

# COMING SOON TO A COURT NEAR YOU: RELIGIOUS MALE CIRCUMCISION

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*Certain parts of the United States have seen recent political movements seeking to ban the practice of religious male circumcision. Although these movements have not been successful yet, multiple Western European governments have already taken actions to restrict religious male circumcision. This trend of circumcision restrictions will reach the United States in the near future, which raises questions about the implications for religious liberty. As male circumcision is a religious practice in both Jewish and Muslim faiths, restrictions and outright bans of circumcision will indeed create First and Fourteenth Amendment concerns, likely to be fought over in court. Questions of family, religion, and bodily rights are all raised in arguments over religious male circumcision, and legal scholars ought to consider these issues now before they are eventually raised in United States court-rooms.*

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Several years ago, I was walking through Washington, D.C., on my way to work when I passed by a protest at the Walter E. Washington Convention Center. One gets used to frequent protests as one of the peculiar annoyances of living in D.C., along with traffic-gnarling motor-

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\* Deputy General Counsel, Becket Fund for Religious Liberty. The views expressed here are mine alone and do not necessarily reflect the views of the Becket Fund or its clients. Many thanks to Professor Robin Wilson and the other Symposium participants for their thoughts on the original version of this Symposium submission. Thanks are also due to the editors of the *University of Illinois Law Review* for their helpful editing and their patience.

cedes and fifteen different kinds of federal security agencies.<sup>1</sup> But this protest was different. First of all, it was at the Convention Center, which is not the usual location for protests—the National Mall and the White House are far more popular venues. Second, as I got closer I realized that the protestors were protesting against pediatricians, rather than politicians. It turned out that the American Academy of Pediatrics (“AAP”) was holding its annual convention in D.C., and that had apparently made them a convenient target for the protestors.

But who protests against pediatricians? One can understand protesting against lawyers, given that the power to sue can be the power to destroy. But pediatricians do not have that reputation. What could they possibly have done to make these people so angry? As the reader may have surmised from the title of this symposium piece, the protestors were mad at the pediatricians because of the AAP’s position on male circumcision of children.<sup>2</sup> Specifically, the protesters wanted the AAP to object to male circumcision, rather than allow pediatricians that performed circumcisions to remain in good standing within the AAP.<sup>3</sup>

This protest was the first I had ever heard of “intactivists,” which is the name that those who wish to ban child male circumcision give themselves.<sup>4</sup> At the time, I could not be faulted for being unaware of this movement; the intactivist movement was still firmly on the fringe. But today I would not be a very good religious-liberty advocate if I did not know of the movement and its potential for enormous effects on religious liberty. The intactivist movement has gathered visible steam within the past decade with a proliferation of new nonprofit organizations and a significant infusion of funds.<sup>5</sup> Intactivists also enjoy significant support within the legal academy, including developed legal and medical ethical arguments for a ban on circumcision of male children.<sup>6</sup> And governmental bodies, both courts and others, have also begun to address the issue.<sup>7</sup>

The premise of this Symposium piece is that the practice of religiously motivated circumcision of male children will soon become an issue that religious-liberty advocates, scholars, and eventually judges must consider. The growth of a social and legal movement against circumcision will inevitably have significant effects on religious liberty for all reli-

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1. It has been said that a federal agency has truly arrived once it has its own police force.

2. See AM. ACAD. OF PEDIATRICS: TASK FORCE ON CIRCUMCISION, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585 (Sept. 2012).

3. Dan Bollinger, *Intactivists Protest AAP National Conference in Washington, DC*, INT’L COAL. GENITAL INTEGRITY (Oct. 12, 2009), <http://www.icgi.org/2009/10/intactivists-protest-at-aap-national-conference-in-washington-dc/>.

4. See, e.g., *About Intact America*, INTACT AMERICA, <http://www.intactamerica.org/aboutus> (last visited May 19, 2016) (leading anti-male-circumcision organization describing members as “intactivists”).

5. Mark Joseph Stern, *How Circumcision Broke the Internet*, SLATE (Sept. 18, 2013), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2013/09/intactivists\\_online\\_a\\_fringe\\_group\\_turned\\_the\\_internet\\_against\\_circumcision.html](http://www.slate.com/articles/health_and_science/medical_examiner/2013/09/intactivists_online_a_fringe_group_turned_the_internet_against_circumcision.html).

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

7. See *infra* Part II.

gious groups, but most obviously and particularly for two specific minority religious groups, Jews and Muslims. It thus behooves us to think now about how this development will affect the law of religious liberty and, particularly germane to this Symposium, the law of the family. Indeed, the issue of circumcision of male children has already been litigated in courts in Europe,<sup>8</sup> and sooner or later the issue will end up in courts in the United States.

In what follows, I will first discuss, at a fairly high level of generality, the main religious practices in question. Second, I will discuss the development of the law in this area, along with recent developments, such as pro- and anti-circumcision activity in Europe. Third, I will discuss how the law of religious liberty and the law of the family might intersect with challenges to religious circumcision of male children.

