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PAPER

After Cologne: male circumcision and the law. Parental right, religious liberty or criminal assault?

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ABSTRACT
Non-therapeutic circumcision violates boys' right to bodily integrity as well as to self-determination. There is neither any verifiable medical advantage connected with the intervention nor is it painless nor without significant risks. Possible negative consequences for the psychosexual development of circumcised boys (due to substantial loss of highly erogenous tissue) have not yet been sufficiently explored, but appear to ensue in a significant number of cases. According to standard legal criteria, these considerations would normally entail that the operation be deemed an 'impermissible risk'—neither justifiable on grounds of parental rights nor of religious liberty: as with any other freedom right, these end where another person's body begins. Nevertheless, after a resounding decision by a Cologne district court that non-therapeutic circumcision constitutes bodily assault, the German legislature responded by enacting a new statute expressly designed to permit male circumcision even outside of medical settings. We first criticise the normative foundations upon which such a legal concession seems to rest, and then analyse two major flaws in the new German law which we consider emblematic of the difficulty that any legal attempt to protect medically irrelevant genital cutting is bound to face.

ON THE QUESTION OF A GENERAL PERMISSIBILITY

Do parental rights, that is, rights to raise, educate, and care for one's own children, justify circumcisions that are not medically indicated on boys who, due to their age, are unable to legally consent to the procedure? The law certainly does grant parents wide leeway in determining the course of their children's lives. In liberal constitutional traditions, this far-reaching authority is a fundamental constitutional right of parents. It even covers decisions to deliberately shape children's characters, and hence their lives, in ways that most reasonable observers would deem ethically misguided, or even harmful. For a telling example, consider the famous American case of the people from the 'Old Order Amish'. Parents of this tradition-oriented Christian sect, for religious reasons, restrict their children to two fewer years of schooling than the minimum required by state law. The idea is to ensure the prospect of a simple, modest, unintellectual life for their children, 'aloof from the world and its values'.[1] This is the only way of living the Amish consider agreeable to God. The practice is designed to intentionally foreclose any other, broader, perspective. Joel Feinberg called this a violation of 'the child's right to an open future'.[2] Ethically speaking, it is hard to disagree with him.

Wisconsin versus Yoder: mental versus physical integrity in child-rearing

In this Amish schooling case, however, the attempt by Kansas state authorities to protect the child's need for a standard public education by simply enforcing existing law was patently unsuccessful. When the Amish were asked to accept the full (minimal) established public schooling period for their children they filed a lawsuit, and, in the end, 'won a resounding victory in the Supreme Court of the USA'.[3] The court, supposedly in accordance with legal precepts in many other jurisdictions, ascertained that this way of narrowing, even impoverishing, the mental development of one's own children in an ethically questionable way, was still warranted as a parental right by the law.[i] Not because the law would insist that parents always know and do what's best for their children; obviously, not all parents do. But rather because (1) there are no clear-cut criteria capable of strictly determining what is better or worse for the mental status of one's children (apart from gross and evident forms of psychic maltreatment); and (2) because shaping children's 'psyche' is, to a large extent, the outcome of a continuous process of countless interactions between children and parents, and thus deeply interwoven with fundamental liberties of the parents to act on behalf of their child; and finally, (3), because, against this complicated normative backdrop, no one would seriously want the state to interfere in these matters ab initio, attempting to 'micromanage' family child-rearing.

Matters are very different, however, with regard to a child's bodily integrity. There we do have a distinct and definite criterion with which to identify the outer boundary of parental authority: simply the bounds of the child's skin. Note that refraining from intrusions into that sphere does not require renouncing any of the parents' own basic liberty rights. Therefore, any substantial and permanent lesion upon the physical *gestalt* of a child is rightly considered an unjustified harm and hence

[i]One may plausibly doubt this; in 'Yoder', Justice William O Douglas issued a strong Dissenting Opinion, pointing out that if parents keep their children out of school beyond grade school, then the children 'will be forever barred from entry into the new and amazing world of diversity that we have today (ref. 1 at 245). Still, legally speaking, the case is a borderline case within a rather extended grey area. We leave this problem open here.

