William & Mary Bill of Rights Journal

Volume 21 (2012-2013)
Issue 3

Article 7

March 2013

To Cut or Not to Cut?: Addressing Proposals to Ban Circumcision Under Both a Parental Rights Theory and Child-Centered Perspective in the Specific Context of Jewish and Muslim Infants

Andrew E. Behrns

TO CUT OR NOT TO CUT?: ADDRESSING PROPOSALS TO BAN CIRCUMCISION UNDER BOTH A PARENTAL RIGHTS THEORY AND CHILD-CENTERED PERSPECTIVE IN THE SPECIFIC CONTEXT OF JEWISH AND MUSLIM INFANTS

Andrew E. Behrns*

INTRODUCTION

Recently, a popular cultural, societal, medical, and religious tradition has come under attack. First, scholars and, more recently, citizens of San Francisco have called for a ban on male circumcisions.[1] For just over a decade now, scholars calling for an end to the practice of male circumcision have gained little traction outside academia. This was true until a recent ballot proposal in San Francisco, which essentially would have forbidden the practice by criminalizing it, with few exceptions.[2] Most noticeably, the proposed ban, which was the first of its kind in the country, would not have allowed for religious exemptions.[3] Unsurprisingly, amid the outcry from religious groups, the California state legislature and Governor Jerry Brown quashed the ballot proposal.[4]

---

* Andrew E. Behrns, J.D., 2012, William & Mary School of Law. First, special thanks are due to my beautiful and patient wife Megan who continuously supported me in this endeavor and had to endure my frequent ramblings. Thanks are also due to my Notes Editor, Davis Walsh, for his wisdom and willingness to help focus and organize this Note, as well as to the *William & Mary Bill of Rights Journal* staff for their countless hours of hard work. I would also like to express great appreciation for my parents, Kevin and Patti, and their lifelong support and encouragement of my academic pursuits. Finally, thanks to my Lord and Savior Jesus Christ, the inspiration behind all that I pursue.

[1] *See, e.g.*, 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 (1999) (arguing that constitutional considerations outweigh parental consent for infant circumcision); Shea Lita Bond, Comment, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment?*, 32 J. MARSHALL L. REV. 353 (1999) (arguing for a ban of male circumcision due to an equal protection violation that cannot be overcome by First Amendment claims); Robin Hindery, *San Francisco Circumcision Ban to Appear on Ballot*, HUFFINGTON POST (May 18, 2011), http://www.huffingtonpost.com/2011/05/18/san-francisco-circumcision-ban_n_863945.html (noting that the initiative for a ban in San Francisco had collected more than 7,700 signatures and thus qualified for the November ballot).

[2] *See* Hindery, *supra* note 1.

[3] *Id.*

[4] Steven Harmon, *Governor Jerry Brown Signs Bill Prohibiting Cities, Counties from Banning Male Circumcision*, SAN JOSE MERCURY NEWS, Oct. 3, 2011, http://web.archive.org/web/20111101130501/http://www.mercurynews.com/california-budget/ci_19026518.

San Francisco's attempted ballot proposal, however, may just be the first political rumblings of a larger battle yet to ensue over male circumcision.[5]

Arguably, the most controversial aspect of the San Francisco proposal is the absence of a religious exemption.[6] This controversy stems from the fact that male circumcision is deeply embedded in religion, specifically Jewish and Islamic practices.[7] Consequently, Jewish organizations have been among the loudest and most active opponents of the proposed ban—asserting both parental choice rights and religious freedoms.[8] Historically, arguments advocating for parental control and religious freedom, when coupled together, have received strong protection from the U.S. Supreme Court.[9]

Proponents of banning male circumcision describe the procedure as torturous and argue that it should not be afforded First Amendment protection or be subject to parental rights claims.[10] As an alternative ground for banning circumcision, some have argued that the practice violates the Equal Protection Clause of the Fourteenth Amendment.[11]

In response to this debate, this Note analyzes infant male circumcision from two distinct perspectives: a parental rights theory and a child-centered best-interests approach.

---

[5] While San Francisco's proposed ban is the first ballot proposal, recently several states have stripped Medicaid funding for infant circumcision. The laundry list of states includes California, North Dakota, Oregon, Mississippi, Nevada, Washington, North Carolina, Arizona, Missouri, Florida, Utah, Montana, Maine, Minnesota, Idaho, Louisiana, South Carolina, and most recently, Colorado in June 2011. David March, Editorial, *Efforts to Defund, Ban Infant Male Circumcision Unfounded*, JHU GAZETTE, Oct. 10, 2011, http://gazette.jhu.edu/2011/10/10/efforts-to-defund-ban-infant-male-circumcision-unfounded/.

[6] *See, e.g.*, Harmon, *supra* note 4 (noting that a San Francisco judge categorized the proposal as one that "flouted U.S. Constitutional protections of religious freedom"); Hindery, *supra* note 1 (noting concern from the Jewish community about the proposed ban, which lacks religious exemptions).

[7] Mark D. Jordan, *The Body*, *in* RELIGION AND AMERICAN CULTURES 333, 340 (Gary Laderman & Luis León eds., 2003).

[8] *See* James Nash, *San Francisco Circumcision Fight Prompts Limits Signed by Brown*, BLOOMBERG (Oct. 3, 2011), http://www.bloomberg.com/news/2011-10-03/san-francisco-circumcision-fight-prompts-limits-signed-by-brown.html (citing the Jewish Community Relations Council of San Francisco's concern that the ban "would restrict parental choice and religious freedom").

[9] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they . . . prepare [them] for additional obligations." (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)) (internal quotation marks omitted)).

[10] *See generally* Abbie J. Chessler, Comment, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555 (1997).

[11] *See, e.g.*, Povenmire, *supra* note 1, at 119–22.

Before addressing these approaches, Part I provides background material on the historical and religious origins of male circumcision. Part II then examines the constitutional claims likely to be brought under a parental rights theory—parental and free exercise claims. Part II also considers whether these rights can be conjoined to form a hybrid-rights claim requiring the application of strict scrutiny. In finding that they do form a hybrid-rights claim, Part II lays out what strict scrutiny means in the context of circumcision. Part III examines the issues implicated by a child-centered approach. First, it addresses threshold issues and finds that the applicable approach is a best-interests inquiry. Then, Part III lays out how best-interests analysis operates and what are the key considerations in its application. Next, Part IV applies each approach. Part IV concludes that under a parental rights analysis, bans on circumcision do not satisfy strict scrutiny, because the health risks associated with circumcision are minimal. Finally, Part V argues that due to the medical and emotional benefits associated with circumcision for Jewish and Muslim infants, the procedure is in their best interests.

I. BACKGROUND: HISTORICAL AND RELIGIOUS ORIGINS OF CIRCUMCISION

Many associate the beginning of male circumcision with either Judaism or, for non-Jewish men in the United States, with the anti-masturbation movement in the late 1800s.[12] The origins of male circumcision, however, can be traced as far back as ancient Egypt.[13] For the Egyptians, the practice of circumcision was a combining of the medical and the mystic in a process of refinement.[14] As a result, circumcision became identified with prominence and was the aspiration of many.[15]

With its origins in Egypt, circumcision soon became one of the defining acts of the monotheistic Jewish culture.[16] The oldest reference to the actual practice of circumcision in the Jewish Torah is from a story about Moses and his wife, Zipporah[17]:

> At a lodging place on the way the Lord met him [Moses] and sought to put him to death. Then Zipporah took a flint and cut off her son's foreskin and touched Moses' feet with it and said, "Surely you are a bridegroom of blood to me!" So he let him alone. It was then that she said, "A bridegroom of blood," because of the circumcision.[18]

---

[12] *See, e.g.*, *id.* at 91.

[13] DAVID L. GOLLAHER, CIRCUMCISION: A HISTORY OF THE WORLD'S MOST CONTROVERSIAL SURGERY 1–3 (2000). The oldest reference to male circumcision rests on a tomb near ancient Memphis where there is a depiction, which dates to roughly 2400 B.C., of a priest performing a circumcision on two young males. *Id.* at 1–2. Other evidence of Egyptian mummies indicates that circumcision may date back as far as 4000 B.C. *Id.* at 3.

[14] *Id.* at 6.

[15] *Id.*

[16] *Id.*

[17] *See id.* at 7.

[18] *Exodus* 4:24–26 (English Standard Version).

While this passage cites the first actual performance of a circumcision recorded in the Torah, the defining significance of circumcision in the Jewish faith is properly associated with Abraham.[19] In fact, the encounter between God and Abraham concerning circumcision is considered to be the key foundation of the Jewish faith.[20] The critical passage is found in the book of Genesis:

> And God said to Abraham, "As for you, you shall keep my covenant, you and your offspring after you throughout their generations. This is my covenant, which you shall keep, between me and you and your offspring after you: *Every* male among you shall be circumcised. You shall be circumcised in the flesh of your foreskins, and it shall be a sign of the covenant between me and you. He who is *eight days old* among you shall be circumcised. *Every* male throughout your generations, whether born in your house or bought with your money from any foreigner who is not of your offspring, both he who is born in your house and he who is bought with your money, shall surely be circumcised. So shall my covenant be in your flesh an everlasting covenant. Any uncircumcised male who is not circumcised in the flesh of his foreskin shall be *cut off* from his people; he has broken my covenant."[21]

This passage denotes two critically important aspects of circumcision in Judaism: 1) that circumcision is the oldest Jewish practice, and 2) it is the symbol of God's covenant with the Jewish people, which forms the basis and foundation of the whole faith.[22] In Judaism, the practice of circumcision is known as Brit Milah ("covenant of circumcision").[23] This covenant is "so central to Jewish life, that it takes precedence over everything else—including Shabbat and even Yom Kippur."[24]

During the early periods of the Christian church, circumcision remained important to the Jews, as it visibly designated membership in the Jewish faith.[25] More

---

[19] *See* GOLLAHER, *supra* note 13, at 8.

