

## IS CIRCUMCISION A FRAUD?

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*This Article suggests that non-therapeutic male circumcision or male genital cutting (MGC), the irreversible removal of the foreskin from the penises of healthy boys, is not only unlawful in the United States but also fraudulent. As a German court held in 2012 before its ruling was effectively overturned by a special statute under political pressure, circumcision for religious or non-medical reasons is harmful, violates the child's rights to bodily integrity and self-determination (which supersedes competing parental rights), and constitutes criminal assault. MGC also violates the child's rights under U.S. law, and it constitutes a battery, a tort and a crime, and statutory child abuse. Building upon a 2016 case in the United Kingdom, we make the novel suggestion that when performed by a physician, MGC is a breach of trust or fiduciary duty, and hence constructive fraud, where courts impute fraud even if intent to defraud is absent. We reprise and build upon the argument that it is unlawful and Medicaid fraud for physicians and hospitals to bill Medicaid for unnecessary genital surgery. Finally, we suggest that MGC constitutes intentional fraud by the American Academy of Pediatrics (AAP) and most physicians who perform circumcisions in the United States. They have long portrayed MGC as medicine when it is violence, and as a parental right when males have the right to keep their penile foreskin, and physicians are not allowed to take orders from parents to perform unnecessary genital surgery on children. Various aspects of potential litigation would be favorable to the plaintiffs. Hence, we conclude that MGC exposes physicians, hospitals, and the AAP to large and possibly uninsured liability.*

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*This Article begins by suggesting that the arguments for leaving the foreskin of the penises of healthy boys alone, as physicians in most developed countries do, are convincing. It is better for the health of boys and men.<sup>1</sup> It respects what boys would choose for themselves if able to choose.<sup>2</sup> In any case, males, like females, have the ethical and legal right to remain genitally intact.<sup>3</sup>*

*Physicians are required to justify each medical intervention and to obtain the patient's consent to it whenever possible.<sup>4</sup> The burden thus falls to physicians in the U.S., who are outliers in circumcising healthy boys, primarily at birth, to justify performing non-therapeutic circumcisions without consent, and thus to refute the arguments against circumcision.*

*As the British physician Douglas Gairdner wrote in 1949, however, of all the many varied medical and trivial reasons that physicians had advanced for the practice from the mid-1800s to the mid-1900s, none were convincing.<sup>5</sup> In 1999, the legal scholar Matthew Giannetti showed that the American Academy of Pediatricians (AAP) had made unscientific, negligent, and possibly intentionally fraudulent claims about the practice in order to perpetuate the circumcision industry for monetary gain.<sup>6</sup> Medical experts,<sup>7</sup> ethicists,<sup>8</sup> and legal scholars<sup>9</sup> have adjudged the AAP's most recent 2012 circumcision guidelines, which contain even more extravagant medical claims, to be unsustainable.*

*We suggest that it will never be possible for physicians who circumcise and their medical associations to justify non-therapeutic circumcision without consent. It is violence, the opposite of medicine,<sup>10</sup> and it crosses a line that physicians are not allowed to cross,<sup>11</sup> regardless of*

<sup>1</sup> See *infra* Introduction I.A.

<sup>2</sup> See *infra* at note 48.

<sup>3</sup> See *infra* Introduction Part I.B and Part I.

<sup>4</sup> See *infra* note Part II.A.

<sup>5</sup> Douglas Gairdner, *The Fate of The Foreskin: A Study of Circumcision*, 2 BRIT. MED. J. 1433, 1433 (1949).

<sup>6</sup> See Matthew R. Giannetti, Note, *Circumcision and the American Academy of Pediatrics: Should Scientific Misconduct Result in Trade Association Liability?*, 85 IOWA L. REV. 1507, 1553 (2000).

<sup>7</sup> See, e.g., Morten Frisch et al., *Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796 (2013) [hereinafter *Frisch Cultural Bias*].

<sup>8</sup> See, e.g. Brian D. Earp, *The AAP Report on Circumcision: Bad Science + Bad Ethics = Bad Medicine*, CREATIVITY POST (Sept. 2, 2012), [https://www.creativitypost.com/article/the\\_aap\\_report\\_on\\_circumcision\\_bad\\_science\\_bad\\_ethics\\_bad\\_medicine](https://www.creativitypost.com/article/the_aap_report_on_circumcision_bad_science_bad_ethics_bad_medicine) [hereinafter *Earp Bad Ethics*].

<sup>9</sup> See *infra* Part I.

<sup>10</sup> See *infra* Introduction B.2.

<sup>11</sup> See *infra* notes 126–128.

*the many excuses advanced for it in the past, or that might be advanced for it in the future. Through unfair and deceptive conduct and fraudulent claims and omissions,<sup>12</sup> physicians in the U.S. deceive parents about circumcision, and insofar as the parents are acting as legal proxies on behalf of and in place of their sons, the physicians also thereby also deceive the sons. With legally invalid parental permission in hand, they take the foreskin that boys have the legal right to keep and enrich themselves in the process.<sup>13</sup>*

*We show that circumcised boys and men, their parents, and the U.S. and state governments have several causes of action against the physician, the hospital, the American Academy of Pediatrics, and the American College of Obstetricians and Gynecologists for three types of fraud. We therefore suggest that circumcision is a complex, 150-year-old multibillion dollar-per-year fraud.*

INTRODUCTION.....	48
A. <i>Factual Background</i> .....	48
1. <i>The Prepuce</i> .....	48
2. <i>Genital Cutting</i> .....	50
B. <i>Ethical and Legal Background</i> .....	53
I. <i>BATTERY AND CHILD ABUSE</i> .....	55
A. <i>Unnecessary Surgery</i> .....	55
B. <i>Unnecessary Genital Cutting</i> .....	58
II. <i>CLAIMS ARISING FROM BREACH OF TRUST</i> .....	62
A. <i>Breach of Fiduciary Duty</i> .....	62
B. <i>Constructive Fraud</i> .....	66
C. <i>Unjust Enrichment</i> .....	67
D. <i>Unfair and Deceptive Acts and Practices</i> .....	68
III. <i>CLAIMS ARISING FROM UNLAWFUL MEDICAID BILLING</i> ...	68
A. <i>Unlawful Medicaid Billing</i> .....	68
B. <i>Medicaid Fraud</i> .....	70
IV. <i>INTENTIONAL FRAUD</i> .....	72
A. <i>The Past as Prologue</i> .....	73
1. <i>Early False Medical Claims</i> .....	73
2. <i>Early Specious Claims</i> .....	76
3. <i>Early Unfair and Deceptive Practices</i> .....	77
4. <i>Not Medically Justified</i> .....	78
B. <i>Motives to Defraud Today</i> .....	78
C. <i>Intentional Fraud by the AAP in 2012</i> .....	80
1. <i>Fraudulent Medical Claims and Omissions</i> .....	81
a. <i>Material Omissions</i> .....	83