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prohibited by law. This is to say that, from a legal perspective, the body is deemed essentially sacrosanct even considering the broad sweep of parental discretion. Hence, in German law (as in many other legal systems), all physically violent measures against children have been outlawed as methods of education or chastisement.

Some argue that this is due mainly to the fact that such measures are degrading as forms of punishment, and hence tend to violate personal dignity. And this argument allegedly does not hold for religiously or socially motivated physical intrusions that produce no comparable mental harm as does corporal punishment. But this is misguided. The body is protected, as it were, in its own right, not just as a mediator for the mental well-being of the child. Imagine some fundamentalist Christian sect with the sinister rite of flagellation, whipping all newborns with four strokes on the first Good Friday of their lives in order to secure their participation in the suffering of Christ and thus their eternal communion with him. No degradation involved, no punishment, no later memory of the procedure ingrained in the child's mind—only a pious, well-meaning motive on the part of parents, just as in neonatal (ritual) circumcision. And yet, there is not the slightest doubt that this would be unlawful and punishable as child abuse.

Medical advantages?

One may reject this flagellation comparison and try to point to normatively decisive differences between the two types of cases. In order to do so, one would have to show that circumcision, in contrast to being whipped for communion with Christ, is in the best interest of the child's well-being. For that is exactly what is required for a valid parental consent. Some pursue this tack by offering up supposed epidemiological advantages from a routine practice of circumcision. But such claims apply, if at all, with regard to sexually transmitted diseases or to diseases caused by widespread deficits in genital hygiene[ii]: conditions that are obviously of no relevance to infants or children (who are not sexually active) in developed and well-off societies (in which good hygiene can be assured). In contrast, the disadvantages are manifest: Without a decisive medical reason, the boy irreversibly loses a healthy part of his body, a part that may have a significant, albeit not yet fully understood function as protective and erogenous tissue.[4] As has long been established beyond a reasonable doubt, circumcision introduces a loss of genital sensitivity in adolescents and men[5 6] It is not unlikely that this may, at least in some cases, cause deficiencies in the boy's later sexual life whose natural development, unimpeded by unnecessary surgical intervention, is something he is ethically and legally entitled to.

Moreover, the child usually suffers severe pain resulting from the operation itself, even if anaesthetised, and from a postoperative wound that takes several painful days to heal.[7] In Judaism, circumcision is still carried out predominantly without effective anaesthesia.[8] Clinical research has demonstrated that this regularly results in immense distress for a sensitive infant and may even lead to persistent traumatic consequences.[9–12] Sometimes it is argued that the occasional (apparently) quiet sleep of the infant shortly after a circumcision indicates that the impact on the child's physical integrity is mild. Yet as has been shown in numerous careful studies, this 'quiet sleep' is much more likely to be a state of complete exhaustion or 'neurogenic shock', a protective mechanism of retreat of the baby's central nervous system caused by the traumatic pain.[7 13] Finally, the risk of complications accompanying or following the operation has to be taken into account as a further disadvantage.

Psychosocial indication?

A common argument for the normative compensation of such harmful physical effects, and hence for the lawfulness of neonatal or infant circumcision, is its psychosocial indication, that is, its positive and allegedly indispensable function for the child's initiation into a certain religious community. Indeed, the parental right of custody certainly does cover the integration of a child into a religious community of the parents' choice. Again, not for the reason that the law itself deems such a religious upbringing constitutive for the child's well-being: it does not, as of course it equally condones an atheistic education. Instead, the law simply refrains from interfering in the parents' discretion to decide such matters for themselves and their children.