[20] *Id.*

[21] *Genesis* 17:9–14 (English Standard Version) (emphasis added).

[22] MICHAEL KEENE, THIS IS JUDAISM 58 (1996).

[23] WAYNE DOSICK, LIVING JUDAISM 285 (1995).

[24] *Id.* at 286.

[25] LAWRENCE A. HOFFMAN, COVENANT OF BLOOD: CIRCUMCISION AND GENDER IN RABBINIC JUDAISM 9 (1996). Other examples can be found outside of the traditional Jewish or Christian texts, such as in the accounts of Josephus. *Id.* Josephus recounts the life of two somewhat insignificant Jews: Herod the Great and his grandson Agrippa. *Id.* Both men at one point ruled Judea and thus had to demonstrate that they were Jewish. *Id.* In Josephus's first account, Herod's sister, Salome, wanted to marry Sylleus, the prime minister of an Arabian king. *Id.* at 9–10. Herod allowed Salome to marry Sylleus on one condition—that Sylleus be circumcised. *Id.* at 10. Similarly in the second account, Agrippa, who was initially reluctant to become the king, was eventually remembered for allowing his daughter to marry a foreign king only if the foreigner would be circumcised. *Id.*

appropriately, the significance of circumcision in the Jewish faith may best be seen in the Reform movement of the 1800s.[26] "Indeed, the reformers abandoned nearly *all* major tenets of traditional Judaism *except* circumcision."[27]

Still today, circumcision remains important in the Jewish faith for two reasons. First, during the ceremony the child receives a blessing from his father, which has been very important to the practice since its Abrahamic beginnings.[28] Second, it is the process by which the baby is welcomed into the Jewish community and gets to share in the blessings of God's covenant.[29]

In addition to Judaism, circumcision is a practice closely observed in Islam.[30] Unlike in Judaism, however, the Koran does not provide clear authority on circumcision.[31] Yet, circumcision is considered by many a required practice, based both on tradition and Muhammad's example.[32] The practice symbolizes a submission to God's will and a surrendering of immoral sexual desires.[33] When performed on adolescent boys, it is considered a passage into manhood and allows the boy to regularly participate in public prayer.[34] Notably, while the practice of male circumcision is obligatory, female circumcision is not an official Islamic practice.[35]

Meanwhile, the origins of circumcision in the United States, as separate from citizens' individual religions, are found in the underpinnings of the anti-masturbation movement of the late nineteenth century.[36] The practice became commonplace in the early 1900s as new justifications developed.[37] Among the new justifications were a belief in hygienic benefits,[38] effective treatment for neurological disorders,[39] and a

---

[26] *See* ERIC KLINE SILVERMAN, FROM ABRAHAM TO AMERICA: A HISTORY OF JEWISH CIRCUMCISION 186 (2006).

[27] *Id.* (noting that while the Reform Judaism movement did technically deny the obligatory status of circumcision, it fully "affirmed the meaningfulness of the rite" and the importance of the tradition).

[28] KEENE, *supra* note 22, at 58.

[29] *Id.*

[30] *See* JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 110 (2d ed. 2011).

[31] MALE AND FEMALE CIRCUMCISION 137 (George C. Denniston et al. eds., 1999).

[32] *See* ESPOSITO, *supra* note 30, at 110. This also includes the practice of adult male circumcision as some Muslims believe that circumcision is required for true conversion to the faith. *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 111.

[36] *See* Povenmire, *supra* note 1, at 91 (citing Phil Nguyen, *Foreskin Envy: Circumcising Our Sons*, VIETNOW MAG., July 31, 1997, at 50) (stating that circumcisions were believed to help decrease masturbation).

[37] *Id.*

[38] *See id.* at 91–92 (citing Charles J. Schleupner, *Urinary Tract Infections Separating the Genders and the Ages*, 101 POSTGRADUATE MED. 231 (1997)) (stating that circumcised boys have lower incidence of urinary tract infections than those who are uncircumcised).

[39] E. Charlisse Caga-anan & Anthony J. Thomas, Jr., *Requests for "Non-Therapeutic"*

decrease in sexually transmitted diseases.[40] During the past quarter century, however, several groups in the United States have condemned the practice and questioned its supposed benefits.[41] Despite criticisms of the justifications for circumcision, there remains a belief in its benefits.[42] American Jews and Muslims still promote the benefits and importance of the practice today.[43]

II. CONSTITUTIONAL ISSUES: CLAIMS BROUGHT BY PARENTS

The first issue this Note examines is the constitutional claims likely to be brought by Jewish and Muslim parents. These claims include parents' fundamental right to direct the upbringing of their child under the Due Process Clause of the Fourteenth Amendment[44] and the right to the free exercise of religion granted by the First Amendment.[45] As a part of this examination it is important to determine whether the combination of these rights provides parents any extra protection under the hybrid-rights exception, and if so, what are the implications.

A. Parental Rights Claims

Several cases have found that parental rights are a fundamental interest protected by the U.S. Constitution.[46] The Supreme Court first adopted the notion of parents'

Interventions in Children: Male Circumcision, *in* CLINICAL ETHICS IN PEDIATRICS 43, 44 (Douglas S. Diekema et al. eds., 2011).

[40] *See* EDWARD WALLERSTEIN, CIRCUMCISION: AN AMERICAN HEALTH FALLACY 80–85 (1980) (finding that this belief was likely based on the fact that venereal diseases were less common in the Jewish community in the late 1800s).

[41] *See* Edgar J. Schoen, *Male Circumcision*, *in* MALE SEXUAL DYSFUNCTION 95, 102–03 (Fouad R. Kandeel et al. eds., 2007) (discussing the anticircumcision movement).

[42] Povenmire, *supra* note 1, at 93; *see also infra* Part IV.B.1 (noting findings that circumcision provides tangible health benefits to children).

[43] In the United States there are approximately 6.5 million Jews and 1.4 million Muslims. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 61–62. Significantly, the Muslim population has nearly tripled in the past twenty years. *See id.*

[44] *See* U.S. CONST. amend. XIV, § 1.

[45] *See* U.S. CONST. amend. I.

[46] *See* Troxel v. Granville, 530 U.S. 57 (2000) (affirming the right of parents to rear their children and striking down a Washington state law that allowed any third party to petition state courts for child visitation rights over the objections of the parents); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that parents have a right, which is embedded in the American tradition, to direct the upbringing of their child); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding that parents bear the primary responsibility for care of children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding Oregon's Compulsory Education Act unconstitutional in part because parents have a right to "direct the [religious] upbringing . . . of [their] children" and to control the process of their education); Meyer v. Nebraska, 262 U.S. 390, 400, 402 (1923) (holding that the law restricting foreign language teaching at school

rights in *Meyer v. Nebraska*,[47] in 1923, when it held that parents have the fundamental right to instruct their children in a foreign language.[48] The Court found that this fundamental right derived from the Due Process Clause of the Fourteenth Amendment which grants parents the right to "establish a home and bring up [their] children."[49]

Just two years later, in *Pierce v. Society of Sisters*,[50] the Court struck down the Oregon Compulsory Education Act which required children to attend public schools and forbade them to attend private school.[51] In affirming parental rights, the Court found that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[52]

Roughly twenty years later, in 1944, the Court stated in *Prince v. Massachusetts*[53] that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[54] Despite this high regard for parental rights, the Court further noted that parental rights are not "beyond limitation," and upheld Massachusetts's child labor law against a mother's desire to have her daughter distribute religious literature on the street.[55] Notably, however, the Court qualified and greatly limited this holding by stating:

> Our ruling does not extend beyond the facts the case presents. We neither lay the foundation "for any [that is, every] state intervention in the indoctrination and participation of children in religion" which may be done "in the name of their health and welfare" nor give warrant for "every limitation on their religious training and activities."[56]

Later, in 1972, the Court decided a watershed case in parents' rights, *Wisconsin v. Yoder*.[57] In *Yoder*, an Amish family challenged a Wisconsin compulsory education law that required school attendance by all children until they reached the age of sixteen.[58]

---

interfered with "the natural duty of the parent to give his children education suitable to their station in life").

47 262 U.S. 390 (1923).

48 *Id.* at 400.

49 *Id.* at 399.

50 268 U.S. 510 (1925).

51 *Id.* at 534–35.

52 *Id.* at 535.

53 321 U.S. 158 (1944).

54 *Id.* at 166.

55 *Id.* at 166, 168–70.

56 *Id.* at 171.

57 406 U.S. 205 (1972).

58 *Id.* at 207.