What is this piece not about? It is not about the practice—or perhaps better put, practices—of female genital mutilation. Although intactivists and others frequently link the two practices in discussions of the issues, they are quite different. Of course at a high level of generality both sets of practices involve cutting the genitals, but that is an arbitrary place to draw the line. Each practice should be considered on its own, alongside other issues concerning modification of the body, including tattoos, nose rings, ritual scarring, and the like.<sup>9</sup> Use of the term “female circumcision” is both inaccurate in fact and ultimately a rhetorical tactic. Therefore, I do not address it here.

This piece is also not about adult circumcision, which is not an issue of great controversy, nor is it about the practice—most widespread in English-speaking countries<sup>10</sup>—of secular, infant circumcision.

## I. THE PRACTICE OF RELIGIOUS MALE CIRCUMCISION

Religious male circumcision is a practice common in Judaism and Islam.<sup>11</sup> In most streams of Judaism, male circumcision, or *brit milah*, is performed on the eighth day after birth.<sup>12</sup> This is meant to keep the cove-

8. See *infra* Part II.

9. Contra Brian D. Earp, *Female Genital Mutilation (FGM) and Male Circumcision: Should There Be a Separate Ethical Discourse?*, PRACTICAL ETHICS BLOG (Feb. 18, 2014), <http://blog.practicaethics.ox.ac.uk/2014/02/female-genital-mutilation-and-male-circumcision-time-to-confront-the-double-standard/>. Earp’s argument is in my view unconvincing because he does not explain why all forms of body modification in children would not also fall within the same ethical discourse. The only link between the practices is that one involves modification of male genitals and the other involves modification of female genitals, but even that set is broader than Earp makes it out to be.

10. See Helen Weiss et al., *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability*, UNAIDS, 11–12 (2007) available at [http://www.unaids.org/sites/default/files/media\\_asset/jc1360\\_male\\_circumcision\\_en\\_2.pdf](http://www.unaids.org/sites/default/files/media_asset/jc1360_male_circumcision_en_2.pdf).

11. See *Male Circumcision: Context, Criteria and Culture (Part 1)*, UNAIDS (Feb. 26, 2007), <http://www.unaids.org/en/resources/presscentre/featurestories/2007/february/20070226mcp1>. In addition to Jewish and Muslim practices of religious male circumcision, some animist groups in Africa, Asia, and Oceania also engage in circumcision, but I am aware of no circumcision-related cases in the United States or Europe involving these groups.

12. See SARA E. KARESH & MITCHELL M. HURVITZ, *Brit Milah*, in *ENCYCLOPEDIA OF JUDAISM* 70–71 (2005).

nant (“*brit*”) between God and Abraham and his descendants, as described in the Book of Genesis:

This is My covenant, which ye shall keep, between Me and you and thy seed after thee: every male among you shall be circumcised. And ye shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant betwixt Me and you. And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any foreigner, that is not of thy seed. He that is born in thy house, and he that is bought with thy money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant. And the uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people; he hath broken My covenant.<sup>13</sup>

The operation is typically performed by a trained circumciser or *mohel*.<sup>14</sup>

In Islam, the practice is known as *khitān*.<sup>15</sup> It is not set out in the Quran, but is instead set forth in several hadith, or collected prophetic traditions.<sup>16</sup> There is no specific age set for circumcision and across different Islamic cultures, the age of circumcision varies anywhere from seven days after birth to puberty.<sup>17</sup> Doctrinally the practice centers on purification rather than denoting a covenantal relationship; nor is there an Islamic counterpart to the Jewish *mohel*.<sup>18</sup>

For many Jews and Muslims, the issue of circumcision is one of basic religious identity. Being circumcised is a physical reminder of one’s belonging to the faith community, especially in contexts where the faith community may be a minority. For many, circumcision also denotes willingness to sacrifice for one’s faith. Jews have a long history of suffering punishment at the hands of the relevant government for engaging in circumcision.<sup>19</sup> Similarly, Muslims have also suffered from suppression of the religious practice of male circumcision.<sup>20</sup>

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13. Genesis 17:10–14 (JPS Tanakh 1917).

14. KARESH & HURVITZ, *supra* note 12, at 70.

15. See Juan E. Campo, *Circumcision*, in ENCYCLOPEDIA OF ISLAM 149 (2009).

16. *Id.*

17. *Id.*

18. *Id.*

19. See Aryeh Tuchman, *Circumcision*, in 1 ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION 128 (2005). Perhaps the most famous example was the complete ban on circumcision imposed by the Ptolemaic king Antiochus IV Epiphanes. *Id.* During Hellenistic times, government and social disapproval of the Jewish practice of circumcision was so great that many Jewish men would attempt to “reverse” circumcision. *Id.*

20. See, e.g., ALI EMINOV, *TURKISH AND OTHER MUSLIM MINORITIES IN BULGARIA* 60–61 (1997) (describing Communist-era Bulgarian ban on circumcision designed to suppress Muslim religious identity).