Circumcision, however, is more than an integrative ritual. It is a substantial violation of a child's bodily integrity. And this physical aspect, rather than the mental or spiritual one, brings into play the 'sacrosanct' quality of a child's body, and thus calls for legal protection. This does not exclude all modifications of a child's body, however slight, by his or her parents. An ancient legal maxim holds, *de minimis non curat lex*: 'the law does not concern itself with trifles'. This is to avoid interference with personal freedom, even if such freedom touches upon another's legally protected sphere. Thus circumcision may be argued to be trivial enough to remain below such a threshold. Or one may claim for it a (relatively lightweight) medicopsychological indication for an (equally lightweight) intervention, as is done for corrective surgery on children's ears that stick out far enough to invite the possibility of ridicule. Thus, in this respect, parental rights are restricted by normative criteria that are strictly protective for the child if the physical modification transgresses a certain boundary of severity; whereas, on the near side of that boundary, they are subject to a balancing approach. In such a process of weighing, however, the prohibition of excess physical force, or loss of anatomical function, is constitutionally paramount. Hence, since circumcision involves trauma-grade force (as described above) and eliminates functional tissue, it cannot be simply dismissed as a 'trifle' and thereby escape the notice of the law.

Summarising all of this with regard to infant circumcision, it is fair to say that had there never been any ritual justification for the procedure in history, it would quite certainly not be legally tolerated in most civilised countries, not even in the USA where it took mere familiarity with—and habituation to—the religious ritual to pave the way for a widespread social practice cloaked in medical justification. Imagine that the whole procedure had been unknown and were now newly developed by some religious sect or in the wake of an odd social fashion. There is little doubt that it would be made subject to criminal prosecution at once.

[ii]The only exception to this is the occurrence of Urinary Tract Infections (UTIs) in early childhood, for which there is some evidence of a protective effect conferred by circumcision prior to the age of sexual maturity. Yet UTIs are profoundly rare for boys (ie, much rarer than for girls), and can easily be treated with oral antibiotics (just as they are for girls). Pre-emptive surgery that removes functional tissue must never be considered a viable option for 'treating' an infection when the infection has a very low baseline occurrence, and when it can be treated more effectively and less invasively by other means if and when it does occur.

Religious liberty—whose freedom? Whose body?

Another argument for the justification of circumcision is the parents' right to freedom of religion.[14 15] However, intruding into the child's bodily integrity in a sufficiently deep way cannot be justified by a pure liberty right such as freedom of religion. No conceivable (positive) liberty right, roughly understood as a right to perform certain acts at one's will, can possibly justify direct physical intrusion into someone else's body.[iii] Having a positive legal liberty to do x means being legally entitled to do x solely because one wants to. It is obvious that there can be no legal right granting unfettered permission to intrude into another's body simply at one's discretion. This is not the result of a weighing of conflicting interests. Rather, such a permission is excluded ab initio.[iv] There are, of course, other types of rights—in a broad sense, emergency rights, such as the right to self-defence or certain rights of necessity—that may well justify a wide range of actions that harm another person's body. Authorisation by a valid consent is an additional exception. Furthermore, in the public realm, there may well be collisions of the exercise of one's liberty rights with the physical sphere of others which can only be resolved by a normative process of weighing the conflicting interests (think of the chiming of a church bell striking the ear of a disinclined and unreceptive atheist). But there is no such thing as a right to directly harm another's body solely at one's arbitrary will. Hence, freedom of religion of whomever, including the parents, cannot so much as factor in to any reasonable argument for the justification of religiously motivated circumcisions.

This is not to suggest any hostile attitude towards religions but rather to assign them their legitimate range and to mark the end limits of religious freedom. No one seriously proposes an overall prohibition of religious circumcisions. These ritualistic surgeries should, however, be performed only on someone who is competent to consent for himself. There is already a sizeable and growing number of Muslims and Jews who postpone the procedure for their children accordingly, or who prefer bloodless alternatives, without compromising their children's religious affiliations or self-conception in the least.[7] Furthermore, many religious commandments and prohibitions, some of them directly attached to the biblical order addressed to Abraham to circumcise himself and his progeny, have changed in the course of history and are not taken literally by anyone anymore. We propose that it can rightly be expected of a religious community to look for alternatives to even its ancient and most hallowed practices, if these violate human rights and the physical integrity of others. Historic examples of harmful religious customs that have been abandoned and superseded by protective individual rights abound, from child sacrifice to bartering one's daughter into marriage to severe forms of female genital mutilation (FGM) for religious reasons, the last of which is unfortunately still widely practiced today but is doubtlessly unlawful under any respectable legal order.[v]