The challenge was based on Amish religious concepts to which the teachings of schools after eighth grade were repugnant, because the Amish faith required that parents raise their kids with Amish values and in the Amish way of life after the eighth grade.[59] The Court held that under the First and Fourteenth Amendments, Wisconsin could not compel the Amish parents to send their children to formal school through age sixteen.[60]

Legally, the case involved: "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[61] In making this declaration, the Court was expressing disdain at the notion that the State may or should "influence . . . the religious future of the child."[62] The Court further elaborated that "[t]he [parents'] duty to prepare the child for 'additional obligations . . .' must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[63]

Interestingly, Justice Douglas argued in dissent that the Court had wrongly decided the matter by not considering the religious beliefs of the Amish children.[64] The Court, however, rejected this argument by finding that the religious rights of the child were not implicated in the case.[65] The Court pointed out that the children were not parties to the suit and that the state's prosecution was focused on the parents' failure to send their children to school.[66]

With this foundational backdrop of the fundamental nature of parents' rights, the Supreme Court, in a case particularly germane to circumcision, *Parham v. J.R.*,[67] found that parents have the right to make medical decisions for their children.[68] The Court cited a principle from *Yoder* and *Prince* that parents do not have unlimited control when the child's health is implicated.[69] Yet, the Court held that a parent could voluntarily institutionalize his or her child for mental health care so long as a neutral authority (i.e., a physician, not the State) approved the decision.[70]

Throughout the opinion, the Court went to great lengths to reiterate the strong interests that parents have in decisions concerning their children.[71] To this effect, the Court stated that "[t]he law's concept of the family rests on a presumption that parents

---

[59] *Id.* at 209–12.
[60] *Id.* at 234.
[61] *Id.* at 232.
[62] *Id.*
[63] *Id.* at 233 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).
[64] *Id.* at 241 (Douglas, J., dissenting).
[65] *Id.* at 230–31 (majority opinion).
[66] *Id.* at 231.
[67] 442 U.S. 584 (1979).
[68] *Id.* at 603–04.
[69] *Id.* at 603.
[70] *Id.* at 606–07.
[71] *See generally Parham*, 442 U.S. 584.

possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[72] In light of this, there is a historical presumption that parents act in the "best interests of their children."[73] The Court further articulated that:

> [s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or *other medical procedure*. Most children . . . simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.[74]

While acknowledging the strong interest of parents in making medical decisions for their children, the Court also noted the existence of neglect and abuse in some cases, which consequently implicates the interests of the State.[75] However, the Court found that the fears of neglect or abuse could be quelled by the agreement of a "neutral fact-finder" speaking on the child's behalf.[76] In cases regarding medical issues, the Court established that a physician is an appropriate neutral fact-finder.[77]

B. Free Exercise Claims

In order for an individual to make a Free Exercise claim, the individual must have a sincerely held religious belief.[78] This belief does not have to be the prevailing view within the faith, so long as it is sincerely held, because "[c]ourts are not arbiters of scriptural interpretation."[79] In addition, the individual must prove that his or her belief is, in fact, in conflict with and inseparable from the law (i.e., the state's infringement).[80]

---

[72] *Id.* at 602.

[73] *Id.*

[74] *Id.* at 603 (emphasis added).

[75] *Id.* at 602.

[76] *Id.* at 606–07.

[77] *See id.*

[78] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1189–90 (3d ed. 2006). While the sincerity of the belief is open to judicial review, the truth or falsity of the belief is not. *See id.* ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." (quoting United States v. Ballard, 322 U.S. 78, 86 (1944))). Yet, the sincerely held belief must have a "religious basis" and not merely be a philosophical belief. *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

[79] Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981).

[80] *Yoder*, 406 U.S. at 215.

In *Yoder*, the Court found that the Amish held a sincere belief, which was predicated on the phrase "be not conformed to this world," from Paul's letter to the Romans, and that their way of life was in conflict with the Wisconsin statute.[81] In short, the Court found that "[t]his command [was] fundamental to the Amish faith."[82] The Court further noted that the Amish way of life had remained consistent despite vast societal changes and developments.[83]

In applying this analysis to the circumcision context, it is clear that Jewish and Muslim parents could meet the threshold inquiry of a sincerely held religious belief. Because circumcision is a strict mandate in both religions,[84] the practice would meet the sincerely held belief requirement. Further, a law banning circumcision without religious exceptions would conflict with the belief that circumcisions are religiously obligatory.[85]

Historically, such state intrusions on religious activities were subject to strict scrutiny review.[86] That is, in order for the state's infringement on citizens' First Amendment rights to satisfy constitutional strict scrutiny, the state must have a compelling interest.[87] The Court has articulated that the compelling interest standard applies "[o]nly [to] the gravest abuses, endangering paramount interests."[88] As a result, a state's mere articulation of its police power is not sufficient.

In 1990, however, the Supreme Court in *Employment Division v. Smith*[89] greatly diminished the protection provided by the Free Exercise Clause.[90] In *Smith*, the Court held that free exercise claims are not protected against a "neutral law of general applicability," unless the law fails rational basis review.[91] Put differently, a law can burden religious activity as long as it is not motivated by a desire to interfere with that

---

[81] *Id.* at 216–17.

[82] *Id.* at 216.

[83] *See id.* at 216–17.

[84] *See supra* Part I (discussing the historical and religious origins of circumcision).

[85] *See supra* notes 20–35 and accompanying text.

[86] Technically the Supreme Court did not articulate a standard of review until *Sherbert v. Verner*, 374 U.S. 398 (1963), in 1963, but functionally, and in that case, the Court determined that strict scrutiny was the appropriate standard of review for evaluating laws that restrict or burden the free exercise of religion. *See* CHEMERINSKY, *supra* note 78, at 1247.

[87] *Sherbert*, 374 U.S. at 406.

[88] *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[89] 494 U.S. 872 (1990).

[90] The decision essentially eroded the application of strict scrutiny to free exercise claims. This erosion is articulated by Justice Scalia's remarks that:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Id. at 888 (citations omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

[91] *Id.* at 879.

particular religious practice.[92] If, however, the law does target a particular religious practice, then strict scrutiny is applied.[93]

In *Smith*, the Court found Oregon's law prohibiting the use of peyote to be a neutral law of general applicability.[94] Importantly, however, the Court distinguished *Smith* from previous cases which applied strict scrutiny, such as *Yoder*, on the grounds that the previous cases involved hybrid claims.[95] The Court elaborated that all prior cases applying strict scrutiny involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press or *the right of parents*."[96] The Free Exercise claim in *Smith*, therefore, was distinguishable because it was "unconnected with any communicative activity or parental right."[97] This finding by the Court seems to suggest that when a free exercise claim is combined with another fundamental right, such as *parental rights*, the applicable constitutional standard of review is strict scrutiny.

C. Hybrid Claims

As noted above, *Smith* carved out a special space for "hybrid situation[s]" of fundamental rights.[98] Unfortunately, the Court did not expand on the applicability and appropriate analysis for hybrid claims.[99] Consequently, lower courts have had a difficult time understanding and applying the hybrid-rights exception.[100] As a result, a few courts refuse to recognize hybrid rights and instead apply rational basis review for all cases in which there is a neutral law of general applicability.[101]

Most courts, however, presume the hybrid-rights exception establishes that when a free exercise claim is combined with another fundamental right, the applicable constitutional standard is strict scrutiny.[102] These courts, though differing in their analysis of what triggers the hybrid-claim exception, agree on two key points: first, hybrid claims must be a rare exception; and second, and most importantly, the hybrid

---

[92] CHEMERINSKY, *supra* note 78, at 1248.

[93] *See* Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[94] *Smith*, 494 U.S. at 882.

[95] *Id.* at 881–82.

[96] *Id.* at 881 (emphasis added) (citations omitted).

[97] *Id.* at 882.

[98] *See id.*

[99] Benjamin I. Siminou, Note, *Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in* Douglas County v. Anaya, 85 NEB. L. REV. 311, 316 (2006).

[100] *Id.* at 316–17.

[101] *Id.* at 317 (citing Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003)).

[102] *See id.*

claim must be "consisten[t] with Supreme Court precedent."[103] In courts applying the hybrid-claims exception, three approaches have emerged[104]: the independently viable claim approach;[105] the colorable-claim approach;[106] and the genuinely implicated approach.[107]

Benjamin Siminou argues that the genuinely implicated approach is the most coherent option as it most effectively preserves the hybrid-rights doctrine as a narrow exception and is most consistent with Supreme Court precedent.[108] Under the genuinely implicated approach, a hybrid-rights claim is effectively invoked when the companion claim is one of the three acceptable claims established in *Smith*'s hybrid-rights paragraph, and when the challenged law "genuinely implicates" the companion claim.[109] Thus, to pass the first prong the claimant must assert at least one companion claim of freedom of speech, freedom of the press, freedom of association, or the rights of parents, in conjunction with the free exercise claim.[110] The second prong focuses on whether the companion claim is legitimately implicated by the challenged law.[111] If both prongs are satisfied, a valid hybrid-rights claim exists and strict scrutiny should be applied.[112]

Under this genuinely implicated approach, Jewish and Muslim parents have valid hybrid-rights claims in challenging anti-circumcision laws. The first prong is sufficiently met as the asserted companion claim fits under the *Smith* paradigm—the right of parents.[113] Moreover, parents' rights are certainly legitimately implicated in decisions regarding the medical treatment—such as circumcision—of their child.[114] As a result, strict scrutiny must apply to their claims.

Simply because strict scrutiny applies, however, does not assure parents a victory. As the Court noted in *Prince*, parental rights claims, even when coupled with religious claims meeting the hybrid-rights exception, are not protected when they threaten the well-being of the child.[115] To this end, courts have found that the state can mandate

---

[103] *Id.* at 317–18 (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999)).

[104] *See id.* at 318–26.

[105] *See id.* at 319–20 (citing Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995)).

[106] *See id.* at 320–23 (citing Swanson *ex rel*. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998)).

[107] *See id.* at 324–26 (describing the "genuinely-implicated" approach and arguing that it is the most effective approach of the existing approaches to hybrid-rights claims).

[108] *See id.* at 340–46.

[109] *Id.* at 324.

[110] *See* Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

[111] Siminou, *supra* note 99, at 324.

[112] *See id.* at 326, 348.

[113] *See Smith*, 494 U.S. at 881.

[114] *See supra* notes 67–77 and accompanying text.