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part II.C.

b.	Undisclosed Disadvantages and Understated Risks . . . . .	83
c.	Exaggerated and Irrelevant Claims About Actual and Potential Medical Benefits . . . . .	86
d.	Usually Not Performed for Medical Reasons Anyway . . . . .	90
2.	Fraudulent Legal Claims . . . . .	91
a.	“Parents Have the Right to Elect Circumcision” . . . . .	92
b.	“Parents Will Need to Take Their Personal Preferences Into Account” . . . . .	93
c.	“Parents Have the Right to Elect Circumcision for Religious Reasons” . . . . .	96
d.	“Physicians Are Allowed to Take Orders from Parents” . . . . .	97
D.	<i>Intentional Fraud by Many Physicians Who Circumcise</i> . . . . .	98
1.	The “Question” . . . . .	98
2.	The “Talk” . . . . .	100
3.	Coercion . . . . .	101
V.	LITIGATING THE FRAUD CLAIMS . . . . .	102
A.	<i>Easier than a Malpractice Suit</i> . . . . .	103
B.	<i>Longer Statute of Limitations</i> . . . . .	103
C.	<i>Right to Summary Judgment</i> . . . . .	104
D.	<i>Prior Admissions</i> . . . . .	104
E.	<i>Damages May Be Large, Multiplied, and Uninsured</i> . . . . .	105
	CONCLUSION AND RECOMMENDATIONS . . . . .	106

## INTRODUCTION

### A. *Factual Background*

#### 1. The Prepuce

We claim that to be in perfect health is to have one’s body and hence also one’s genitals intact and fully functioning. Therefore, when living tissue is excised or a functional part of a person’s body is removed—or in medical terms, amputated—from a healthy person’s body, the person is no longer in perfect health. A California court observed in 2006 in *Tortorella v. Castro*, which concerned an adult who was subjected to unnecessary surgery, that it seems obvious that it is inherently injurious or harmful to needlessly go under the knife.<sup>14</sup> The same reasoning applies to unnecessary male and female genital cutting (FGC), whether performed by laypeople, as has been the case from ancient

<sup>14</sup> *Tortorella v. Castro*, 140 Cal. Rptr. 3d. 853 (Cal. 2006).

times<sup>15</sup> to the present, or by a physician, as is uncommon in the Western world<sup>16</sup> except in the United States, South Korea, and Israel.<sup>17</sup>

The prepuce, in males the foreskin of the penis and in females the clitoral hood, is a natural body part that has evolved over more than 65 million years,<sup>18</sup> and in neither sex is it a birth defect. The foreskin and the clitoral hood have many similarities.<sup>19</sup> Like the vulva, the penis is a complex, intimate body part of significant psychosexual importance. Both types of external genitalia have multiple components that function together as part of a coherent anatomical system.<sup>20</sup> Similar to the labia minora—which serve a protective and lubricating role, are elastic, and can be manipulated during sex, masturbation, and foreplay—the penile foreskin is an elastic sheath that protects and lubricates the penile glans,<sup>21</sup> can be manipulated, and, as demonstrated by a study using objective methods for establishing sensory thresholds, it is the most sensitive part of the penis to light touch. “Circumcision ablates the most sensitive parts of the penis.”<sup>22</sup> The foreskin of the penis also has immunological properties.<sup>23</sup> Researchers from Foregen, a biomedical company specializing in tissue regeneration, write,

<sup>15</sup> W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROL. INT’L 1, 1 (1999) (circumcision may date back 15,000 years).

<sup>16</sup> Christopher Ingraham, *Americans Truly Are Exceptional—at Least When it Comes to Circumcision*, WASH. POST: WONK BLOG (May 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/26/americans-truly-are-exceptional-at-least-when-it-comes-to-circumcision/> (“Most Western European countries . . . have [circumcision] rates less than 20 percent.”).

<sup>17</sup> MARIA OWINGS ET AL., TRENDS IN CIRCUMCISION FOR MALE NEWBORNS IN U.S. HOSPITALS: 1979–2010, 1 (Nat’l Ctr. for Health Stat. ed. 2013) (finding U.S. circumcision rates of 64.9% in 1981 and 55.4% in 2007).

<sup>18</sup> Christopher J. Cold & Kenneth A. McGrath, *Anatomy and Histology of the Penile and Clitoral Prepuce in Primates*, in MALE & FEMALE CIRCUMCISION 1, 1 (George C. Denniston et al. ed. 1999).

<sup>19</sup> MOHAMED A. BAKY FAHMY, NORMAL AND ABNORMAL PREPUCE, 29–33, 67–85 (Springer ed. 2020); Laurence Baskin et al., *Development of the Human Penis and Clitoris*, 103 DIFFERENTIATION 74 (2018). CJ Cold & J. Taylor, *The prepuce*, BJU INT’L 83, Supp. 1 (1999).

<sup>20</sup> See Baskin et al., *supra* note 19.

<sup>21</sup> Cold and Taylor, *supra* note 19. “The outer epithelium has the protective function of internalising the glans (clitoris and penis), urethral meatus (in the male) and the inner preputial epithelium, thus decreasing external irritation or contamination . . . . The moist, lubricated male preputial sac provides for atraumatic vaginal intercourse.”

<sup>22</sup> Morris L. Sorrells et al., *Fine-touch Pressure Thresholds in the Adult Penis*, 99 BRIT. J. UROLOGY INT’L 864, 864 (2007) (“Circumcision ablates the most sensitive parts of the penis”); *contra* J.A. Bossio, C.F. Pukall & S.S. Steele, *Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing*, 195 J. UROLOGY 1848, 1848 (2016); *but see* Brian D. Earp, *Infant Circumcision and Adult Penile Sensitivity: Implications for Sexual Experience*, 7 TRENDS UROLOGY & MEN’S HEALTH 17, 17 (2016).