Islam and Judaism: varying ritual obligations

We do not think that modifying the practice of religious circumcision to allow for the informed consent of the individual is too strict a demand. With respect to Islam, circumcision is not so much as mentioned in the *Qur'an*, nor is there a religious commandment stipulating a certain age at which it be performed. Rather, the practice is derived from a diffuse and indistinct instruction in the *Qur'an* to follow the example of Abraham. In addition, it is ascribed to a '*Hadith*', a report of the Hashemite Mohammad (a Muslim prophet), containing traditional advice for living a pious life and including remarks on circumcision. As an act of allegiance, it forms part of the *Sunna*, a source of Islamic law.[18] Considering all of this, it does not seem unreasonable, even from an internal Muslim perspective, to defer circumcision until an age at which the boy concerned is legally competent to consent to the procedure. For the act of circumcision, unlike that of baptism in Christianity, merely confirms, but does not establish, the religious affiliation.

The same cannot be said of circumcision in Judaism, the so-called Brit Milah, whose origins are formally laid down in the Torah. But Brit Milah may still leave room for other ways of circumcising that would count as an improvement with respect to the child's well-being and his right to bodily integrity. Possible compromises need not even presuppose that circumcision be reduced to a merely symbolic act, nor even that it be delayed until the boy is legally able to consent, although both of these changes would be necessary to *fully* eliminate the tension between Brit Milah and contemporary medical ethics and Western legal codes. Perhaps the ritual could be modified so as to largely preserve the skin system of the penis. As a matter of fact, this was the ancient Hebraic way of performing circumcisions: a minor incision into the tip of the foreskin, or the removal of a small amount of tissue overhanging the end of the glans penis only, was considered sufficient for sealing the divine covenant from the time of Abraham until circa 100 AD. At this time, the much more radical form of ablating the entire prepuce, the so-called Periah, was introduced by rabbis to make it more difficult to conceal one's circumcision status by stretching any remaining preputial tissue back over the head of the penis.[19] Thus, giving up Periah would only reverse a comparatively recent rabbinic tradition and would therefore not violate the divine commandment in the Torah.[vi]

[iii]We do not want to enter here the complex philosophical discussion on the meaning, content and manifoldness of the concept of 'liberty'; for a classic treatise, see ref. 16. We confine our perspective to legal liberty, that is, roughly, a person's having a legally warranted option to an alternative. Along similar lines, we also distinguish between positive and negative liberty, that is, between the absence of obstacles external to the agent, and the presence of a power on the agent's part to decide on, and control, her actions.

[iv]The reason for this is a cornerstone in the very fundaments of law, viz., its basic justification as a system of coercive rules, namely, its function to exclude solutions to conflicts that resort to sheer force of one (or all) of the parties involved. The idea is aptly spelt out by Kant; it is, he says, derived 'analytically from the concept of *law* as opposed to *force* (violentia)'; see ref. 17 p. 307 (emphasis ibid.).

[v]Note that this clear-cut verdict concerning FGM, as compared with the widespread acceptance of male circumcision, hinges on the 'severe forms' indicated above; it does not hold for the mild (or, at any rate, mildest) forms of female genital alterations which do not exceed (or even clearly lag behind) male circumcision with regard to risks or harmful physiological or psychosexual consequences. Hence, in explicitly granting parents legal permission to circumcise their sons, legislators, for fundamental reasons of gender equality under the law, regrettably relinquish their constitutional entitlement to outlaw such mild forms of female genital alterations, a fact often overlooked or even consciously ignored in current debates on male circumcision.

[vi]The rabbinic tradition may claim that rabbis, collectively, 'channel' the wishes of G-d over the ages, thereby suggesting that G-d is ultimately the source of the changing requirements and hence the institution of the more invasive rite of Periah. This notion is comparable, perhaps, to the Catholic Pope speaking, infallibly, 'ex cathedra.' Talmudic discussions of this sort are well beyond our theological competence. We do think, however, that rabbis should begin to re-examine this tradition in light of new medical and psycho-sexual insights from recent scientific enquiries.