[115] Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

blood transfusions or withdrawals, under its *parens patriae* power, even when they are against the wishes of the parents.[116] One such case was *Jehovah's Witnesses v. King County Hospital*,[117] in which the Supreme Court upheld a district court decision mandating a blood transfusion for a minor, over the parents' objection, when it was medically necessary to protect the life of the minor.[118] In line with this, "[c]ourts have uniformly permitted state officials to order medical treatment where necessary to save the life of a child."[119] Additionally, some courts have even given the state medical decision-making power over parental and religious claims when the threat of serious or grievous injury to the child is imminent.[120] Yet, no court has overridden parental and religious objections when presented with less serious risks.[121]

D. What Is Strict Scrutiny in this Context?

Under strict scrutiny the state must express a compelling interest.[122] A compelling interest must implicate "paramount interests" and the abuse of this interest must be grave.[123] In addition, to pass strict scrutiny the law must be narrowly tailored to achieve the compelling interest in the least restrictive manner possible.[124] The state's likely asserted interest in preventing circumcision, protecting the safety and privacy interests of the child, is on its face a paramount interest. So too, however, are the rights of Jewish and Muslim parents—the free exercise of religion and the right of parents to direct the upbringing of their children.[125] When there are such competing interests under strict scrutiny, the analysis of whether the law is narrowly tailored generally becomes a balancing test of the competing interests.[126] This balancing approach is

---

[116] *See, e.g.*, Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 498–99, 508 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968); Douglas Cnty. v. Anaya, 694 N.W.2d 601, 608 (Neb. 2005).

[117] 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

[118] *Id.* at 505.

[119] James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1399 (1994).

[120] *See, e.g.*, Muhlenberg Hosp. v. Patterson, 320 A.2d 518, 520 (N.J. Super. Ct. Law Div. 1974).

[121] Dwyer, *supra* note 119, at 1399.

[122] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[123] *Id.*

[124] Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

[125] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

[126] *See id.*; Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438–40 (1996); Adam Winkler,

used to verify that the government's underlying reasons are legitimate, and that the government truly believes the ends are necessarily compelling.[127]

In cases where parents assert hybrid claims related to the medical treatment of their child, such as circumcision, this balancing approach would appear to hinge on the severity of the risks.[128] As noted above, the State meets strict scrutiny and overrides parental rights and free exercise claims in medical cases when the situation threatens the life of the child or places the child at risk of serious or grievous injury.[129] Conversely, no courts have found that the presence of less serious risks satisfies strict scrutiny.[130]

III. FAMILY LAW ISSUES: CONSIDERATION OF THE CHILD

Generally, when parents' religious and parental claims are present, courts analyze the issue solely from this framework and dismiss the rights and interests of the child.[131] This has drawn the ire of child-rights advocates who believe that the child is the primary rights-holder and should be considered independent of his parents' rights.[132] Such advocates espouse a child-centered approach which focuses on the rights of the child while disregarding the rights of the parents.[133]

The admonitions of child-centered advocates are respectable, but the difficulty remains that the infant cannot express his own rights and interests (i.e., does he want to be circumcised?). As the law currently exists, the child-centered approach is best applied through a best interests analysis under traditional family law doctrine.[134] Accordingly, this Note now examines the issues present in a child-centered approach.

A. What Rights Do Newborn Infants Have?

The initial question that must be answered is whether newborn infants have rights, and if so, to what degree. The notion of children's constitutional rights began to emerge

---

Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 VAND. L. REV. 793, 803–05 (2006).

[127] Winkler, *supra* note 126, at 803.

[128] *See supra* notes 115–21 and accompanying text.

[129] *See supra* notes 115–21 and accompanying text.

[130] *See supra* notes 115–21 and accompanying text.

[131] *See, e.g.*, Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 385–86 (1994) (noting that though children have constitutional rights, they are usually less protected than adults' rights and often subjugated to the rights of their adult caretakers).

[132] *See, e.g.*, Dwyer, *supra* note 119, at 1446–47.

[133] *See* James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 844 (2006).

[134] *See* J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61, 83–84 (2000).

in the 1960s with the granting of procedural due process rights in *In re Gault*.[135] In *In re Gault*, the Supreme Court pronounced that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[136] Children's constitutional rights received a further boost in *Planned Parenthood of Central Missouri v. Danforth*[137] when the Court declared that "[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."[138]

While these declarations by the Court suggest that children have full and complete constitutional rights, in reality children's rights are less protected than adults' constitutional rights.[139] Justification for this resides in the belief that children are not fully capable of making individual decisions and are ultimately under the control of either their parents or the state.[140] From a child-centered perspective, however, this justification is moot as the inquiry and focus rest solely on the assumption that the child has full rights and interests.[141]

B. Threshold Issue: Informed Consent by Proxy

An initial threshold issue which must be addressed is the problem posed by the doctrine of informed consent. At its constitutional core, informed consent is based on the rights to privacy, bodily integrity, and medical decision making.[142] According to the Supreme Court, the doctrine of informed consent suggests that there is a "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will."[143] As a practical matter, however, informed consent cannot be challenged until a lawsuit is brought after a patient has been harmed.[144] The precise definition of informed consent varies by jurisdiction but generally four main elements are present:

> (1) a physician's duty to disclose material risks; (2) the failure to disclose or inadequate disclosure of those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented

---

[135] 387 U.S. 1 (1967).

[136] *Id.* at 13.

[137] 428 U.S. 52 (1976).

[138] *Id.* at 74.

[139] *See* Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77, 78–79 (1999).

[140] *See id.* at 78–80.

[141] *See supra* notes 132–33 and accompanying text.

[142] *See* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 370 (1999).

[143] *Id.* (quoting Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

[144] Teresa K. Baumann, Note, *Proxy Consent and a National DNA Databank: An Unethical and Discriminatory Combination*, 86 IOWA L. REV. 667, 691 (2001).

> to treatment to which [he] otherwise would not have consented; and (4) the patient was injured by the proposed treatment.[145]

What constitutes a material risk has traditionally been determined by the application of a reasonable physician standard, though some jurisdictions apply a reasonable patient standard.[146] The underlying goal from either perspective is to determine whether or not the patient was indeed making an individual, informed decision.[147]

From a medical perspective, informed consent "is a process of communication between a patient and physician that results in the patient's authorization or agreement to undergo a specific medical intervention."[148] An important underlying element of informed consent, therefore, is that the patient must be competent in order to give informed consent.[149] Thus for infants who cannot be legally competent, the issue becomes whether informed consent may be exercised via a proxy or surrogate.[150] Understandably, the idea of proxy consent is somewhat troubling for pediatric healthcare providers whose legal and ethical duties become blurred when the patient is no

---

[145] Cooper, *supra* note 142, at 378. Medical sources have also produced findings on what constitutes informed consent, such as the Committee on Bioethics for the American Academy of Pediatrics which has found that the focus is on:

> 1. Provision of information: patients should have explanations, in understandable language, of the nature of the ailment or condition; the nature of proposed diagnostic steps and/or treatment(s) and the probability of their success; the existence and nature of the risks involved; and the existence, potential benefits, and risks of recommended alternative treatments (including the choice of no treatment).
> 2. Assessment of the patient's understanding of the above information.
> 3. Assessment, if only tacit, of the capacity of the patient or surrogate to make the necessary decision(s).
> 4. Assurance, insofar as possible, that the patient has the freedom to choose among the medical alternatives without coercion or manipulation.

Comm. on Bioethics, Am. Acad. of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314, 315 (1995). Additionally, according to the American Medical Association website physicians should disclose:

> The patient's diagnosis, if known; [t]he nature and purpose of a proposed treatment or procedure; [t]he risks and benefits of a proposed treatment or procedure; [a]lternatives (regardless of their cost or the extent to which the treatment options are covered by health insurance); [t]he risks and benefits of the alternative treatment or procedure; and [t]he risks and benefits of not receiving or undergoing a treatment or procedure.

Informed Consent, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page (last visited Mar. 15, 2013) [hereinafter *Informed Consent*].

[146] Cooper, *supra* note 142, at 379–80.

[147] *See id.*

[148] *Informed Consent*, *supra* note 145.

[149] *See* Comm. on Bioethics, *supra* note 145, at 314.

[150] *See id.*

longer the decision maker.[151] Yet, every state has a statute allowing for proxy consent for treatments or procedures.[152]

The American Academy of Pediatrics (Academy) has acknowledged that infants do not have the requisite competency to give informed consent and in these circumstances the "parents or other surrogates provide *informed permission* for diagnosis and treatment."[153] The informed permission standard for parents or surrogates is the same standard applied to informed consent.[154] Moreover, particularly germane to the issue at hand, the Academy has found that informed permission or consent is important because, for "patients and family members, personal values affect health care decisions, and physicians have a duty to respect the autonomy, rights, and preferences of their patients and their surrogates."[155] In light of the Academy's views and nationwide acceptance of proxy consent, the real issue is not whether proxy consent is allowed, but rather, with whom should the proxy power rest.[156]

C. Best-Interests Analysis: Determining Who Has the Power of Proxy

In determining whether the procedure of circumcision is appropriate, a court would have to "insert [itself] into decision-making on behalf of children."[157] Functionally the court is determining with whom the power of decision should lie: parents or the state?[158] The basic test applied by courts in these cases is a best-interests test.[159]

Most commonly, the surrogate decision-making power is awarded to the child's parents.[160] Parents are appointed with this power because they are generally in the best position to make the decision due to their closeness with the child.[161] Indeed, the Academy also recognizes that "[u]sually, parental permission articulates what most agree represents the 'best interests of the child.'"[162] Yet, parental decision-making autonomy on medical issues has been diminished in the past thirty years.[163] Consequently,

---

[151] *See id.* at 315.

[152] *See* Elyn R. Saks et al., *Proxy Consent to Research: The Legal Landscape*, 8 YALE J. HEALTH POL'Y L. & ETHICS 37, 60 (2008).

[153] Comm. on Bioethics, *supra* note 145, at 314.

[154] *Id.* at 315.

[155] *Id.* at 314.

[156] *See* Mary B. Mahowald, *Decisions Regarding Disabled Newborns*, *in* READINGS IN HEALTH CARE ETHICS 330, 333 (Elisabeth Boetzkes & Wilfrid J. Waluchow eds., 2000).

[157] Svoboda et al., *supra* note 134, at 84.

[158] *See id.* at 83–84.

[159] *See id.* at 84.

[160] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925))).