<sup>23</sup> MOHAMED A. BAKY FAHMY, NORMAL AND ABNORMAL PREPUCE 65, 68–69 (Springer ed. 2020) ; P.M. Fleiss et al., *Immunological Functions of the Human Prepuce*, 74, SEXUALLY TRANSMITTED INFECTIONS 364, 364 (1998).

Few parts of the human anatomy can compare to the incredibly multifaceted nature of the human foreskin. At times dismissed as ‘just skin,’ the adult foreskin is, in fact, a highly vascularized and densely innervated bi-layer tissue, with a surface area of up to 90•cm<sup>2</sup>, and potentially larger. On average, the foreskin accounts for 51% of the total length of the penile shaft skin and serves a multitude of functions. The tissue is highly dynamic and biomechanically functions like a roller bearing; during intercourse, the foreskin ‘unfolds’ and glides as abrasive friction is reduced and lubricating fluids are retained. The sensitive foreskin is considered to be the primary erogenous zone of the male penis and is divided into four subsections: inner mucosa, ridged band, frenulum, and outer foreskin; each section contributes to a vast spectrum of sensory pleasure through the gliding action of the foreskin, which mechanically stretches and stimulates the densely packed corpuscular receptors (citation and footnotes omitted).<sup>24</sup>

As stated, by our definition, to be in perfect health males and females must have intact genitalia (including the prepuce). Moreover, insofar as the prepuce is highly erogenous, serves multiple functions, and gives pleasure throughout a person’s sex life, it is very good for physical and mental health.

## 2. Genital Cutting

The Greeks posited that a circumcised penis is a deviation from the natural, defective, and disfigured.<sup>25</sup> Today as well, when healthy, living tissue is excised, or a functional part of a person’s body is removed such as the prepuce, a person is, by our definition, no longer in perfect health. Genital cutting, including the cutting or removal of the clitoral or penile foreskin, began as pre-historic rituals<sup>26</sup> often tied to painful rites of passage,<sup>27</sup> and also served other social purposes from the marking of slaves

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<sup>24</sup> Valeria Purpura et al., *The Development of a Decellularized Extracellular Matrix-Based Biomaterial Scaffold Derived from Human Foreskin for the Purpose of Foreskin Reconstruction in Circumcised Males*, 9 J. TISSUE ENG’G 1 (2018).

<sup>25</sup> Frederick M. Hodges, *The Ideal Prepuce in Ancient Greece and Rome: Male Genital Aesthetics and Their Relation to Lipodermos, Circumcision, Foreskin Restoration, and the Kynodesme*, 75 BULL. HIST. MED., 375 (2001).

<sup>26</sup> John P. Warren & Jim Bigelow, *The Case Against Circumcision*, BRIT. J. SEXUAL MED. 6, 6 (1994) (“[M]any writers have suggested that it was a sacrificial rite.”); John C. Caldwell et al., *Male and Female Circumcision in Africa From a Regional to a Specific Nigerian Examination*, 44 SOC. SCI. & MED. 1181, 1184 (2000).

<sup>27</sup> DAVID L. GOLLAHER, *CIRCUMCISION: A HISTORY OF THE WORLD’S MOST CONTROVERSIAL SURGERY* 3 (Basic Books ed. 2000) (“Within the magico-religious framework of Egyptian

to the suppression of sexuality.<sup>28</sup> Thus, both male genital cutting and female genital cutting are analogous and both are violence.<sup>29</sup> The rate of bleeding, infection, and death from both would have been high in ancient times.<sup>30</sup> Both continue to be performed to this day primarily for religious, cultural, and other reasons having nothing to do with medicine.<sup>31</sup> When performed in *non-sterile* settings by untrained practitioners, severe medical complications can occur for both types of cutting,<sup>32</sup> and as the AAP observed in 2012, male circumcision also can be fatal.<sup>33</sup> Among the Xhosa of South Africa, for example, many boys die each year from their harsh circumcision initiation rites, with numerous penile amputations.<sup>34</sup>

The assumption is widespread in the United States that MGC, when performed by licensed medical professionals in a *sterile* hospital environment, is painless, safe, and harmless, but these assumptions are untrue.<sup>35</sup> Even when performed by licensed medical professionals in a sterile hospital environment, MGC and FGC, the latter of which has been performed at least once recently in the U.S.,<sup>36</sup> are still painful, and MGC is often performed on newborn boys without using pain relief.<sup>37</sup> Both MGC and FGC carry the risk of many complications. The American Academy of Pediatrics (AAP) stated in 1975 that male “circumcision predisposes to meatitis,” may result in meatal stenosis, and that, “[t]he immediate hazards of circumcision of the newborn include local infection which

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science and medicine, circumcision apparently was a ritual marking the passage from youth to manhood.”)

<sup>28</sup> Dunsmuir & Gordon, *supra* note 15.

<sup>29</sup> See, e.g., J. Steven Svoboda, *Circumcision of male infants as a human rights violation*, BRIT. MED. J. (2016) (“infant circumcision is a violent act” performed without medical justification or consent); see also William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 337 (1985) (calling male and female circumcision mutilation).

<sup>30</sup> *Circumcision Deaths*, CIRCUMCISION INFORMATION AND RESOURCE PAGES (Aug. 16, 2013), <http://www.cirp.org/library/death/>.

<sup>31</sup> Andrew L. Freedman, *The Circumcision Debate: Beyond Benefits and Risks*, 137 PEDIATRICS 1, 1 (2016).

<sup>32</sup> Aaron J. Krill et. al., *Complications of Circumcision*, 11 Scientific World Journal 2458, 2458 (2011).

<sup>33</sup> American Academy of Pediatrics, Task Force on Circumcision, *Technical Report – Male Circumcision*, 130 PEDIATRICS e756, e774 n.213 (2012) [hereinafter 2012 AAP *Technical Report*].

<sup>34</sup> S.M. Mogotlane et al., *Mortality and Morbidity Among Traditionally Circumcised Xhosa Boys in the Eastern Cape Province, South Africa*, 27 CURATIONIS 57 (2004).