It is, of course, first and foremost the right of religious communities to decide for themselves which rites and beliefs they deem relevant for their own denomination, and which they are ready to abandon. Infant circumcision, however, is more than merely such a rite. It is, in a very mundane sense, a significant bodily harm to a child. And this, inevitably, brings the law onto the scene. Moreover, the imposition of an irreversible mark of a religious membership contradicts the right to self-determination and the child's own (negative) freedom to avoid, or (positive) freedom to adopt, any particular religion. Parents doubtlessly have a constitutional right to initiate their child into a religious community.[vii] But this right does not extend beyond the time when the child acquires the ability to decide on such matters for himself. If parents do not have a right to determine their child's religious affiliation for the child's lifetime, why should they have a right to permanently mark their children's bodies with a symbol of that affiliation? It is, in this respect, quite irrelevant that this mark is ambiguous and does not necessarily point to a religious faith: it was engraved onto the child's body for that reason alone. The chief rabbi of Israel, Yona Metzger, while visiting Germany, expressed this thought quite trenchantly: 'The Brit Mila, the circumcision, is (…) a stamp, a seal on the body of all Jews, a seal one can never retreat from'.[20] Of course, he meant this in an affirmative sense. However, when infants, 8 days old, are permanently marked with a seal they will never be able to break off, this type of religious practice is at odds with the human right of self-determination.

Conclusion thus far

Circumcision therefore is, and, in a material sense, remains, unlawful even if performed as a religious rite. A different question is whether parents who arrange for a circumcision to be performed on their child (along with the person who actually performs it) should be liable to criminal prosecution. If, from a subjective point of view, there is no acceptable alternative to circumcision, as might be the case for devout Jews, a legal ground for a personal exemption from punishment by exculpation might be considered.[21] It certainly does appear excessive to stigmatise such well-meaning and piously minded parents as criminals. To abstain from raising criminal charges would not, however, alter the fact that the circumcision procedure itself remains unlawful. To non-jurists, this may seem to be a peculiar distinction; from the perspective of legal doctrine, however, there is nothing unusual about it. By far the most unlawful deeds occurring in everyday life are not subject to criminal sanctions. Just think of the countless negligent actions in automobile traffic (or in any other social context), luckily not followed by accidents or harms, but which are unlawful nevertheless; or of people skipping days at work (ie, breaching a legal contract), or failing to put the required coin into a parking metre. These are misdemeanours and hence subject to monetary fines, but not to criminal punishment. Circumcision, of course, is definitionally a type of battery and is thus *prima facie* subject to criminal sanctions; however, in certain cases, the legislature may grant exceptional excuses[viii] under criminal law for certain widespread practices that are regularly performed without consciousness of their being unlawful ('mens rea'), or even under the dictate of a belief in a respective divine command. This is not the place to delve into this specific area of legal doctrine any deeper. Suffice it to say that we take such an exceptional exoneration from criminal responsibility (not from civil liability) for religious circumcisions to be practically and legally justifiable, at least for the near future.[ix]

ON A NEW GERMAN STATUTE EXPRESSLY PERMITTING INFANT CIRCUMCISION

In Germany, a now widely known decision by the Cologne County Court in May 2012 stated that circumcision for non-medical reasons is unlawful because it violates a boy's right to bodily integrity. Parental consent (which in the particular case had been given prior to the operation) was deemed unsuitable for justifying the procedure because it transgressed the boundaries of legally granted parental discretion.[23] The judgment stirred up a heated controversy in German politics as well as in the media and in public opinion. It also drew harsh criticisms from the Jewish and Muslim communities in Germany and around the world. The German parliament, the 'Bundestag', promptly reacted with a resolution, adopted by a large majority of MPs from all political parties, stating their discontent with the court's verdict and announcing their intent to enact a new law to expressly allow infant circumcision and thus assure legal clarity on the matter. The Federal Ministry of Justice was requested to draft a proposal as soon as possible. The draft was presented by mid-October 2012, was passed by the *Bundestag* as Art. 1631 d of the German civil code on 12 December, and came into force on 1 January 2013. It consists of the following two paragraphs:

1. Parental custody for the child also encompasses the right to consent to a medically not indicated circumcision of the male child incompetent of understanding or assessing the meaning of the operation, provided that it is performed in accordance with valid medical standards. This does not apply if the circumcision, with regard to its particular purpose, endangers the child's well-being.
2. Until 6 months after birth, circumcisions as described in paragraph (1) may also be performed by persons designated by religious communities who, without being physicians themselves, are trained and skilled accordingly to perform circumcisions in a comparable way.

As should be clear by now, we disapprove of the content of this new law and of the (as we maintain) unjustified extension of parental rights of custody that it grants. However, although there is a small potential that it may be abrogated by a future legislative act or by the German constitutional court,[x] it is for now an effective legal norm; hence, in what follows we simply, albeit *nolens volens*, presuppose it as given. Against this backdrop, we will point out two major flaws of the new law. We take them as emblematic of the difficulty that any legal attempt to protect invasive, religiously-motivated genital cutting will inevitably face.

Anaesthesia administration by non-medics?

The first flaw is a legislative concession that clandestinely subordinates the law to a tacit, but powerful pressure by a religious

[vii] We note that the Oxford biologist Richard Dawkins has argued that even this much is intellectual child abuse, stunting the child's mind against other possibilities. Such is not, however, the view of the law.

[viii] Not justifications!

[ix] If one wishes: as a case of 'non-ideal justification' in the Rawlsian sense of the term, that is, only for a limited period of 'transition' to a normatively better, prospectively 'ideal', legal regulation; cf.22, 244–246.

[x] Possible legal actions in order to engage the court with the new law are a complicated matter of German law not to be discussed here; suffice it to say that prospects of successfully combating the norm are rather poor.

community. The bill has its statutory permission depend upon the precondition that circumcision be carried out in accordance with approved standards of good medical practice. As the official explanatory remarks of the draft bill (and now the new statute) explicate, this includes 'effective anaesthesia'.[24] In its second paragraph, however, the statute allows non-medics to carry out circumcisions on babies within the first 6 months after birth. This relates almost exclusively to Jewish ritual circumcisions performed on newborns, regularly done on the 8th day of the infant's life, and often performed by 'mohalim': persons that are trained, religiously as well as technically, to conduct ritual circumcisions.

The question that comes to mind at once is whether such a mohel will also be entitled to administer an anaesthetic. The statute itself, as well as its 23 pages of explanatory notes, remain silent on that point. But standard criteria of legal interpretation cogently provide an affirmative answer: Yes, anaesthetic administration is also accorded to the person who performs the operation. For para (2) of the statute, in entitling the non-medical mohel to circumcise, simply relates to the entire procedure as described in para (1), and does not, thereby, distinguish between the cut itself and the accompanying, and required, anaesthetic measures. Hence it grants the mohel permission for both. Further, as para (1) stipulates, the mohel must be 'comparably', that is, physician-like, trained and skilled, and the whole intervention must meet medical standards. But is this possible at all with regard to anaesthesia? No, it is not. A non-physician cannot and must not acquire such skills or the respective pharmaceutical substances, let alone apply them to a patient. The German Pharmaceutical Act of 1976 strictly forbids him from doing so.

This explains why the explanatory notes of the draft indicate that in Judaism 'general or local anaesthesia is unusual in infant circumcision'. Instead, 'ointments and/or suppositories are commonly used'. That is all. No further word is given on the question of whether the 'unusual' (ie, proper anaesthesia) is also unnecessary, or whether the 'commonly used' (ie, ointments, etc) are sufficient, to achieve adequate protection of the newborn's most fundamental interests. The tacit message is plain: 'Ointments and suppositories' continue to be deemed sufficient for infant pain control under the new law. Put differently, with respect to anaesthesia, the 'comparable' skill of the non-medic mohel may (and must) be confined to the limits drawn for him as a medical layman by other legal norms.