[161] *See* Mahowald, *supra* note 156, at 333.

[162] Comm. on Bioethics, *supra* note 145, at 315.

[163] *See* Craig A. Conway, *Baby Doe and Beyond: Examining the Practical and Philosophical*

in non-medically necessary contexts, such as circumcision, parents must demonstrate to the court that the procedure is in fact in the best interests of the child.[164]

On the other side of the analysis is the State and its *parens patriae* power.[165] *Parens patriae*, which literally means "parent of the country," is the state's power to care for and protect its citizens.[166] Under this power the state has an interest in promoting and protecting the welfare of children.[167] Normally, in order for the state to exercise its power of *parens patriae* and interfere with the parents' fundamental rights, the state must have a compelling interest.[168] However, in the context of a child-centered approach, the parents' fundamental rights are not under consideration. Thus, the state must prove to the court that it will actually protect the child from the alleged harm, and that this protection is in the best interests of the child.[169] In this child-centered approach, it thus becomes a duel between the parents and the state over who is protecting the best interests of the child.

The application of best-interests tests and analysis varies by jurisdiction.[170] Two predominant approaches have developed: substituted judgment, and a best-interests approach.[171] In theory, under the substituted judgment approach, the court defers to the surrogate decisionmaker, who is presumably asserting the judgment the patient would have if competent.[172] Ultimately, however, this approach is often seen as a more subjective approach.[173] In light of the subjectivity often associated with substituted judgment, some courts have attempted to develop a more objective approach understood to be the best-interests approach.[174] While different in name and in theory, the best-interests approach has often become blurred with the substituted judgment approach.[175] This

---

Influences Impacting Medical Decision-Making on Behalf of Marginally-Viable Newborns, 25 GA. ST. U. L. REV. 1097, 1103 (2009).

[164] Svoboda et al., *supra* note 134, at 88; *see also* Hart v. Brown, 289 A.2d 386, 390 (Conn. Super. Ct. 1972) ("There is authority in our American jurisdiction that nontherapeutic operations can be legally permitted on a minor as long as the parents or other guardians consent to the procedure.").

[165] *See* Svoboda et al., *supra* note 134, at 83–84.

[166] Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and A New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000).

[167] *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982).

[168] *See, e.g.*, *id.* at 758–59.

[169] Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 149 (2004).

[170] *See* Svoboda et al., *supra* note 134, at 88.

[171] *Id.*

[172] *See* RAYMOND J. DEVETTERE, PRACTICAL DECISION MAKING IN HEALTH CARE ETHICS 101 (3d ed. 2009).

[173] *See* Svoboda et al., *supra* note 134, at 88.

[174] *Id.*

[175] Lynn E. Lebit, *Compelled Medical Procedures Involving Minors and Incompetents and Misapplication of the Substituted Judgment Doctrine*, 7 J.L. & HEALTH 107, 108 (1993)

may be due to the fact that the best-interests approach is often a fallback approach when substituted judgment cannot be properly applied because the wishes of the patient are not known.[176]

From a theoretical standpoint, therefore, the best-interests approach is the appropriate approach in the circumcision context as the desires of the infant have not been articulated. In general, the "best interests" approach focuses on what is the best net benefit for the *particular patient* with consideration given to *all relevant factors*.[177] The major benefits considered by courts are the potential medical and emotional benefits.[178] In considering emotional benefits, courts have considered the importance of relationships in determining whether the medical procedure was in the child's best interests.[179]

Importantly, to give true effect to the best interests of the child, the focus must be on the particular child at hand and not on children as a class.[180] Thus, if best-interests analyses are focused on individualized, subjective determinations, then close consideration should be given to the context in which the child will live and the various influences on the child.[181]

IV. ANALYZING CIRCUMCISION UNDER BOTH APPROACHES

Having established in Part II that bans on circumcision in the Jewish and Muslim context must withstand strict scrutiny, this Note now addresses the constitutionality of

---

("Over time, however, courts have come to confuse the best interests standard with the substituted judgment doctrine in certain situations and apply the substituted judgment doctrine to cases in which it is not appropriate.").

[176] *See* DEVETTERE, *supra* note 172, at 101, 103.

[177] *See id.* at 103.

[178] Povenmire, *supra* note 1, at 111.

[179] *See* Curran v. Bosze, 566 N.E.2d 1319, 1331 (Ill. 1990) (noting that in many donor cases the determination of best interests hinges on the closeness of the relationship between the prospective donor and the recipient); Strunk v. Strunk, 445 S.W.2d 145, 145–46 (Ky. 1969) (finding that the parent's consent to a kidney removal from the ward and donation to his brother was in the best interests of the ward, because losing his brother would have been emotionally and psychologically troubling).

[180] *See, e.g.*, Superintendent v. Saikewicz, 370 N.E.2d 417, 430 (Mass. 1977). Here, in an application of best interests analysis to determine whether to provide life-prolonging medical treatment the court stated:

> [W]e realize that an inquiry into what a majority of people would do in circumstances that truly were similar assumes an objective viewpoint not far removed from a "reasonable person" inquiry. While we recognize the value of this kind of indirect evidence, we should make it plain that the primary test is subjective in nature—that is, the goal is to determine with as much accuracy as possible the wants and needs of the individual involved.

Id.

[181] *See Bosze*, 566 N.E.2d at 1326–32 (outlining the decisions of several courts which used a variety of information in best-interests analysis, including the specific circumstances of the child).

bans as applied to Jewish and Muslim parents. More plainly, whether the severity of the harm and risks associated with circumcision justify the state's intrusion on parental and free exercise rights.

Additionally, this Part addresses whether circumcision is in the best interests of Jewish and Muslim infants. In doing so, the focus is on the medical and emotional effects of circumcision. In the case of emotional considerations, the family context is particularly important. Notably, accounting for family dynamics still complies with a child-centered approach because the child-centered approach is not intended to eliminate the family context nor confer greater child-rearing power to the state.[182] In complying with a child-centered approach, consideration is not given to the parents' rights, but rather to the factual reality that parents are the strongest influence on their children's beliefs.[183] To focus on a contrived utopia where children are free from any influence whatsoever would not realistically address the best interests of the infant. Moreover, courts have allowed the best interests analysis to consider relationships that are emotionally connected to the medical decision.[184] In this sense, this Note addresses circumcision in the context in which it is most likely to affect the relationships of Jewish and Muslim infants—their parents and the respective religious community.

A. Strict Scrutiny

1. Circumcision Does Not Threaten the Infant's Life or Expose the Infant to Serious or Grievous Injury

The procedure for circumcision involves "the surgical removal of the foreskin (prepuce) of the penis."[185] Anti-circumcision proponents often point to the pain of the procedure as a reason to ban infant circumcision.[186] While infants may experience some pain during the procedure, doctors today commonly use a dorsile penile nerve block (DPNB) to dull the pain.[187] DPNB, which involves injecting the base of the penis with lidocaine, has been found to be "very effective in reducing . . . pain."[188] Complications

---

[182] Dwyer, *supra* note 119, at 1376.

[183] *See infra* notes 249–51 and accompanying text.

[184] *See supra* note 179.

[185] WILBURTA Q. LINDH ET AL., DELMAR'S COMPREHENSIVE MEDICAL ASSISTING 704 (4th ed. 2010).

[186] *See, e.g.*, Svoboda et al., *supra* note 134, at 109–11 (discussing pain as a harm caused by neonatal circumcision).

[187] ED SCHOEN, ED SCHOEN, M.D. ON CIRCUMCISION 21 (2005). The dorsile penile nerve block is analogous to dental anesthesia and is commonly given to infants through a sugar solution. *Id.*

[188] Task Force on Circumcision, Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS 686, 688 (1999) [hereinafter Task Force, *Policy Statement*]. To note, the Academy updated its Circumcision Policy Statement in August 2012. The Academy now finds that the benefits of circumcision outweigh the risks. This policy statement is addressed *infra*, at notes 243–46 and accompanying text.

associated with DPNB include bruising and rare instances of hematoma which usually do not result in long-term injury.[189] Other analgesic options include a topical anesthetic agent referred to as eutectic mixture of local anesthetics, or EMLA, which is also effective in diminishing the pain for the infant.[190] The advantage of topical anesthetics is that they may be applied with no side-effects or complications.[191]

Jewish circumcisions may be performed in either a hospital, home, or synagogue.[192] The procedure is carried out by a Mohel, who may be a doctor, but must be specifically trained for the procedure and deeply religious.[193] Importantly, in keeping with the Abrahamic tradition, the procedure must occur on the eighth day of life.[194] Typically, Jewish infant circumcision is performed without the use of anesthesia, though "[c]urrent Rabbinic authorities have ruled that it is permissible to use anesthesia in neonatal circumcision as long as there is no danger involved."[195]

Aside from pain, anti-circumcision advocates assert that circumcision should be banned because the risks are too great and the benefits are a myth or illusory.[196] Among the potential complications, anti-circumcision advocates point to meatal ulceration,[197] hemorrhaging,[198] infection,[199] concealed penis,[200] urethral fistula,[201] urinary retention,[202] glans necrosis,[203] injury to or loss of glans,[204] excessive skin loss,[205] and preputial cysts.[206]

---

[189] Task Force, *Policy Statement*, *supra* note 188, at 688.

[190] *See* Franca Benini et al., *Topical Anesthesia During Circumcision in Newborn Infants*, 270 J. AM. MED. ASS'N 850, 850–51 (1993) (finding that EMLA helps diminish the pain felt by newborns during circumcision and thus "may be a useful agent for pain management in neonatal circumcision").

[191] I AVRAHAM STEINBERG, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS 204 (Fred Rosner trans., 1998).

[192] ARYE FORTA, JUDAISM 73 (2d ed. 1995).

[193] *Id.*

[194] DOSICK, *supra* note 23, at 286.

[195] STEINBERG, *supra* note 191, at 204.