## II. DEVELOPMENTS IN THE LAW OF RELIGIOUS MALE CIRCUMCISION

Although historical examples of suppression of circumcision are legion, for much of recent history in the West, the practice of circumcision has been free from government interference. Indeed, for much of the last century, male circumcision for secular reasons was almost universal within the United States and, to a lesser degree, in other English-speaking societies.<sup>21</sup>

In recent years, however, a series of events on both sides of the Atlantic have indicated that the cycle of tolerance or suppression of circumcision is moving decidedly in the direction of suppression.

In Europe, the most prominent example of this trend came in a German appellate court's 2012 decision in a case involving circumcision of a four-year-old Muslim boy.<sup>22</sup> The doctor—who was also Muslim—carried out the circumcision at the request of the boy's parents, but a few days later the parents took the boy to the emergency room because they were concerned that there was still bleeding from the wound.<sup>23</sup> The state prosecutor brought charges against the doctor who had performed the circumcision, claiming the doctor had violated the German Criminal Code by assaulting another with a dangerous tool and harming his health (“*mittels eines gefährlichen Werkzeugs körperlich misshandelt und an der Gesundheit geschädigt*”).<sup>24</sup> The state district court (*Amtsgericht*) held that the parents' consent to perform the circumcision had been valid, and the doctor's performance of the circumcision justified because of the religious reasons for the circumcision.<sup>25</sup> In particular, the district court pointed out that circumcision was “a traditional ritual method for the documentation of cultural and religious belonging to the Muslim life community,”<sup>26</sup> and that allowing the circumcision eliminated an incipient risk of stigmatization faced by the child.<sup>27</sup>

The North Rhine-Westphalia state intermediate appellate court (“*Landgericht*”) sitting in Cologne reversed, holding that the parents' consent was invalid and the doctor's performance of the circumcision unjustified, because the child's right to bodily integrity (*körperliche Unversehrtheit*) under the German constitution outweighed the religious wishes of the parents.<sup>28</sup> In particular, the *Landgericht* held that the child's

21. See Weiss, *supra* note 10, at 11–12.

22. *Landgericht Köln*, 151 Ns 169/11 May 7, 2012, Urteil (Ger.), available at [http://www.justiz.nrw.de/nrwe/lgs/koeln/lg\\_koeln/j2012/151\\_Ns\\_169\\_11\\_Urteil\\_20120507.html](http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html).

23. *Id.*

24. *Id.* The analogous crime in American criminal law would be assault with a deadly weapon.

25. See *Amtsgericht Köln*, Abteilung 528, 528 Ds 30/11 Sept. 21, 2011, Urteil (Ger.), available at [http://www.justiz.nrw.de/nrwe/ag\\_koeln/j2011/528\\_Ds\\_30\\_11\\_Urteil\\_20110921.html](http://www.justiz.nrw.de/nrwe/ag_koeln/j2011/528_Ds_30_11_Urteil_20110921.html).

26. *Id.* (“*traditionell-rituelle Handlungsweise zur Dokumentation der kulturellen und religiösen Zugehörigkeit zur muslimischen Lebensgemeinschaft.*”).

27. *Id.* (“*Damit wird zugleich einer drohenden Stigmatisierung des Kindes entgegengewirkt.*”).

28. *Landgericht Köln* [District Court of Cologne] May 7, 2012, 151 Ns 169/11, Urteil (Ger.) (relying in part on Grundgesetz, Art. 2(2)). Perhaps ironically, this provision of the German Constitution was promulgated in post-war Germany in part as a reaction to the atrocities performed by Josef Mengele and other Nazi physicians against Jewish victims.

welfare (“*Kindeswohl*”) did not allow the parents’ consent to be valid or the doctor’s actions to be justified.<sup>29</sup> The court held, however, that although the doctor had violated the law, he was nevertheless excused from criminal liability because he acted with unavoidable ignorance of the law.<sup>30</sup> The practical effect of this ruling was to treat male circumcision—prospectively—as criminal assault with a deadly weapon.

The Cologne Landgericht’s decision unleashed immediate outrage from Jewish and Muslim groups in Germany.<sup>31</sup> Yet the decision also garnered praise from legal academics, who have long advocated for a prohibition on religious male circumcision.<sup>32</sup> The leading German legal academic advocating for a ban on religious male circumcision is Professor Holm Putzke of the University of Passau.<sup>33</sup> Shortly after the Landgericht’s decision, Professor Putzke—whom the Landgericht had cited—praised the decision, stating that the decision “earned applause” for treating the “archaic ritual” as a criminal act, and stating that the ultimate issue was “how much religiously motivated violence against children a society is ready to tolerate.”<sup>34</sup>

After the debate had been unleashed, the German Bundestag—the national parliament—moved later that year to enact a provision of the Civil Code that allows parents to consent to certain male circumcisions. These include circumcision by a mohel in the first six months of life.<sup>35</sup> This move was strenuously opposed by anti-circumcision academics, but also by the main German pediatric association, which has long held the position that circumcision undertaken for non-medical reasons is unethical.<sup>36</sup> The German pediatric association instead supported a law that would allow male circumcision only after the boy was fourteen years old and capable of consent.<sup>37</sup>

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29. *Id.*

30. *Id.*

31. See *Muslim and Jewish Groups Denounce German Circumcision Ruling*, BBC NEWS (July 12, 2012), <http://www.bbc.com/news/world-europe-18807040>.