But it is precisely these limits that prevent him from performing a circumcision according to the legally required 'state of the art' described[xi] in para. (1) of the new law. The ointment that the explanatory statement refers to is the local-anaesthetic cream 'EMLA' (an acronym for 'Eutectic Mixture of Local Anaesthetics'), containing the active ingredients lidocaine and prilocaine, and usually applied for minor interventions on the surface of the skin. In May 2012, the most recent and as yet most comprehensive research report on the subject, encompassing all available studies on pain control for infant circumcision, appeared in the medical journal *'Anaesthesia and Intensive Care*'.[13] The authors, two Australian anaesthetists, point out that while EMLA does have pain-reducing effects and is better than a placebo, it is 'substantially inferior' to methods such as a 'dorsal penile nerve block', only the latter of which are considered sufficiently effective in relieving infant suffering. In other words, EMLA provides, as the authors conclude, 'insufficient anaesthesia for neonatal circumcision'. And they add a rather disconcerting remark: 'Disturbingly, given (that) the neonatal prepuce is normally fused to the glans, requiring its forcible separation during circumcision, one author reported that 25% of older boys given topical EMLA for release of preputial adhesions could not tolerate even the pain of this, reinforcing concerns that EMLA cream provides insufficient anaesthesia for circumcision proper.' (ibid., 513).

The explanatory notes of the new law mention in passing that in Israel circumcisions on boys older than 6 months may only be performed under general anaesthesia. At the same time, general anaesthesia in neonates bears considerable risks and is to be applied on strict medical indication only. A rather obvious question suggests itself but is not envisaged by the authors of the new law: Why is general anaesthesia prescribed as the only feasible measure in infants or young children as soon as they reach an age beyond the period of highest risk? The facile answer, "because the whole procedure is a minor intervention for which 'ointments and suppositories' will suffice" falls flat. And the implication in all of this is quite clear: Jewish ritual circumcisions on neonates will continue to be performed in Germany on a clearly suboptimal level of pain control, and hence will continue to violate the infant's right to bodily integrity even apart from the cut itself (whose permissibility was, in any case, beyond practical dispute in the draft bill of the new law).

Here a brief additional comment appears in order. Politically speaking, this outcome—that is, explicit legal protection for religious circumcision—was well assured from the very beginning by the fact that its subject is a ritual that is deemed indispensable and integral specifically to Judaism. This fact is decisive for German politics for an obvious reason, namely for its link with the darkest part of German history: the genocidal mass murder of Jews in the Nazi era. We do respect and indeed emphasise the singular political obligation of all German political authorities that originates from this historical fact and encompasses all Jewish concerns of sufficient weight. Circumcision obviously is such a concern. On the other hand, we are convinced that the sheer act of circumcising an infant would not be tolerable, and would hardly be tolerated, under German law, were it not for this peculiar religious background that refers to grave historical guilt. With regard to German political authorities including the legislature, one of the present authors has termed this situation a 'state of political necessity'.[25] We do not think that there is any ideal solution to this political problem.[xii] It is, however, also a profound ethical as well as legal concern, and as scholars in these fields, we consider ourselves obliged, not to provide handy political proposals, but to clarify normative problems.

For or against the boy's well-being: depending on parental motives?

Here we raise our second objection to the new law by describing another flaw that we consider exemplary. In order to avoid any appearance of a legal privilege for religious communities (which would raise serious constitutional questions) the authors of the statute refrained from restricting the legitimising grounds for decisions to have one's son circumcised to religious reasons only. However, this is bound to cause other challenges, as it obviously gives leeway to all kinds of shoddy or outright wicked motives on the parents' side, too. Thus, the phrase 'with regard to its particular purpose' was inserted into the second sentence

[xi]In other words, that is, employing the minimum level of pain relief stipulated by current medical standards.