[196] *See, e.g.*, NAT'L ORG. CIRCUMCISION INFO. RESOURCE CENTERS, http://www.nocirc.org/ (last visited Mar. 15, 2013) (noting that circumcision does not have a sufficient medical reason and has unnecessary risks).

[197] ROSEMARY ROMBERG, CIRCUMCISION: THE PAINFUL DILEMMA 200–03 (1985).

[198] *Id.* at 206–08.

[199] *Id.* at 208–10 (stating that infection is common with symptoms including fever, pus, redness, and swelling).

[200] *Id.* at 211–14.

[201] *Id.* at 214–15.

[202] Infants may potentially not urinate for several hours following the procedure. *Id.* at 217–18.

[203] *Id.* at 218.

[204] *Id.* at 219.

[205] *Id.* at 219–21.

[206] *Id.* at 223.

Despite critics' claims, evidence suggests that their cries about the potential risks or complications are overblown. In reality, "[n]ewborn circumcision is a quick and simple operation with a very low rate of complications when properly performed."[207] Undoubtedly complications occur, but estimates are that complications occur in 0.3% (about 1 in 300) of circumcisions.[208] The most common complications are bleeding and infection, and in most instances these are very minor and temporary.[209] Meanwhile, the risks noted by circumcision opponents are outliers and the product of isolated reports.[210]

The risks associated with circumcision are comparable with the risks of tonsillectomy, which the Court in *Parham* decribed as a procedure within the parents' decision-making authority.[211] Common complications resulting from tonsillectomy include bleeding,[212] sore throat,[213] fever,[214] dehydration,[215] and amputation of the uvula.[216] More serious, complications, though isolated and rare, include hemorrhaging and death.[217]

The very fact that risks exist in circumcision procedures is not sufficient to shift the balance of strict scrutiny in the state's favor.[218] Rather, in order for the state to meet strict scrutiny, the risks must threaten the infant's life or present a threat of serious or grievous injury.[219] Quite simply, pain and minor bleeding or infection do not implicate death or serious injury concerns. No court has overridden parents' religious claims when presented with such minimal risks.[220] Moreover, that isolated incidents of serious injury may occur is covered by the existence of similarly rare, but serious, complications in tonsillectomy procedures—a procedure already noted by the Court as within the realm of parents.[221] In the case of circumcision, a state's purported interest in protecting the child's health and welfare is not sufficiently narrowly tailored to meet strict scrutiny. A ban would therefore subject circumcision to state infringement, while procedures presenting similar risks would be free from state regulation—this would undercut any notion that the state finds its own reasons to be compelling.[222]

---

[207] SCHOEN, *supra* note 187, at 22.

[208] *Id.*

[209] *See id.*; *see also* Task Force, *Policy Statement*, *supra* note 188, at 688.

[210] *See* Task Force, *Policy Statement*, *supra* note 188, at 688.

[211] Parham v. J.R., 442 U.S. 584, 603 (1979).

[212] David A. Randall & Michael E. Hoffer, *Complications of Tonsillectomy and Adenoidectomy*, 118 OTOLARYNGOLOGY—HEAD & NECK SURGERY 61, 61 (1998).

[213] *Id.* at 64.

[214] *Id.* at 64–65.

[215] *Id.* at 65.

[216] *Id.*

[217] *Id.* at 61–62.

[218] *See supra* note 74 and accompanying text.

[219] *See supra* notes 115–21 and accompanying text.

[220] Dwyer, *supra* note 119, at 1399.

[221] Parham v. J.R., 442 U.S. 584, 603 (1979).

[222] *See* Winkler, *supra* note 126, at 803 ("A law with poor fit—one that does not capture all like threats—suggests that the government itself does not really believe the underlying ends are so compelling.").

2. Circumcision Is Not Analogous to Sterilization

It has been proposed that the legal treatment of circumcision should be equated to the legal treatment of sterilization.[223] Sterilization is one of the most common instances in which the state utilizes its *parens patriae* power.[224] In sterilization cases, parents cannot consent to the procedure without specific statutory authority, and they also bear the burden of proving the procedure is medically necessary.[225] Much of the linkage centers on the fact that both procedures involve genitalia and personal bodily integrity concerns.[226] An important distinction in this regard, however, is the additional effect of sterilization—its complete elimination of the right to bear children.[227] This greatly intensifies the seriousness of sterilization procedures as there is a constitutional right to procreate because of its essentiality to existence.[228] This is further concerning as sterilization could be used to eradicate or subordinate individual races or ethnicities.[229] Conversely, circumcision does not implicate procreation rights, and bodily integrity arguments are left to cosmetics.[230] In short, comparisons between the two procedures are misguided.

B. Best Interests Considerations

1. Circumcision Is Medically Beneficial for Newborn Infants

Among the primary considerations of courts in best-interests analysis is the presence of a medical benefit.[231] To this point, a recent study conducted by Aaron Tobian and Ronald Gray, health epidemiologists at Johns Hopkins University, found that there are lifelong health benefits associated with infant circumcision.[232] Additionally, Tobian

---

[223] *See* Povenmire, *supra* note 1, at 107–09.

[224] *Id.* at 107.

[225] *Id.* at 108.

[226] *Id.* at 107–08.

[227] *See, e.g.*, Anonymous v. Anonymous, 469 So. 2d 588, 592 (Ala. 1985) (Jones, J., dissenting) (noting the seriousness of sterilization because "the right to bear children is 'fundamental to the very existence and survival of the race'" (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

[228] *See Skinner*, 316 U.S. at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.").

[229] *See id.*

[230] *See* Task Force, *Policy Statement*, *supra* note 188, at 687 (noting that a survey has found that circumcised males have more variety in their sexual practices and that there is likely no sensation difference between circumcised and uncircumcised men).

[231] *See Anonymous*, 469 So. 2d at 592 (Jones, J., dissenting).

[232] *See generally* Aaron A. R. Tobian & Ronald H. Gray, Commentary, *The Medical Benefits of Male Circumcision*, 306 J. AM. MED. ASS'N 1479, 1479–80 (2011) (arguing that

and Gray point out that the complication rate for infant circumcision "is substantially lower than the complication rates of adult male circumcision."[233] This is likely due to the fact that performing the procedure on adult males requires the use of general anesthesia and a more in-depth surgical procedure.[234] This belies some anti-circumcision advocates' belief that it is in the best interests of the child to postpone the procedure until the child reaches adulthood.[235]

Tobian and Gray further note that there are potential medical benefits in childhood:

> Neonatal male circumcision provides other potential benefits during childhood such as prevention of infant urinary tract infections, meatitis, balanitis, and phimosis, as well as protection from viral STIs. Approximately 50% of high school students report having sex prior to 18 years of age, so delaying male circumcision to age 18 years or older would deny children and adolescents these potential benefits.[236]

As further support for their findings, Tobian and Gray point to several recent studies finding that circumcision helps reduce HIV risk by sixty percent, genital herpes by thirty percent, and human papillomavirus by thirty-five percent.[237] In addition to the infant himself, there would be communal beneficiaries as well, namely females, who could benefit from less genital herpes, bacterial vaginosis, trichomoniasis, and cervical cancer.[238] In their conclusion, Tobian and Gray argue that:

> [b]ased on the medical evidence, banning infant male circumcision would deprive parents of the right to act on behalf of their children's health. Parents should be provided with information derived from evidence-based medicine about the risks and benefits of male circumcision so that they can make an informed choice for their children. It would be ethically questionable to deprive them of this choice.[239]

---

infant circumcision has long-term health benefits, and that it would be ethically questionable to deprive infants of this option).

[233] *Id.* at 1480. Tobian and Gray find that while the rate of complication is between 0.2% and 0.6% for infants, it is between 1.5% and 3.8% for adult males. *Id.*

[234] *See* Task Force, *Policy Statement*, *supra* note 188, at 688.

[235] *See* Povenmire, *supra* note 1, at 112 (advocating for a presumption that no child would choose circumcision and would have the option to choose the procedure upon reaching adulthood).

[236] Tobian & Gray, *supra* note 232, at 1480.

[237] *Id.* at 1479–80.

[238] *Id.* As a result of a decrease in the rates of STIs for both men and women there would be societal economic benefits from the reduced medical cost from treating these diseases. *See id.* at 1480.

[239] *Id.*

Tobian and Gray's findings suggest, therefore, that circumcision is indeed in the medical interests of the infant. By comparison, the significant long-term benefits shown in their findings appear to outweigh the minimal and rare risks associated with circumcision.[240] Additionally, the benefits are certain to outlast any pain associated with the procedure—though pain is already greatly diminished through the use of analgesics.[241] Certainly, their findings undermine any notion that courts should presume that no child would choose circumcision.[242]

In addition to Tobian and Gray, the Academy has acknowledged that there are medical benefits associated with male infant circumcision.[243] After developing a new task force to study male circumcision in 2007, the Academy recently issued a policy statement stating that the "preventive health benefits of elective circumcision of male newborns outweigh the risks of the procedure."[244] The task force's findings were similar to Tobian and Gray in that they found the benefits to be decreased rates of UTIs and STDs, while the risks are minimal and rare.[245] Moreover, in determining what is in the best interests of the child, the Academy has found that "[i]t is legitimate for the parents to take into account cultural, religious, and ethnic traditions, in addition to medical factors."[246] Accordingly, this is what the remainder of this Note attempts to do.

2. Circumcision Emotionally Benefits Jewish and Muslim Infants by Better Preserving the Parent-Child Relationship

A starting point in considering the impact of the parent-child relationship in best-interest analysis is that, from a child-centered perspective, the child has a constitutional right to a relationship with his parent.[247] Therefore, if possible, attempts should be made to enhance this right and protect it.