32. Peter Martino, *Germans Do Not Favor Male Circumcision*, JEWISH PRESS (July 24, 2012), <http://www.jewishpress.com/indepth/analysis/germany-debates-male-circumcision/2012/07/24/>.

33. Michael Gessat, *Circumcision Verdict Causes Legal Headache*, DEUTSCHE WELLE (June 28, 2012), <http://dw.com/p/15Mzi>.

34. See Holm Putzke, *LG Köln fällt wegweisendes Urteil: Religiöse Beschneidungen von Jungen verboten*, LEGAL TRIB. ONLINE (June 26, 2012), <http://www.lto.de/recht/hintergruende/h/wegweisendes-urteil-religioese-beschneidungen-von-jungen-verboten/>.

35. See Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], Dec. 20, 2012, § 1631d (Ger.).

36. See BERUFSVERBAND DER KINDER-UND JUGENDÄRZTE, *Rituelle Beschneidungen bei Minderjährigen-Kinder-und Jugendärzte fordern: allein das Recht eines Kindes auf Körperliche Unversehrtheit zählt* (July 17, 2012), <http://www.bvkj.de/bvkj-news/pressemitteilungen/news/article/rituelle-beschneidungen-bei-minderjaehrigen-kinder-und-jugendaerzte-fordern-allein-das-recht-ein/> (“Ritual circumcisions of minors—child and adolescent doctors urge: solely the right of a child to bodily integrity counts.”).

37. See *Pressemeldung des Berufsverbandes der Kinder- und Jugendärzte (BVKJ) zum franktionsübergreifenden [sic] Gesetzentwurf zur rituellen beschneidungen bei Jungen: „Gesetzentwurf entspricht Kindeswohl!“*, BERUFSVERBAND DER KINDER-UND JUGENDÄRZTE (Nov. 7, 2012), <http://www.bvkj.de/bvkj-news/pressemitteilungen/news/article/pressemeldung-des-berufsverbandes-der-kinder-und-jugendaerzte-bvkj-zum-franktionsuebergreifenden/>.

Although it was eventually rendered nugatory by the Bundestag's legislation, the decision of the Cologne Landgericht seemed to open up a space that other European critics of male religious circumcision did not hesitate to jump into. Shortly after the German decision, hospitals ceased providing religious circumcision in parts of Austria and Switzerland.<sup>38</sup> The Jewish Hospital of Berlin was also forced to temporarily suspend its circumcision practice.<sup>39</sup> In Norway, the Ombudsman for Children, a government official tasked with looking out for the interests of children, stated that religious circumcision should be replaced with a bloodless rite.<sup>40</sup>

Although prohibiting circumcision has much less institutional support in America than it does in Europe, the United States has also seen a number of efforts to ban or restrict religious male circumcision. For example, beginning in 2006, there have been ongoing efforts in Massachusetts to enact the "Massachusetts State Prohibition of Genital Mutilation Act."<sup>41</sup> The Act has never made it out of committee, but it was the subject of a public committee hearing in 2010.<sup>42</sup>

In 2011, a ballot measure was proposed in San Francisco that would have criminalized the performance of male circumcision within the city limits.<sup>43</sup> The ballot measure was proposed by a group known as MGM-bill.org; one of the group's leaders, Matthew Hess, drafted the ballot measure.<sup>44</sup> Hess has also authored a comic book series called "Foreskin Man," in which a blonde-haired, blue-eyed superhero fights off villains, such as "Monster Mohel," who seek to circumcise boys.<sup>45</sup> The comic books are laden with stereotypical anti-Semitic tropes.<sup>46</sup>

38. See *Hospitals in Austria and Switzerland Suspend Circumcision*, GUARDIAN (July 25, 2012), <http://www.theguardian.com/world/2012/jul/25/hospitals-in-austria-and-switzerland-suspend-circumcision>.

39. See Ofer Aderet, *Berlin Jewish Hospital to Cease Circumcisions After German Court Ruling*, HAARETZ (June 30, 2012, 5:22 PM), <http://www.haaretz.com/jewish/news/berlin-jewish-hospital-to-cease-circumcisions-after-german-court-ruling-1.447850>.