<sup>35</sup> Krill et al., *supra* note 32, at 2462–43.

<sup>36</sup> See Pam Belluck, *Michigan Case Adds U.S. Dimension to Debate on Genital Mutilation*, N.Y. TIMES (June 10, 2017), <https://www.nytimes.com/2017/06/10/health/genital-mutilation-muslim-dawoodi-bohra-michigan-case.html> (“As more details emerge about the first-ever charges of female genital mutilation in the United States . . .”).

<sup>37</sup> Barbara Brady-Fryer et al., *Pain Relief for Neonatal Circumcision*, 18 COCHRANE SYSTEMATIC REV. (July 19, 2004), <https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD004217.pub2/full>.

may progress to septicemia, significant hemorrhage, and mutilation.”<sup>38</sup> MGC can be fatal even when performed in a sterile setting.<sup>39</sup> It causes sexual harm<sup>40</sup> by removing nerves that would otherwise be susceptible to stimulation during sexual activity and by destroying how the foreskin normally moves and functions. MGC also radically alters the appearance of the penis, and leaves a scar as evidence of the wound.<sup>41</sup> As discussed below, even granting the AAP’s disputed claims that MGC slightly reduces the absolute risk of some diseases, most of which occur in adulthood, it has no meaningful or net potential medical benefit in childhood, and boys are not at risk of adult diseases. Even taking adult diseases into account, it is unlikely that a man will benefit from it on balance; and any potential medical benefit that it might have in adulthood can be easily achieved without any pain or risk and without the loss of the foreskin.<sup>42</sup> MGC can cause psychological harm as well.<sup>43</sup>

It is safe to say that people do not want to be operated on without their consent when they are healthy, and about 30% of adults seek a second opinion to ensure that a recommended surgery is needed.<sup>44</sup> Men with intact penises typically assign positive value to the foreskin,<sup>45</sup> and historically some have regarded it as a highly valued body part.<sup>46</sup> Indeed, healthy men in Western countries rarely volunteer to have the foreskin of their penis removed.<sup>47</sup> Infants cry with piercing screams while being cir-

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<sup>38</sup> H.C. Thompson et al., *Report of the Ad Hoc Task Force on Circumcision*, 56 *PEDIATRICS* 610, 611 (1975) [hereinafter *1975 AAP Statement*].

<sup>39</sup> A 2018 article showed that in a sterile hospital setting in the United States, every 49,166 circumcisions resulted in one death. B.D. Earp, V. Allareddy & A. T. Rotta, *Factors Associated with Early Deaths Following Neonatal Circumcision, 2001-2010*, 57 *CLINICAL PEDIATRICS*, 1532 (2018).

<sup>40</sup> Brian Earp, *Female Genital Mutilation and Male Circumcision: Toward an Autonomy-Based Ethical Framework*, 2015 *DOVEPRESS* 89, <https://www.dovepress.com/female-genital-mutilation-and-male-circumcision-toward-an-autonomy-bas-peer-reviewed-article-MB>.

<sup>41</sup> See Tim Hammond & Adrienne Carmack, *Long-term adverse outcomes from neonatal circumcision reported in a survey of 1,008 men: an overview of health and human rights implications*, 21 *INT’L J. HUM. RTS.* 189, 195 (2017).

<sup>42</sup> See *infra* Part IV.C.1.c.

<sup>43</sup> Gregory J. Boyle et al., *Male Circumcision: Pain, Trauma and Psychosexual Sequelae*, 7 *J. HEALTH PSYCH.* (2002); see also Tim Hammond & Adrienne Carmack, *Long-Term Adverse Outcomes from Neonatal Circumcision Reported in a Survey of 1,008 Men: An Overview of Health and Human Rights Implications*, 21 *INT’L J. HUM. RTS.* 189 (2017).

<sup>44</sup> *Five Things You May Not Know About Second Opinions, from the Harvard Health Letter*, HARVARD HEALTH PUBLISHING (Oct. 2011), [https://www.health.harvard.edu/press\\_releases/five-things-you-may-not-know-about-second-opinions](https://www.health.harvard.edu/press_releases/five-things-you-may-not-know-about-second-opinions).

<sup>45</sup> Peter J. Ball, *A Survey Of Subjective Foreskin Sensation in 600 Intact Men*, in *BODILY INTEGRITY AND THE POLITICS OF CIRCUMCISION* 177–88 (George C. Denniston et al., eds.).

<sup>46</sup> ROBERT DARBY, *A SURGICAL TEMPTATION: THE DEMONIZATION OF THE FORESKIN AND THE RISE OF CIRCUMCISION IN BRITAIN* 24 (University of Chicago Press) (2005) (hereinafter *Darby Temptation*).

<sup>47</sup> J. Steven Svoboda, *Nontherapeutic Circumcision of Minors as an Ethically Problematic Form of Iatrogenic Injury*, *AMA J. ETHICS: MED. & SOC.* (Aug. 2017), <https://>



cumcised, even when anesthetic is provided, and they need to be physically restrained during the operation by a “circumstraint” device,<sup>48</sup> and thus they object to it. It can be inferred that if given the choice and developmentally able to make it, boys would typically choose, as genitally intact men do, to keep the foreskin of their penis and not to undergo a painful, risky, unnecessary, and irreversible penile procedure.

### B. *Ethical and Legal Background*

Medically unnecessary surgery in the U.S., which includes unnecessary genital surgery, is proscribed by several rules and opinions of the American Medical Association Code of Medical Ethics,<sup>49</sup> and by the fundamental principles of medical ethics, namely autonomy, non-maleficence, beneficence, and justice.<sup>50</sup> When performed non-consensually on a minor, genital cutting preempts and undermines the individual’s future bodily autonomy with respect to a special, very personal, and indeed “private part” of his body.<sup>51</sup> MGC violates the ethical rule of proportionality whereby, when treatment is needed, there must be an acceptable balance between the likelihood of benefit and the risk of harm.<sup>52</sup> Indeed, ethical rules require that physicians, “provide guidance about what they consider the optimal course of action for the patient based on the physician’s objective professional judgment”, and that they consider and discuss treatment alternatives including the risks, benefits and costs of

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journalofethics.ama-assn.org/article/nontherapeutic-circumcision-minors-ethically-problematic-form-iatrogenic-injury/2017-08.