In considering the best interests of the child, it is important to understand parent-child functioning within religion. After all, it is commonly accepted that parents are the greatest influence on their child's religious beliefs.[248] While parents maintain a healthy degree of influence in many aspects of their children's lives, nowhere is their influence greater than in the realm of religion.[249] Parents have great influence on their child's

---

[240] *See supra* note 207–11 and accompanying text.

[241] *See supra* notes 187–91 and accompanying text.

[242] *See* Povenmire, *supra* note 1, at 112 (advocating for such a presumption). This is certainly something to which any adult who was circumcised as an infant can attest, as any memories of pain during the circumcision are long forgotten by adolescence.

[243] Task Force, *Policy Statement*, *supra* note 188, at 691.

[244] Task Force on Circumcision, Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585 (2012).

[245] Id.

[246] Task Force, *Policy Statement*, *supra* note 188, at 691.

[247] Holmes, *supra* note 131, at 383–84.

[248] *See, e.g.*, BERNARD SPILKA ET AL., THE PSYCHOLOGY OF RELIGION 118 (3d ed. 2003).

[249] *See, e.g.*, BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, THE PSYCHOLOGY OF RELIGIOUS BEHAVIOUR, BELIEF AND EXPERIENCE 99 (1997). A 1982 study of 203 Stanford

religious views because parents are the primary teachers of religion, and children most often feel a sense of trust and loyalty with their parents.[250]

The concept of parental influence is particularly relevant in Judaism, where family is at the core of Jewish rituals and experience.[251] Indeed, parents are expected to set a standard of Jewish commitment for their children.[252] The Torah, comprised in part of the Book of Deuteronomy in the Bible, commands Jewish parents to teach their children the faith:

> You shall love the Lord your God with all your heart and with all your soul and with all your might. And these words that I command you today shall be on your heart. *You shall teach them diligently to your children*, and shall talk of them when you sit in your house, and when you walk by the way, and when you lie down, and when you rise.[253]

The importance of Jewish parental teaching of the faith is also captured by the Talmud: "Our Rabbis taught: A father has the following obligations towards his son—to *circumcise* him, to redeem him, if he is a firstborn, *to teach him Torah*, to find him a wife, and to teach him a craft or a trade."[254]

The importance of parents passing on the Jewish faith, especially the practice of circumcision, should not be understated. Indeed, "[f]or devout Jews, a failure to circumcise their infant son would clearly be seen as a dereliction of their duty to foster their child's best interests by ensuring he enters properly—meaning through circumcision on the eighth day of his life—into the covenant with God."[255] In short, to Jewish parents "[c]ircumcision [is] the sine qua non of Jewish identity,"[256] and thus to abandon or disallow it is to essentially abandon or disallow Judaism.[257]

---

students found a correlation of 0.57 between the students' religious behavior and their parents' religious behavior. *Id.* at 99–100. The same study found a correlation of only 0.32 on political behavior, 0.16 on entertainment, and 0.09 on miscellaneous beliefs, respectively. *Id.*

[250] *See* DANIEL NYAKUNDI, WHO'S TELLING THE TRUTH? 36 (2008). Alongside the quality of loyalty is that many children do not want to act in a disloyal manner toward their parents and follow the parents' religion as a result. *See id.*

[251] *See* STEVEN M. COHEN & ARNOLD M. EISEN, THE JEW WITHIN 46 (2000).

[252] *See id.* at 44.

[253] *Deuteronomy* 6:5–7 (English Standard Version) (emphasis added).

[254] *Kiddushin* 29a (Talmud) (emphasis added).

[255] Leslie Cannold, *The Ethics of Neonatal Male Circumcision: Helping Parents to Decide*, *in* CUTTING TO THE CORE: EXPLORING THE ETHICS OF CONTESTED SURGERIES 47, 54 (David Benatar ed., 2006).

[256] HOFFMAN, *supra* note 25, at 11.

[257] In essence, bans on circumcision are bans on Judaism. While Jews could still claim Jewishness and still perform many of the faith's practices, an old and core practice would vanish. Though this impact may not change the faith in scientifically observable ways outside of the practice of circumcision itself, it is, in a sense, a ban on the practice. There can be no

Much like in Judaism, the family is the bedrock of the Muslim community.[258] Parental influence is especially critical as "[t]he most important responsibility of the Muslim family is to guide children to an understanding of Islam."[259] Under Islamic beliefs, the parent "will be held accountable for his or her upbringing on Judgment Day."[260] As a result of this teaching, Muslim children are very knowledgeable about their faith, leading one observer to state, "all they know is the Koran."[261]

The parent-child religious correlation combined with the command that parents of each faith raise their child in the practices of the faith—which would thereby include a belief in the necessity of circumcision[262]—suggests that the child will be influenced by his parents' faith. In reality, it is more likely than not that the child will adopt the same religious beliefs as his parents.[263] From a practical perspective, this should weigh in favor of infant male circumcision as it would strengthen the parent-child bond and most likely preserve his religiosity.

As an aside, there may be concerns that a court's consideration of parental influence on the infant's religious beliefs would create an Establishment Clause problem;[264] namely, that a court would have to accept as true the parents' religious beliefs, and this would be preferring one religion over the other.[265] This, however, is not the case. The emphasis is not on the truth of the belief, but the mere fact that this belief will impact the infant's life.[266] This simply means that given the fact that the child will be indoctrinated with this belief, best-interests analysis must consider if it would be beneficial *to the child* to be in accordance with the belief.

To this end, circumcision is in the best interests of Jewish and Muslim infants as it promotes the emotional benefit of religious solidarity with their parents' beliefs. Studies have shown that religious solidarity between parents and their child positively affects the relationship.[267] Moreover, the more strongly the religious beliefs are held by

---

quantification of the presence of the spiritual in religion, especially for Judaism where the practice of circumcision lies at the root of the faith.

[258] *See, e.g.*, ARSHAD KHAN, ISLAM, MUSLIMS, AND AMERICA 196 (2003).

[259] I THE ISLAMIC WORLD 154 (John L. Esposito et al. eds., 2004); *see also* DUAA ANWAR, THE EVERYTHING KORAN BOOK 65 (2004).

[260] ANWAR, *supra* note 259, at 65–66.

[261] *See* Baraka G. Muganda, *Filling the Vacuum*, *in* WE CAN KEEP THEM IN THE CHURCH 120, 122 (Myrna Tetz & Gary L. Hopkins eds., 2004) (explaining the fervency with which Muslims practice in Tanzania).

[262] *See supra* Part I.

[263] *See, e.g.*, SHEILA FURNESS & PHILIP GILLIGAN, RELIGION, BELIEF AND SOCIAL WORK 125 (2010).

[264] *See* Dwyer, *supra* note 119, at 1427–28.

[265] *Id.* at 1428.

[266] *Id.*

[267] Melinda Lundquist Denton, Relationship Quality between Parents and Adolescents: Understanding the Role of Religion 143 (2006) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill), *available at* https://cdr.lib.unc.edu/indexablecontent?id=uuid:b01a41ca-9b48-4c05-8ecd-3814f8a98cc7&ds=DATA_FILE.

the parent and the child, the stronger their bond.[268] Additionally, parents and children who have religious solidarity report having more positive relationships than parents and children with differing beliefs.[269] This strengthening of the relationship is notable because research has found that the parent-child relationship impacts the emotional well-being of children in a variety of ways including academic achievement, risk behaviors, mental health, and life satisfaction.[270]

Conversely, depriving Jewish and Muslim infants of the right to be circumcised does not promote religious solidarity. Rather, it rejects the importance of religion in parent-child relationships, and thus potentially deprives the child of some of the emotional benefits associated with a strong parent-child relationship. Trying to remove the parents' religious views from best-interests analysis does not protect and preserve the child's own religious views. To truly apply an individual, subjective best-interests calculus, all relevant factors must be considered, including the impact religion will have on the child's life.

3. Permitting Circumcision Best Takes into Account Important Sociological and Psychological Considerations

In light of parental influence on children's religious beliefs, it is very likely that a child born to Jewish parents will become Jewish, and that a child born to a Muslim family will become Muslim.[271] Additionally, given the mandatory nature of circumcision in both religions,[272] it is likely that many of the infant's future friends, as they grow up in their religious communities, will be circumcised according to the religious mandate.

Even outside of the religious community, infant male circumcision is the norm in American culture.[273] Though scholars question the merits of the origins of circumcision in the United States,[274] it has nevertheless, become a commonplace practice and one of the most frequently performed surgical procedures in the United States.[275] From 1997 to 2000, approximately 61% of infant males were circumcised.[276] Scholars note,

---

[268] *See id.* (noting that the quality of the relationship improves as the religiosity increases).

[269] *See* Lisa D. Pearce & William G. Axinn, *The Impact of Family Religious Life on the Quality of Mother-Child Relations*, 63 AM. SOC. REV. 810, 825 (1998).

[270] Denton, *supra* note 267, at 1–2.

[271] *See supra* notes 262–64 and accompanying text.

[272] *See supra* Part I.

[273] *See, e.g.*, David J. Llewellyn, *Winning and Losing on the Circuit*, *in* CIRCUMCISION AND HUMAN RIGHTS 219, 220 (George C. Denniston et al. eds., 2009); *see also* Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL'Y & L. 497, 504 (2002) (arguing that the legal system is not likely to change its views on circumcision until it is no longer a popular social norm).

[274] *See, e.g.*, Povenmire, *supra* note 1, at 91–94.

[275] GOLLAHER, *supra* note 13, at xii.