40. See JTA, *Replace Circumcision with Symbolic Ritual, Says Norwegian Children's Watchdog*, HAARETZ (Aug. 7, 2012, 1:37 AM), <http://www.haaretz.com/replace-circumcision-with-symbolic-ritual-says-norwegian-children-s-watchdog-1.456443>. This statement was followed the next year with a joint statement of the Ombudsmen for Children of Norway, Sweden, Denmark, Finland, Iceland, and Greenland taking the same position, *i.e.* that male religious circumcision without medical indication should be forbidden for minors. See *Let the Boys Decide on Circumcision: Joint Statement from the Nordic Ombudsmen for Children and Pediatric Experts*, (Sept. 30, 2013), available at <http://barneombudet.no/wp-content/uploads/2013/11/English-statement-pdf> [hereinafter *Nordic Ombudsmen for Children*].

41. See S. 1777, 186th Leg. (Mass. 2009), available at <https://malegislature.gov/Bills/186/Senate/S1777>.

42. *Id.*

43. See *The Proponents' Proposed Language*, COMM. FOR PARENTAL CHOICE AND RELIGIOUS FREEDOM, <http://stopcircban.com/proposedban/> (last visited May 19, 2016) (proposing to amend the San Francisco Police Code to make it "unlawful to circumcise, excise, cut, or mutilate the whole or any part of the foreskin, testicles, or penis of another person who has not attained the age of 18 years.").

44. Matthew Hess, *About Us*, MGMBILL.ORG, <http://www.mgmbill.org/about-us.html> (last visited May 19, 2016).

45. See *Foreskin Man*, MGMBILL.ORG, <http://www.mgmbill.org/foreskin-man.html> (last visited May 19, 2016).

46. See *id.*

After receiving the requisite number of supporting signatures, the San Francisco measure was initially placed on the ballot. In *Jewish Community Relations Council of San Francisco v. Arntz*, however, a California superior court upheld a challenge to the ballot measure, holding that the measure was invalid as a matter of law because if enacted the measure would conflict with California Business and Professions Code § 460(b).<sup>47</sup>

In 2011, a similar ballot measure was also proposed in Santa Monica.<sup>48</sup> It was abandoned after significant public pressure on the ballot measure's proponent.<sup>49</sup>

After the public debate surrounding both the San Francisco and Santa Monica proposed ballot measures, in 2011 the California Legislature enacted a provision of the Health and Safety Code that forbids California municipalities from adopting any rules that prohibit or restrict male circumcision.<sup>50</sup> The law invokes medical and "affiliative" interests as justifying the practice of male circumcision.<sup>51</sup>

The issue of religious male circumcision practices has also recently come to the forefront in New York City, in a case named *Central Rabbinical Congress of the United States and Canada v. New York City Department of Health and Mental Hygiene*.<sup>52</sup> The case arose after the New York City Department of Health and Mental Hygiene ("Department") issued a rule regulating the use of *metzitzah b'peh* (the use of oral suction by the mohel to clean the post-circumcision wound).<sup>53</sup> The practice is common (and ancient) among some streams of Hasidic Judaism, including several with many adherents living in New York City.<sup>54</sup> The Department began public awareness efforts and eventually issued regulations concerning the practice after it concluded the practice could spread the herpes simplex virus to infants.<sup>55</sup> In an effort to counteract the dangers it perceived, the Department required mohels to have the parents of the circumcised child fill out a form that contradicted the mohels' beliefs.<sup>56</sup> Failure to comply would result in a financial penalty.<sup>57</sup>

A group of mohels and rabbis sued in federal court, arguing that the regulation violated their rights to the free exercise of religion and free-

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47. See *Jewish Cmty. Relations Council of S.F. v. Arntz*, No. CPF-11-511370, 2012 WL 11891474, at \*2 (Cal Super. Ct. Apr. 6, 2012).

48. See Jennifer Medina, *In Santa Monica, Circumcision Opponent Abandons Efforts*, N.Y. TIMES (June 7, 2011), <http://www.nytimes.com/2011/06/08/us/08circumcise.html>.

49. *Id.*

50. See CAL. HEALTH & SAFETY CODE § 125850(b) (West 2011) ("No city, county, or city and county ordinance, regulation, or administrative action shall prohibit or restrict the practice of male circumcision, or the exercise of a parent's authority to have a child circumcised.").

51. *Id.* § 125850(a)(1).

52. 763 F.3d 183 (2d Cir. 2014).

53. *Id.* at 185–86.

54. *Id.* at 187.

55. *Id.* at 185–86.

56. *Id.* at 186.

57. Michael M. Grynbaum, *Mayor de Blasio is Set to Ease Rules on Circumcision Ritual*, N.Y. TIMES (Feb. 24, 2015), [http://www.nytimes.com/2015/02/25/nyregion/de-blasio-set-to-waive-rule-requiring-consent-form-for-circumcision-ritual.html?\\_r=0](http://www.nytimes.com/2015/02/25/nyregion/de-blasio-set-to-waive-rule-requiring-consent-form-for-circumcision-ritual.html?_r=0).



dom of speech.<sup>58</sup> The federal district court ruled against them for two main reasons.<sup>59</sup> First, the court held that the Department's rule was neutral and generally applicable, and therefore did not trigger strict scrutiny under the Free Exercise Clause of the First Amendment of the United States Constitution.<sup>60</sup> Second, the court said the City's enlisting of the mohels to spread the City's message (with which the mohels strongly disagreed) did not trigger strict scrutiny review under the Free Speech Clause of the First Amendment.<sup>61</sup> Thus, the district court applied rational basis review to uphold the City's regulation.<sup>62</sup>