<sup>48</sup> RONALD GOLDMAN, CIRCUMCISION: THE HIDDEN TRAUMA 20–24 (1997).

<sup>49</sup> Sharon P. Douglas, REPORTS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, 142 (American Medical Association, 2012 Annual Meeting) (“There is broad consensus that physicians should first take medical need into consideration when making recommendations and providing care. Physicians are expected to refrain from offering or acceding to patients’ requests for interventions or diagnostic tests that are medically unnecessary (E-2.19, ‘Unnecessary Medical Services’) or that cannot reasonably be expected to benefit the patient (E-2.035, ‘Futile Care’).”). “Opinion 2.19, ‘Unnecessary Medical Services,’ states, ‘Physicians should not provide, prescribe, or seek compensation for services that they know are unnecessary.’ F. Lagay, *Case 5.1: Futile Care—An Inoperable Cancer*, AMA J. ETHICS (Jan. 2005). AMA Opinion 4.04 states, “Treatment or hospitalization that is willfully excessive or inadequate constitutes unethical practice . . . In a situation where the economic interests of the hospital are in conflict with patient welfare, patient welfare takes priority.” See also *AMA Code of Medical Ethics’ Opinions of the Physician as a Businessperson*, AMA J. ETHICS (2013).

<sup>50</sup> See T.L. BEAUCHAMP & J.F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS, OXFORD UNIVERSITY PRESS (6th ed. New York: 2008).

<sup>51</sup> Brian D. Earp & Rebecca Steinfeld, *Genital Autonomy and Sexual Well-Being*, 10 CURRENT SEXUAL HEALTH REP. 7; Kate Goldie Townsend, *The Child’s Right to Genital Integrity*, 20 PHIL. & SOC. CRITICISM 1 (2019).

<sup>52</sup> Göran Hermerén, *The Principle of Proportionality Revisited: Interpretations and Application*, 15 MED. HEALTH CARE AND PHILOS. 373, 374 (2012). See also Ungar-Sargon E., *On the impermissibility of infant male circumcision: a response to Mazor*, 41 J. MED. ETHICS 186 (2013).

forgoing treatment.<sup>53</sup> In addition, physicians should, “in general [prefer] alternatives that will not foreclose important future choices by the adolescent and adult the patient will become.”<sup>54</sup> MGC also violates the rule of justice: it targets vulnerable boys who cannot object;<sup>55</sup> it unfairly precludes boys and men from deciding the fate of their own foreskin; and since medically unnecessary FGC of all types, including minor forms, is illegal in the United States and most of the world, MGC unfairly discriminates against males. If physicians adhered to the ethical rules enumerated above they would not invite parents to make the circumcision decision, but rather they would determine that the optimal course of action is to leave the foreskin of healthy boys alone, and that is what they would recommend.

Since unnecessary surgery is definitionally harmful and unethical, it is also unlawful. American case law shows that adults subjected to unnecessary surgery have causes of action for battery, breach of fiduciary duty, and often fraud in inducing consent.<sup>56</sup> In *Lloyd v. Kramer*, for example, the court allowed an adult subjected to unnecessary foot surgery to proceed to trial on those causes of action.<sup>57</sup> As detailed below, it also is unlawful to bill Medicaid for unnecessary surgery as Medicaid only pays for medically necessary surgery.<sup>58</sup>

What about minors subjected to medically unnecessary genital surgery? The genitals are widely considered to deserve special protection by law from non-consensual interference, whether by touching or cutting. For example, some states have extended the statute of limitations for the sexual abuse of minors.<sup>59</sup> Since 1985,<sup>60</sup> legal scholars have been arguing that MGC is unlawful as well.<sup>61</sup> As discussed in Parts I and II below, courts in Europe are reaching the same conclusion. This Article suggests that boys and men subjected to MGC have the same causes of action as adults subjected to unnecessary non-consensual surgery.

<sup>53</sup> AMA CODE OF MEDICAL ETHICS, Rule 1.1.3(b) Patient Rights.

<sup>54</sup> AMA CODE OF MEDICAL ETHICS, Rule 2.2.1 Pediatric Decision Making.

<sup>55</sup> Darby R., *Targeting patients who cannot object? Re-examining the case for non-therapeutic infant circumcision*, SAGE OPEN 1–16 (June 2016), <https://journals.sagepub.com/doi/full/10.1177/2158244016649219>.

<sup>56</sup> *Lloyd v. Kramer*, 503 S.E.2d 632, 635 (Ct. App. Ga. 1998).

<sup>57</sup> *Id.*

<sup>58</sup> *See infra* Part III.

<sup>59</sup> *See, e.g.*, Mass. Gen. Laws Ann. ch. 260 § 2A; *see also* Brussels Collaboration on Bodily Integrity, *Medically Unnecessary Genital Cutting and the Rights of The Child: Moving Toward Consensus*, 19 AM. J. BIOETHICS, 17, 17–28 (2019).

<sup>60</sup> *See, e.g.*, Brigman, *supra* note 29; Shea Lita Bond, *Female Circumcision Laws and the Equal Protection Clause*, 32 JOHN MARSHALL L. REV. 353 (1999); and Giannetti, *supra* note 6.

<sup>61</sup> *See generally* *Circumcision Legal Issues*, CIRCUMCISION INFO. RES. PAGE (Sept. 30, 2013), <http://www.cirp.org/library/legal/>.

The Article is organized as follows. Part I of the Article suggests that MGC constitutes battery and child abuse under U.S. law. Part II makes the novel suggestion that MGC is a breach of trust, giving rise to the causes of action of breach of fiduciary duty and hence constructive fraud, unjust enrichment, and in some states, unfair and deceptive practices. Part III suggests that it is unlawful and Medicaid fraud for physicians and hospitals to bill Medicaid for unnecessary genital surgery, and for the American Academy of Pediatrics to encourage such billing. We suggest for the first time that circumcised males are entitled to summary judgment on the battery, child abuse, breach of fiduciary duty, and constructive fraud claims. In addition, the U.S. government, state governments, and taxpayers in some states are entitled to summary judgment on claims against Medicaid officials for failing to do their duty to stop paying physicians' claims for unnecessary genital surgery. Part IV suggests that MGC constitutes intentional fraud on the part of the AAP and most physicians who circumcise. Part V suggests that litigation considerations are favorable to the plaintiffs and adverse to the U.S. medical profession.