[276] Ctrs. for Disease Control & Prevention, *Trends in In-Hospital Newborn Male Circumcision—United States, 1999–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 1167, 1167 (2011).

however, more recent declines in the practice of circumcision to suggest that circumcision is not as highly regarded as in days past.[277] While there has been a decline, it has not been as dramatic as some initial media reports suggested.[278] Realistically, decline in the practice of circumcision has been minimal. A study by the Center for Disease Control and Prevention found that the rate of circumcision procedures declined from 2001 to 2008 by roughly five to six percent.[279] Furthermore, the statistics are likely an understatement of circumcision rates as the study did not consider circumcisions performed outside of the hospital, such as many Jewish circumcisions.[280] Additionally, the decline in circumcision may be misleading due to the growing number of states that are no longer providing Medicaid funding for infant circumcisions.[281] Despite scholars' protestations of decline, circumcision still remains prevalent in American society and to exclude it would arguably create a cultural divide.[282]

One of scholars' main societal attacks on circumcision is that it is losing its importance in American culture.[283] Once thought medically, aesthetically, and socially useful, now anti-circumcision advocates argue circumcision is an unnecessary procedure.[284] They attack the procedure, calling it nothing more than an archaic procedure with barbaric undertones.[285] Indeed, they frame it as a procedure unnecessarily inflicting pain on newborn infants for no justifiable reason—equivalent to a human rights abuse.[286]

In holding this view, however, scholars and the San Francisco ballot proposal fail to recognize the potential sociological and psychological benefits of circumcision for Jewish and Muslim children. Opponents point to the potential psychological harm on the infant due to the pain of the procedure.[287] Human experience and useful

---

[277] *See* Miller, *supra* note 273, at 502–03; *see also supra* note 5 (discussing the decline in Medicaid funding for circumcision).

[278] At one point, the *New York Times* reported that circumcision had dropped dramatically from 56% in 2006 to roughly 32% in 2009 based on calculations by SDI Health, a company that analyzes healthcare data. Roni Caryn Rabin, *Steep Drop Seen in Circumcisions in U.S.*, N.Y. TIMES, Aug. 17, 2010, at D6. In fairness to the article, it did report that the CDC stated that the figures obtained by SDI were not definitive. *Id.*

[279] Ctrs. for Disease Control & Prevention, *supra* note 276, at 1167.

[280] *Id.*

[281] *See id.* at 1168; *see also* March, *supra* note 5.

[282] *See, e.g.*, GOLLAHER, *supra* note 13, at xiv.

[283] *See* Miller, *supra* note 273, at 502–03.

[284] *Id.* at 557–61 (describing counter-arguments to all of the previously accepted justifications for circumcision).

[285] *See id.* at 553 (noting that opponents believe circumcision is "a mutilating and unnecessary operation"); *see also* Chessler, *supra* note 10, at 573 ("[M]ale circumcision is an invasive and mutilating act that has been justified for thousands of years.").

[286] *See* Chessler, *supra* note 10, at 593–94 (arguing that male circumcision is as much a human rights violation as female circumcision and advocating a view that the procedure violates the Universal Declaration of Human Rights).

[287] *See id.* at 571–72.

analgesics suggest, however, that circumcised males recover from the pain without ill effects, or possibly forget the experience altogether.[288]

Meanwhile more concrete research indicates that American children in minority groups struggle both socially and psychologically.[289] As minorities perceive their minority status, they attempt to counteract it by strongly identifying with their minority group and perceiving the group as more homogeneous.[290] However, as groups become more homogeneous and dogmatic, the possibility of the black-sheep effect for some members increases.[291] In many cases the black-sheep member will be viewed less favorably than members outside of the homogenous group altogether.[292] Though the sociological and psychological effects on children who are the black sheep have not been widely studied, it is likely that they are similar to those of other types of rejection[293]: hurt feelings,[294] loneliness,[295] low self-esteem,[296] aggression,[297] and depression.[298] Karen Bierman, a psychologist at Pennsylvania State University, has found that children who suffer from peer rejection exhibit four negative characteristics: "(1) low rates of prosocial behavior, (2) high rates of aggressive/disruptive behavior, (3) high rates of inattentive/immature behavior, and (4) high rates of socially anxious/avoidant behavior."[299]

Importantly, circumcision is mandated in both the Jewish and Muslim faiths, and notably for Jews, it has long been considered a distinguishing feature from Gentiles.[300] Therefore, banning circumcision without religious exceptions would conceivably cause young Jewish and Muslim boys to become outsiders within the religious communities

---

[288] *See supra* notes 187–91 and accompanying text.

[289] *See, e.g.*, 3 CHILDREN & YOUTH IN AMERICA 1485 (Robert H. Bremner et al. eds., 1974).

[290] Miles Hewstone et al., *Majority-Minority Relations in Organizations: Challenges and Opportunities*, *in* SOCIAL IDENTITY PROCESSES IN ORGANIZATIONAL CONTEXTS 67, 73 (Michael A. Hogg & Deborah J. Terry eds., 2001).

[291] *See* DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING 264 (2004).

[292] *See* Scott Eidelman & Monica Biernat, *Derogating Black Sheep: Individual or Group Protection?*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 602, 602 (2002).

[293] Mark R. Leary, *Affiliation, Acceptance, and Belonging: The Pursuit of Interpersonal Connection*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 864, 879 (Susan T. Fiske et al. eds., 5th ed. 2010).

[294] *Id.*

[295] *See* Eric S. Buhs & Gary W. Ladd, *Peer Rejection as an Antecedent of Young Children's School Adjustment: An Examination of Mediating Processes*, 37 DEVELOPMENTAL PSYCHOL. 550, 550 (2001).

[296] Marlene J. Sandstrom & Audrey L. Zakriski, *Understanding the Experience of Peer Rejection*, *in* CHILDREN'S PEER RELATIONS 101, 101 (Janis B. Kupersmidt & Kenneth A. Dodge eds., 2004).

[297] Mitchell J. Prinstein et al., *Peer Reputations and Psychological Adjustment*, *in* HANDBOOK OF PEER INTERACTIONS, RELATIONSHIPS, AND GROUPS 548, 556 (Kenneth H. Rubin et al. eds., 2009).

[298] Sandstrom & Zakriski, *supra* note 296, at 101.

[299] KAREN L. BIERMAN, PEER REJECTION 17 (2004).

[300] *See* HOFFMAN, *supra* note 25, at 9.

in which they are raised.[301] Considering the mandatory nature of the procedure for both religions, it may cause the young boys to question their place and belonging within the Jewish and Muslim faiths.

This potential sense of ostracism and identity crisis causes great social detriment for young boys and adolescents.[302] Adolescents who suffer ostracism and peer victimization from the group tend to isolate themselves and develop slowly socially.[303] Among adolescents' biggest fears are rejection and attachment of a negative social stigma.[304] As a result, young Jewish and Muslim boys may attempt to keep their uncircumcised status a secret.[305] Of course, given the importance of circumcision within both faiths, it is unlikely to remain a secret for long.[306]

In sum, Jewish and Muslim boys may be forced into uncomfortable social interactions which damage them socially and psychologically. In light of this, the fractured psychological state potentially created by group ostracism is clearly not in the best interests of the child. Rather, permitting circumcision for Jewish and Muslim infants would preserve their relationships with peers in the respective religious community and protect them emotionally, socially, and psychologically.

CONCLUSION

Had the San Francisco ballot proposal been successful in banning circumcision, it likely would have created a firestorm of litigation with a variety of competing interests. In addressing these competing interests, two avenues are available: 1) a parental rights theory, or 2) a child-centered approach. In addressing these two approaches, this Note focused the inquiry to the specific context of Jewish and Muslim parents and infants.

Under a parental rights theory, Jewish and Muslim parents' claims should be protected by strict scrutiny under the hybrid-rights exception in *Smith*.[307] In applying strict scrutiny analysis, states should have to show that circumcision subjects male infants to serious bodily harm. Requiring any lesser standard would not comply with the narrow

---

[301] *See id.* at 9, 12 (noting that nineteenth century Rabbis could not agree that an uncircumcised man could even be a Jew and describing circumcision as "the limits beyond which Jews felt they could not go without at the same time leaving Judaism").

[302] *See* Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134, 143 (2010) (finding that adolescents react more negatively to ostracism than do adults).

[303] *See* SANDRA LEANNE BOSACKI, THE CULTURE OF CLASSROOM SILENCE 75–76 (2005).

[304] *See* CAITLYN RYAN & DONNA FUTTERMAN, LESBIAN & GAY YOUTH 74 (1998) (noting that peer rejection is among the largest negative stressors on adolescent homosexuals).

[305] *See* Duane Buhrmester & Karen Prager, *Patterns and Functions of Self-Disclosure During Childhood and Adolescence*, *in* DISCLOSURE PROCESSES IN CHILDREN AND ADOLESCENTS 10, 35 (Ken J. Rotenberg ed., 1995) (citing potential humiliation as a cause for adolescents to keep secrets from peers).

[306] Additionally, it is more likely to become gossip in the synagogue or mosque.

[307] *See supra* Part II.C.

tailoring requirement of strict scrutiny as it would subject circumcision to state regulation, while other comparable procedures are not subjected to similar regulation. Consequently, since the risks associated with circumcision are minimal, a state's infringement on Jewish and Muslim parents' parental and free exercise rights to have their infant sons circumcised would be unconstitutional.

Under a child-centered inquiry, the focus should be on what is in the best interests of the child. In analyzing the best interests of Jewish and Muslim infants, courts should not focus solely on temporal interests. Doing so grossly undermines the best interests analysis, which should focus on all medical and emotional benefits and detriments. Expanding the scope beyond the temporal in the circumcision context reveals long-term medical and emotional benefits associated with the practice. These considerations debunk any notion that courts should hold a presumption that a child would reject circumcision. Moreover, such a presumption rejects the subjectivity and individuality that is central to a true best interests analysis. Rather, the medical and emotional benefits of circumcision for Jewish and Muslim infants indicate that the procedure is arguably in their best interests.

Thus, the adoption of either a parental or child-centered focus in addressing the circumcision of Jewish and Muslim infants should not affect the outcome. Under either approach circumcision should be permissible for Jewish and Muslim infants.