After the rabbis appealed, the Second Circuit reversed.<sup>63</sup> Adopting an argument that my organization—the Becket Fund for Religious Liberty—advanced in an amicus brief we submitted with Stanford Law School Professor (and former Tenth Circuit Judge) Michael McConnell, the Second Circuit held that the City's regulation was not neutral because it singled out a particular Orthodox Jewish practice for regulation.<sup>64</sup> By targeting a particular practice and a particular religion, the City triggered strict scrutiny, rather than rational basis review.<sup>65</sup> This did not mean that the City would not ultimately prevail, since public health can qualify as a compelling governmental interest.<sup>66</sup> But it did mean that the district court had to reevaluate the facts under that more demanding standard.<sup>67</sup> After this remand, the City settled the case with the plaintiff rabbis and mohels and repealed the regulation.<sup>68</sup>

Thus, the evidence shows that the practice of religious male circumcision is already coming under some pressure in the United States, particularly in urban coastal areas.

### III. THE FUTURE OF THE LAW OF RELIGIOUS MALE CIRCUMCISION

Where is the law in this area likely to go, both in Europe and in the United States?

First, in both Europe and the United States, the issue will continue to be pressed. In Europe it is clear that there will be significant ongoing pressure put on the practice of religious male circumcision. The statement of the Ombudsmen for Children of the Nordic countries is signifi-

58. *Cent. Rabbinical Cong. of the U.S. & Canada v. N.Y.C. Dept. of Health & Mental Hygiene*, 763 F.3d 183, 186 (2014).

59. *Id.*

60. *Cent. Rabbinical Cong. of the U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 12 Civ. 7590 (NRB), 2013 WL 126399, at \*30 (S.D.N.Y. Jan. 10, 2013), *vacated and remanded*, 763 F.3d 183.

61. *Id.* at \*20–21.

62. *Id.* at \*30, 34.

63. *Cent. Rabbinical Cong.*, 763 F.3d at 186.

64. *Id.* at 185, 194.

65. *Id.* at 194.

66. *Id.* at 198.

67. *Id.*

68. See Michael M. Grynbaum, *New York City Health Board Repeals Rule on Consent Forms for Circumcision Ritual*, N.Y. TIMES, (Sept. 9, 2015), [http://www.nytimes.com/2015/09/10/nyregion/new-york-city-health-board-repeals-rule-on-consent-forms-for-circumcision-ritual.html?\\_r=0](http://www.nytimes.com/2015/09/10/nyregion/new-york-city-health-board-repeals-rule-on-consent-forms-for-circumcision-ritual.html?_r=0).

cant because it demonstrates strong institutional support for the idea that international-human-rights law simply forbids this religious practice.<sup>69</sup> Other significant institutional supporters of bans or severe restrictions are the main pediatric medical associations in northern Europe. For example, after the AAP took a pro-circumcision position in a 2012 policy statement, representatives of pediatric medical associations from Austria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Sweden, and the United Kingdom published a counter-statement in *Pediatrics*, the official journal of the AAP.<sup>70</sup> In the piece, they explained their view that the AAP's position was the outlier among Western pediatric associations and unsupported by the relevant medical literature.<sup>71</sup>

Perhaps most importantly, Professor Putzke, and like-minded legal academics, will continue to criticize the German circumcision law and look for ways to undermine it, perhaps through a test case directed at challenging the circumcision accommodation within the Civil Code under the German constitution. They are actively making the case in legal circles.<sup>72</sup>

There is a final factor that is taking on increasing importance in Europe: xenophobia. In the context of the refugee crisis Europe currently faces, opposition to culturally and religiously distinct practices such as circumcision provide an easy way to oppose certain minorities—especially Muslims—without admitting to xenophobia. This has already been true of practices such as kosher and halal slaughter, both of which have been opposed across northern Europe on the basis of protecting animals against cruelty.<sup>73</sup> And government actions, such as a recent “pork mandate” in Danish public schools, seem directed specifically at disfavored religious groups, even though they are billed as protecting Danish “food culture.”<sup>74</sup> It is thus not hard to imagine that a ban on male circumcision would be politically attractive to some precisely because such a ban would make life for disfavored religious minorities very difficult without appearing openly anti-Semitic or Islamophobic.

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69. See *Nordic Ombudsmen for Children*, *supra* note 40.

70. See Morten Frisch et al., *Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision*, 131 *PEDIATRICS* 796 (2013), available at <http://pediatrics.aappublications.org/content/pediatrics/131/4/796.full.pdf>.

71. See *id.* at 798–99.

72. See, e.g., Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?*, 39 *J. MED. ETHICS* 444 (2013); Holm Putzke, *Das Beschneidungsgesetz (§ 1631d BGB): Fauler Kompromiss und fatales Signal*, 161 *MONATSSCHRIFT KINDERHEILKUNDE* 950–51 (2013).