## I. BATTERY AND CHILD ABUSE

This Part first shows that unnecessary, non-consensual surgery on adults constitutes a battery. This takes parents and religion out of the equation. It then shows that the same reasoning applies to MGC and FGC, which constitute a battery and child abuse.

### A. *Unnecessary Surgery*

A Mississippi Appeals Court stated in 2006 that “[s]urgery deals with the diagnosis and treatment of *injury, deformity, and disease* through an operation or procedure.” Thus, patients subjected to surgery, which involves the destruction of tissue, must have a medical condition requiring treatment. “A patient sees a surgeon because there is *the need for an invasive procedure*. . . . [T]he surgeon determines whether a surgical procedure is *medically necessary*,” (emphasis added).<sup>62</sup> Setting aside cosmetic surgery with fully informed adult consent, there are three types of unnecessary surgery: surgery that is not needed; surgery that is not medically indicated; and surgery that is not in the best interest of a patient because a more conservative treatment alternative exists.<sup>63</sup> Unnecessary surgery is considered to be a serious violation of a physician’s license to practice medicine. For example, Florida medical guidelines prohibit “a procedure that is medically unnecessary or otherwise unre-

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<sup>62</sup> Meeks v. Miller, 956 So. 2d 942, 947 (Ct. App. Miss. 2006).

<sup>63</sup> Philip F. Stahel et al., *Why Do Surgeons Continue to Perform Unnecessary Surgery?*, 11 PATIENT SAFE SURGERY 1, 1 (2017).

lated to the patient's diagnosis or medical condition."<sup>64</sup> Massachusetts worker's compensation regulations require reporting physicians for discipline "who have engaged in a pattern of abuse such as . . . [u]nnecessary surgery."<sup>65</sup> Illinois law provides a form to report claims against physicians arising from unnecessary surgery.<sup>66</sup>

Unnecessary non-consensual surgery in the United States also violates every individual's inalienable common law rights, derived from the English common law. Chapter I of William Blackstone's Commentaries, "Of the Absolute Rights of Persons"<sup>67</sup> provides that the rights of the people are to be preserved inviolate: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." A person's body is "entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member," and to "[t]he preservation of a man's health from such practices as may prejudice or annoy it."<sup>68</sup>

Next to personal security, the law of England "preserves the personal liberty of individuals."<sup>69</sup> This right to liberty or freedom is sometimes referred to in the United States as the right to self-determination, autonomy, or privacy.<sup>70</sup> In 1891, the United States Supreme Court in *Union Pacific Railway Company v. Botsford* affirmed these rights, stating,

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . 'The right to one's person may be said to be a right of complete immunity: to be let alone.'<sup>71</sup>

The legal right to be left alone is analogous to the ethical rule of nonmaleficence, while the legal right to self-determination is analogous to the ethical rule of autonomy.<sup>72</sup> These legal rights are the founding

<sup>64</sup> 64 FL ADC 64B8–8.001 (Fl. Disciplinary Guidelines).

<sup>65</sup> 243 Mass. Code Regs. 2.14.

<sup>66</sup> 40 Ill. Reg. 928, exhibit B, code 260.

<sup>67</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 125 (1769), [https://www.gutenberg.org/files/30802/30802-h/30802-h.htm#Page\\_117](https://www.gutenberg.org/files/30802/30802-h/30802-h.htm#Page_117).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.")

<sup>71</sup> *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>72</sup> R. Gillon, *Ethics Needs Principles—Four Can Encompass the Rest—and Respect for Autonomy Should Be "First Among Equals"*, 29 J. MED. ETHICS. 307, 310. (2003).

principles in the United States Constitution and U.S. state constitutions,<sup>73</sup> which are recognized by all democratic countries, codified in some of their constitutions, and recognized as international law.<sup>74</sup>

Boyle *et al.* observed in 2000 that, “the general rule in English criminal law, and reflected in other common law jurisdictions [including the United States], is that any application of force, no matter how slight, is *prima facie* an assault.”<sup>75</sup> In common law jurisdictions including the United States, assault is usually paired with battery, which technically under U.S. law is the act that causes the physical harm.<sup>76</sup> Svoboda, Van Howe, and Dwyer wrote in 2000, “The common law has always recognized battery – violation of a person’s right to be free from unwanted touching – as a civil and criminal wrong.”<sup>77</sup>

As stated, in 1998 in *Lloyd v. Kramer*, involving unnecessary foot surgery on an adult, the Georgia Court of Appeals allowed the plaintiff’s battery claim to proceed to trial.<sup>78</sup> Similarly in the context of children, in *Williamson v. State of Texas*, involving unnecessary surgery on a child that caused serious bodily injury, a physician testified that “unnecessary surgeries do not constitute reasonable medical care.”<sup>79</sup> The Texas court held that the physician’s use of a scalpel constituted use of a deadly weapon in violation of a Texas criminal child abuse statute.<sup>80</sup> Following this logic, unnecessary surgery today, like unnecessary genital cutting from ancient times to the present, is violence and it constitutes a *prima facie* case of assault and battery. Cosmetic surgery on an adult is as well, but the violence is justified by the fully informed consent of the person being subjected to it.

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<sup>73</sup> See, e.g., MASS. CONST. art. CVI. Christyne Neff writes, “American constitutional and common law principles incorporate these concepts of physical liberty and bodily integrity in a wide array of legal principles, each of which affirms the central importance of a citizen’s bodily integrity . . . . In addition to its common law roots, the right to be free from an invasion of bodily integrity by the state has found support in the First, Fourth, Fifth, and Fourteenth Amendments of the Constitution.” Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J. L. & FEMINISM 326, 328–29, 337 (1991).

<sup>74</sup> See, e.g., Gw. CONSTITUTION art. 11 (“Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament.”); Eur. Conv. On H.R. (following T3.4 – BAS) Art. 5(1) (“Everyone has the right to liberty and security of the person.”).

<sup>75</sup> Gregory J. Boyle et al., *Circumcision of Healthy Boys: Criminal Assault?*, 7 J.L. MED. 301 (2000).

