS EUROPE (June 26, 2012), <http://www.bbc.co.uk/news/world-europe-18604664>; N. Kulish, GERMAN RULING AGAINST CIRCUMCISING BOYS DRAWS CRITICISM, N.Y. TIMES (June 26, 2012), <http://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html>.

452. *See supra* notes 385-92.

453. *Id.*

This leaves the argument that circumcision is legally justified because it is preventive medicine. As the ethicist Margaret Somerville has written, it is a common error to believe that this justifies circumcision.<sup>454</sup> Amputating any body part would have medical benefits but would violate the rights of the child.<sup>455</sup> Circumcision also does not benefit the vast majority of boys or men at all (*e.g.*, at best it reduces the risk of HIV during unsafe sex), and any benefits can be achieved easily and more effectively without it.<sup>456</sup> The ethical and legal rule is that physicians cannot operate on healthy children.<sup>457</sup> Amputations are legally justified only when medically necessary to treat serious medical conditions,<sup>458</sup> after a diagnosis and recommendation that the surgery is likely to be effective, cannot be delayed, that its benefits will outweigh the risks and harm, and that all other efforts to treat the disease have failed.<sup>459</sup> Moreover, physicians and parents would need to prove that the surgery is in the best interests of the child, which includes proving that the child, if able, would have chosen the surgery for himself.<sup>460</sup> Circumcision fails all of these tests. In short, under any analysis, circumcision is illegal.

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454. MARGARET SOMERVILLE, *THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT* 202-19 (2000).

A common error made by those who want to justify infant male circumcision on the basis of medical benefits is that they believe that as long as some such benefits are present, circumcision can be justified as therapeutic, in the sense of preventive health care. This is not correct. A medical-benefits or "therapeutic" justification requires that overall the medical benefits sought outweigh the risks and harms of the procedure required to obtain them, that this procedure is the only reasonable way to obtain these benefits, and that these benefits are necessary to the well-being of the child. None of these conditions is fulfilled for routine infant male circumcision. If we view a child's foreskin as having a valid function, we are no more justified in amputating it than any other part of the child's body unless the operation is medically required treatment and the least harmful way to provide that treatment.

455. *See supra* Part III.A.

456. *See supra* Part III.G. UTIs can be treated with antibiotics. Infants are not at risk of penile cancer, which can be prevented by proper hygiene, or of STDs, which can be prevented easily and effectively by abstinence, monogamy, or safe sex.

457. *See supra* Part III.B.

458. *Id.*

459. *See supra* Part III.B.

460. *See supra* Part III.B.6.