[xii]This may be another case for Rawlsian 'non-ideal theory' (see n. 7, supra).

of para (1) of the bill. As the explanatory notes point out, this aims to exclude objectionable parental motives such as 'purely aesthetic reasons or the intent to hamper masturbation' once the boy reaches the age of puberty or sexual (self-) exploration. The idea is, however, misguided, and its insinuation misleading. The phrase 'with regard to its particular purpose' is patently unfit to filter out inappropriate parental motives and prevent circumcisions on such grounds. This does hold for practical reasons and as a matter of principle. Here is why:

Circumcision stands in need of justification because it is harmful, and hence exclusively vis-a-vis the child to be harmed. It is rather obvious that the amount of harm, and thus the measure of the need for justification, depends solely on the objective properties of the physical intervention: its depth, painfulness, duration, risks, and so on—in short: on the overall weight of the burdens it loads onto the child. These burdens are not even reached, let alone modified, by alternating motives on the part of the parents. What this shows is that the circumcision itself, irrespective of the motives for which it might be initiated, is deemed compatible with the child's well-being once it is expressly endorsed by the law. For otherwise, even the most well-meaning motives could not justify an objectively harmful intervention. Rather, in themselves (ie, without any accompanying objective advantages for the child) such motives are indifferent to, and detached from, the child's own interests, and hence not apt to contribute anything to the required justification.

This is quite evident in cases in which a certain educational measure, objectively detrimental to the child's well-being, is borne by the most well-meaning motives on the parents' side. Take the age-old, and now outlawed, practice of whipping one's children for their own alleged good. But the argument, of course, also holds the other way around. Just as an objectively harmful action cannot be justified by 'good' motives alone, an act that is objectively compatible with the child's well-being is not delegitimised vis-a-vis the child by shoddy motives, either. The mother who takes her reluctant 6-year-old to his piano lessons twice a week does not harm his well-being in the least even if the only reason she does this is to gain some undisturbed hours for her adulterous affair. The father who takes his hated stepson to an urgently needed dental treatment does not harm the boy's well-being if the only reason he does this is *schadenfreude*, or taking malicious joy in witnessing the fear and pain of the child. Wicked motives concern the morality of the parental actors. As to justifying the violation of the child's body, however, they do not even touch upon, let alone solve, the normative problem. In short, and with a return to our new German statute and its rationale: If circumcision is compatible with the child's well-being, then it continues to be so even if solely borne by an aesthetic or a sexual-educational fad of the parents.

From the perspective of legal theory, all of this is fairly clear. So one does not even need to raise the pragmatic objection that the problem of detecting and rejecting impermissible parental motives will never occur, anyway. All that parents nourishing even the most condemnable of motives, if asked about it, would have to answer, is 'medical-prophylactic', 'hygenic', or 'religious', or 'social'. None of this is verifiable, none correctable, each is sufficient. The German bill boasts about its eschewal of even a remote appearance of granting a legal privilege to religious groups. However, if one approves of opening up a motivational leeway for discretions beyond (objectively) religious grounds, one ought to stand by the consequences. Circumcisions on infant boys will henceforth be lawful in Germany for any and every reason parents might have. The fundamentalist Catholic father who catches his 8-year-old masturbating, and, in order to prevent the habit from taking hold, hits him hard in the face, acts unlawfully and is punishable by the criminal law. If he, for the very same purpose, decides to have the boy circumcised, the new law paves the way for him.

Outlook, somewhat sceptical

We think that the necessary debate about circumcision in Germany as well as worldwide has only just begun. In the end, it will be decisive for its outcome whether and to what extent the two great religious communities of Judaism and Islam will be able to normatively (not only religiously) reflect on their ancient practice of cutting off parts of infants' genitals to their objective detriment even if backed by the most well-meaning motives. Legal policy, however, has an important role to play in promoting, and even necessitating, this self-reflective process. In the present case, a historical chance of just this nature appears to have been squandered in Germany after its promising initiation by the sober verdict of a small County Court.

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After Cologne: male circumcision and the law. Parental right, religious liberty or criminal assault?

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