73. See, e.g., Adam Withnall, *Denmark Bans Kosher and Halal Slaughter as Minister Says 'Animal Rights Come Before Religion'*, *INDEPENDENT* (Feb. 18, 2014), <http://www.independent.co.uk/news/world/europe/denmark-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html>. The institutional contrast with the United States holds true in this instance as well; American law specifically defines kosher and halal slaughter—which involve severing the carotid arteries without previous stunning—as humane. See 7 U.S.C. § 1902(b) (2012).

74. See Dan Bilefsky, *Denmark's New Front in Debate Over Immigrants: Children's Lunches*, *N.Y. TIMES*, (Jan. 20, 2016), <http://nyti.ms/1nm7nLL>.

In the United States the situation is very different, presumably because circumcision is practiced by a far greater percentage of the population than in Europe.<sup>75</sup> That fact alone makes institutions less likely to declare themselves opposed to circumcision.

Over the long term, however, it seems clear that secular circumcision rates in the United States are likely to continue decreasing.<sup>76</sup> In coming decades, circumcision will likely become a minority practice, and one that is more closely associated with religious minority groups, specifically Jews and Muslims.<sup>77</sup> That will in turn mean increased legal, political, and social pressure from intactivists.

In the near term, the more likely source of change in this area of American law is elsewhere. Specifically, circumcision is likely to be affected as an incident to changes in other areas of law that affect the nexus of health, religious freedom, and family law. In particular, the law of children's rights in the context of abortion, contraception, cosmetic surgery, tattoos, or other procedures involving children's bodies is the most likely source of incidental restrictions on religious male circumcision.

For example, in the process of countering proposed parental consent provisions concerning abortions, pro-abortion law professors have found themselves confronted with the roughly parallel situation of abortion. In this vein, Professor B. Jessie Hill has recently argued that the idea of "bodily integrity" as a constitutional right under the Fourteenth Amendment ought to be extended more broadly to parents' interaction with their children.<sup>78</sup> The concept of bodily integrity would thus feature more prominently in American family law disputes as a factor designed to counteract parental rights.<sup>79</sup> Notably, although Professor Hill discusses some of the circumcision cases,<sup>80</sup> she does not explain that a move to the bodily integrity model she proposes would necessarily put in doubt the ability of parents to obtain religious male circumcision for their sons.

In its most extreme form, the anti-parentalist school would eliminate parental rights altogether. For example, Yale Law School scholar Samantha Godwin has challenged the very existence of parental rights, including, but not limited to, parental rights concerning religious upbringing.<sup>81</sup> In "Against Parental Rights" she writes:

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75. See Cordelia Hebblethwaite, *Circumcision, the Ultimate Parenting Dilemma*, BBC NEWS (Aug. 21, 2012), <http://www.bbc.com/news/magazine-19072761>.

76. *Id.*

77. Some have pointed to the example of the United Kingdom in this regard, where circumcision was once strongly promoted by medical institutions, particularly during the Victorian era. During the post-World-War-II period, however, the National Health Service refused to cover circumcision as medically necessary, and circumcision rates fell off rapidly. *See id.*

78. See B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295, 1297-1301 (2015). The United States Constitution makes no reference to "bodily integrity," but the Supreme Court has referred to it as a right variously protected under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment.

79. *Id.* at 1355-61 (proposing suite of lawsuits minors could bring against their parents regarding issues concerning bodily integrity).

80. *Id.* at 1326-27.

81. Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 27 (2015).

But to enable parents to compel unwilling children to engage in religious practices, attend church, or receive religious education makes sense from a secular perspective only if we wish to vindicate the parents' interests in propagating their belief system. It does not make sense that inculcation into that belief system is itself in the child's own best interests. Such parental power is a privilege or prerogative of the parent, not a matter of the child's interests.<sup>82</sup>

If government were, under Godwin's proposed regime, given power to prevent parents from transmitting their faith to their children, then religious minorities might be eliminated rather quickly. It is hard enough for religious minority groups to transmit their faith to younger generations even without government interference; under Godwin's legal regime it would be almost impossible.<sup>83</sup> The echoes of Antiochus IV Epiphanes are unmistakable: In this conception, State knows best, and Father and Mother should stay out of it.<sup>84</sup>

The key intersection between opposition to circumcision with the anti-parentalist school of family law lies in the concept of the best interests of the child (in German *Kindeswohl*—"welfare of the child"<sup>85</sup>). The most important feature of the best interests of the child/*Kindeswohl* criterion for this purpose is its threshold inquiry—at what point does the court (and therefore advocacy groups, law professors, and attorneys) get to take over from the parent and make the best-interests decision instead of the parent? The Cologne Landgericht said that the line is crossed before the point at which permanent bodily changes are made.<sup>86</sup> Godwin would put all parent-child interaction on the state's side of the line; no area would be free from state control.<sup>87</sup> For now, the AAP puts circumcision on the parents' side of the line.<sup>88</sup> But if it follows the lead of other Western pediatric associations, then the line might be drawn in a different place, meaning that parents would have no say over the circumcision decision.<sup>89</sup>