<sup>76</sup> *Johnson v. United States*, 559 U.S. 133, 139 (2010) (stating that at common law, even the slightest offensive touching constituted a battery); see also *Assault and Battery*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/assault\\_and\\_battery](https://www.law.cornell.edu/wex/assault_and_battery).

<sup>77</sup> J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL’Y 61 (2000) [hereinafter *Svoboda Informed Consent*].

<sup>78</sup> *Lloyd v. Kramer*, 503 S.E.2d 632, 635 (Ct. App. Ga. 1998).

<sup>79</sup> *Williamson v. State*, 356 S.W.3d 1, 15 (Ct. App. Tx. 2010).

<sup>80</sup> *Id.* at 27.

### B. *Unnecessary Genital Cutting*

In 1996, when the United States Congress made female genital cutting (FGC), which it called female genital mutilation, a federal statutory crime,<sup>81</sup> Congress made findings that FGC was already unlawful:

The Congress finds that—(1) the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States; (2) the practice of female genital mutilation often results in the occurrence of physical and psychological health effects that harm the women involved; (3) *such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional*; . . . (5) the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law.<sup>82</sup>

FGC also violates the black letter law of the U.S. child abuse statutes.<sup>83</sup> Physicians are required to report suspected cases of child abuse.<sup>84</sup>

In 1985, the legal scholar William Brigman showed that MGC also violates the criminal child abuse statutes in every U.S. state. He reasoned,

[C]hild abuse, commonly defined as the intentional, non-accidental use of physical force that result in injury to a child, is universally proscribed by state law. The California law is typical: ‘[C]hild abuse’ means a physical injury which is inflicted by other than accidental means on a child by another person. . . . Since [male] circumcision is not medically warranted, has no significant physiological benefits, is painful because it is performed without anesthesia and leaves a wound in which urinary salts

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<sup>81</sup> 18 U.S.C. § 116. In 2018, a federal judge ruled the ban unconstitutional for failure to protect children on a nondiscriminatory basis. *United States v. Nagarwala*, 350 F.Supp.3d 613, 618 (E.D. Mich. 2018), appeal dismissed, No. 19-1015, 2019 WL 7425389 (6th Cir. Sept. 13, 2019).

<sup>82</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 645, 709–10 (emphasis added) [hereinafter *Notes*].

<sup>83</sup> SHELDON SILVER & ROGER GREEN, *A GUIDE TO NEW YORK’S CHILD PROTECTIVE SERVICES SYSTEM*, 9 (2001) (defining “abused child” in New York as when a parent or other person legally responsible for a child’s care, such as a physician, “inflicts or allows to be inflicted upon the child physical injury . . . which causes or creates a substantial risk of death, serious or protracted disfigurement, protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ” and a sex offense against the child).

<sup>84</sup> *Id.* at 11.

burn, carries a significant risk of surgical complications, including death, and deforms the penis, it would seem that as a nonaccidental physical injury, it is properly included in the definition of child abuse.<sup>85</sup>

Moreover, because MGC permanently disfigures the penis compared to its intact state, disables the motile functions of the foreskin vis-à-vis the rest of the penis, and carries many minor and serious medical risks up to and including death, it creates a risk of harm, it constitutes a harm, and in at least some states meets the definition of a substantial harm or serious bodily injury, in violation of state child abuse statutes.<sup>86</sup> As recently as 2015, a senior British judge held that any form of female genital mutilation constitutes “significant harm” under the United Kingdom Children Act 1989. He reasoned that because some forms of female genital mutilation, such as pricking or nicking of the vulva or partial removal of the clitoral prepuce, are less invasive than male circumcision, male circumcision constitutes a “significant harm” as well.<sup>87</sup> When harm is significant, the damages are higher in a civil lawsuit and when criminally prosecuted the prison term is longer.<sup>88</sup>

In 1997, the ethicist Margaret A. Somerville, “characterized male circumcision as ‘technically criminal assault’ under the Canadian criminal code.”<sup>89</sup> In 1997, Christopher Price<sup>90</sup> similarly reasoned that because the practice is non-therapeutic, invasive, irreversible, and major surgery with serious potential risks, it could be regarded as a violation of the common law assault provisions of Australia’s Queensland Criminal Code.<sup>91</sup> This has been clearly established in the case of FGC, including minor forms that are less invasive than penile circumcision. Price observed, as discussed below,<sup>92</sup> that appeals to religion do not count as an

<sup>85</sup> Brigman, *supra* note 29.

<sup>86</sup> *See, e.g.*, Mass. Gen. Laws Ann. ch. 265, § 13L (“Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment in the house of correction for not more than 2 1/2 years. . . . ‘Serious bodily injury’ [is] bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death”).

<sup>87</sup> Re B and G (Children) [2015] EWFC 3 LJ13C00295, 9, 22 [hereinafter UK Case].

<sup>88</sup> *See* Mass. Gen. Laws Ann. ch. 265, § 13J(a)–(b) (establishing a prison term of “not more than fifteen years” for assault causing “substantial bodily injury” to a child, compared to five years for more minor assaults).

<sup>89</sup> *Circumcision: Legal Issues*, CIRCUMCISION INFO. RES. PAGE (Sept. 30, 2013), <http://www.cirp.org/library/legal/>.

<sup>90</sup> Christopher Price, *Male Circumcision: An Ethical and Legal Affront*, 128 BULL. MED. ETHICS 13 (1997).

<sup>91</sup> *Circumcision of Male Infants Research Paper*, QUEENSLAND L. REFORM COMM’N (1993).

<sup>92</sup> Price, *supra* note 90.

excuse under Western law.<sup>93</sup> He concluded, “[n]on-therapeutic circumcision is clearly discriminatory, unethical and illegal. Its pre-historic origins, and its kinship with subincision and other forms of penile mutilation, show its essential barbarity. It should no longer be tolerated, despite its religious overtones.”<sup>94</sup>

Legal scholars have thus shown that MGC constitutes a battery,<sup>95</sup> which is a tort and a crime,<sup>96</sup> and criminal statutory child abuse,<sup>97</sup> and that it violates children’s civil and human rights under U.S. and international law.<sup>98</sup> “There is no reason, other than cultural bias, why the current child abuse laws and laws prohibiting female circumcision are not applied to those performing involuntary male circumcision.”<sup>99</sup> The International Council on Violence Against Children has stated that “non-consensual, non-therapeutic circumcision of boys, whatever the circumstances, constitutes a gross violation of their rights, including the right to physical integrity, to freedom of thought and religion and to protection from physical and mental violence.”<sup>100</sup> The Swedish Paediatric Society has called infant male circumcision an “assault on these boys.”<sup>101</sup> Thus, American society has in effect been giving physicians who circumcise a pass to cause significant harm and bodily injury to boys and men and to violate their rights.