The other question raised by future attacks on religious male circumcision is of course that of religious liberty. Under *Pierce v. Society of Sisters*, the Supreme Court has long recognized the right of parents to give their children a religious upbringing.<sup>90</sup> And court rulings targeting specific religious practices (such as circumcision) for disfavor would fall

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82. *Id.*

83. Godwin studiously avoids addressing how her proposed legal regime would affect Jews and Muslims.

84. Godwin's modest proposal is for parents to have only those rights with respect to their own children that are already enjoyed by public school teachers. See Godwin, *supra* note 81, at 81–82.

85. See Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], Dec. 20, 2012, § 1666 (Ger.).

86. Landgericht Köln [District Court of Cologne] May 7, 2012, 151 Ns 169/11, Urteil (Ger.).

87. See Godwin, *supra* note 81.

88. See *Circumcision Benefits Outweigh Risks, but Parents Should Choose, Pediatricians Say*, NBC NEWS (Aug. 27, 2012, 5:29 AM), [http://vitals.nbcnews.com/\\_news/2012/08/27/13460930-circumcision-benefits-outweigh-risks-but-parents-should-choose-pediatricians-say?lite](http://vitals.nbcnews.com/_news/2012/08/27/13460930-circumcision-benefits-outweigh-risks-but-parents-should-choose-pediatricians-say?lite).

89. Frisch et al., *supra* note 70, at 799.

90. 268 U.S. 510 (1925).

afoul of the Free Exercise Clause and the Establishment Clause.<sup>91</sup> But some scholars have argued that religious-liberty rights should be read to protect individual claims over the free-exercise rights of the group, or even that group religious rights as such do not exist.<sup>92</sup> The necessary corollary of this approach is that infant religious male circumcision would not be protected by the First Amendment, because the free-exercise rights of the group (the family) and the group's decisionmakers (the parents) could not be asserted with respect to the third party (the boy). Were a governmental entity of any sort to decide that circumcision harms a third party—the infant boy—then it could ban circumcision without constitutional consequence.<sup>93</sup>

Scholars are likely not thinking deeply about circumcision when setting forth their theoretical interventions in the fields of family law and the law of religious liberty. The resulting limitations on circumcision, if enacted, would be incidental, but they would be limitations nonetheless. The threat to religious male circumcision is thus more oblique in the United States than in Europe, but perhaps almost as great.

#### IV. RELIGIOUS MALE CIRCUMCISION AS A HEURISTIC

As is apparent from the foregoing, this Symposium contribution offers many more questions than it does answers. It would, however, be prudent for advocates, scholars, and judges to begin considering these questions now, before the time for answers is upon them. In particular, legal thinkers should deploy the question of the permissibility of government prohibitions on religious male circumcision as a useful heuristic for evaluating different possible approaches to family law and the law of religious liberty.

Thus, if one is considering—in court, in class, or in public discourse—a vision of family law that places relatively low value on parental rights, then one should decide whether that vision would result in allowing governments to ban religious male circumcision despite (presumably low-value) parental objections. Similarly, if one adopts a view of religious freedom that downplays the collective aspect of religious exercise, then one must be prepared to articulate why a collective entity—the family—would have any religious exercise at stake when seeking religious circumcision for an infant boy. Put another way, it is

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91. See *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982).

92. See, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 965 (2013) (“[A]tributing human rights to institutions poses a potential danger to individual human rights.”); but see International Covenant on Civil and Political Rights, art. 18(1), Dec. 19, 1966, 1976 U.N.T.S. 172 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”) (emphasis added).

93. See Griffin, *supra* note 92, at 1014.

precisely because it seems like government bans on religious male circumcision ought to be wrong that the idea of those bans provides a useful way for evaluating proposed theories—particularly normative theories—of the law of religious freedom or the law of the family.

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To sum up: The trendlines show, I think, that religious male circumcision is going to be litigated and adjudicated a number of times in American and European courts within the next decade. Judges, scholars, and advocates ought to consider the question of religious male circumcision now because eventually they will have to anyway, and because it provides a useful test for any normative theory of religious freedom or the family.

In closing I want to address one additional argument often offered (at least subconsciously) by many Americans against the idea of even thinking about religious male circumcision. This is what I call the “It Can’t Happen Here” argument.<sup>94</sup> That is, it is simply unthinkable that circumcision could be challenged as against the law and against basic principles of human rights.

To the contrary, human history demonstrates that it is actually quite likely that—given a long enough timeframe—religious male circumcision will be challenged. The idea that the United States is immune to this feature of human history is a variety of American exceptionalism that is supported only by the evidence that it hasn’t happened yet. Those who care about the religious practices of Jewish and Muslim Americans should be paying attention.

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94. See SINCLAIR LEWIS, *IT CAN’T HAPPEN HERE* (1935).