Importantly, in a landmark 2012 decision, a regional court in Cologne, Germany held for the first time in modern history that circumcision is unlawful.<sup>102</sup> The court held that it is an assault and a crime for a

<sup>93</sup> Notes, *supra* note 82.

<sup>94</sup> Price, *supra* note 90.

<sup>95</sup> Price, *supra* note 90 (citing Poulter for the proposition that, “The basic right to bodily integrity which everyone possesses under the English common law means that any interference with this right amounts to an assault or battery.”).

<sup>96</sup> Gregory J. Boyle, J. Steven Svoboda, Christopher P. Price, J. Neville Turner, *Circumcision of Healthy Boys: Criminal Assault?* 7 J. L. MED. 301 (2000).

<sup>97</sup> Brigman, *supra* note 29.

<sup>98</sup> See generally Svoboda, *supra* note 77. “Numerous legal scholars have concluded that routine neonatal circumcision falls within the legal definition of child abuse and violates children’s civil and human rights under national and international law.” See also J. Steven Svoboda, *Circumcision of male infants as a human rights violation*, 39 BRIT. MED. J. 469 (2016).

<sup>99</sup> R. S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 BJU INT’L 63, 73 (1999).

<sup>100</sup> *Violating Children’s Rights: Harmful Practices Based on Tradition, Culture, Religion or Superstition*, INT’L NGO COUNCIL ON VIOLENCE AGAINST CHILDREN 22 (2012).

<sup>101</sup> Clara Guibourg, *Swedish Docs in Circumcision Protest*, THE LOCAL (Feb. 19, 2012), <https://www.thelocal.se/20120219/39200>.

<sup>102</sup> Nicholas Kulish, *German Ruling Against Circumcising Boys Draws Criticism*, N. Y. TIMES (Jun. 26, 2012), <https://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html#:~:text=german%20Ruling%20Against%20Circumcising%20Boys%20Draws%20Criticism,-By%20Nicholas%20Kulish&text=BERLIN%20%E2%80%94%20A%20German%20court%20in,significant%20repercussions%20for%20religious%20groups>.



physician to circumcise a boy for religious reasons, and by implication, whenever performed without medical need.<sup>103</sup> The court reasoned that the practice is harmful; that it violates boys' rights to bodily integrity and self-determination; and that boys' rights supersede their parents' religious and other rights.<sup>104</sup> The court stated that, consequently, parents cannot provide valid consent for the procedure.<sup>105</sup> Under political pressure, and over the objection of the German Pediatric Association,<sup>106</sup> the German legislature subsequently passed a specific statute allowing religious circumcisions.<sup>107</sup> Reinhard Merkel and Holm Putzke argue, however, that medically unnecessary, non-consensual penile circumcision remains unlawful notwithstanding the special statute as it is an assault according to the countermanding standard legal criteria.<sup>108</sup>

As discussed above, the same reasoning applies in the United States to MGC and FGC. The only exception that Congress carved out for FGC is that it is lawful when it is medically necessary.<sup>109</sup> Likewise, MGC is lawful only when it is medically necessary and cannot be deferred. Otherwise, like any unnecessary surgery, it violates boys' rights to bodily integrity and self-determination. The German court reached its decision after a hearing and without a trial. No trial is needed in the U.S. either to make the same determination. Hence, we suggest for the first time that boys and men in the U.S. are entitled to summary judgment on the battery and child abuse counts.<sup>110</sup>

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<sup>103</sup> Landgericht Köln [Cologne Regional Court] May 7, 2012, Urteil Ns 169/11 (Ger.) [hereinafter *Cologne Decision*]. English translation available from the authors.

<sup>104</sup> *Id.* See also Wendy Zeldin, *Germany: Regional Court Ruling Criminalizes Circumcision of Young Boys*, LIBR. CONG.: GLOB. LEGAL MONITOR (July 3, 2012), <https://www.loc.gov/law/foreign-news/article/germany-regional-court-ruling-criminalizes-circumcision-of-young-boys/>.

<sup>105</sup> *Cologne Decision*, *supra* note 103.

<sup>106</sup> Dr. W. Hartman, Pres. of the Prof. Ass'n Pediatricians, Statement to the federal government (Nov. 26, 2012) ("Stellungnahme Dr.med. Wolfram Hartmann, Präsident des Berufsverbands der Kinder- und Jugendärzte, zur Anhörung am 26. November 2012 zum Gesetzentwurf der Bundesregierung: "Entwurf eines Gesetzes über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes" und zum Gesetzentwurf der Abgeordneten Marlene Rupprecht, Katja Dörner, Diana Golze, Caren Marks, Rolf Schwanitz, weiterer Abgeordneter: "Entwurf eines Gesetzes über den Umfang der Personensorge und die Rechte des männlichen Kindes bei einer Beschneidung.""). English translation available from the authors.

<sup>107</sup> Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law*, 39 J. MED. ETHICS 444, 444 (2013).

<sup>108</sup> *Id.* at 447.

<sup>109</sup> CENTER FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES 3, (2004).

<sup>110</sup> See also *infra* Part V.C.

## II. CLAIMS ARISING FROM BREACH OF TRUST

Unnecessary surgery on a child, including MGC and FGC, thus constitutes a battery and child abuse. This Part will show that unnecessary surgery also takes unfair advantage of people and abuses their trust,<sup>111</sup> giving rise to additional causes of action for breach of fiduciary duty and hence constructive fraud, unjust enrichment, and unfair and deceptive trade practices.

### A. Breach of Fiduciary Duty

As courts have noted, physicians have superior knowledge of medicine and superior bargaining power, while even adult patients know little or nothing about medicine and have no choice but to trust their physician with their most valuable possession: their health and safety.<sup>112</sup> Children are more vulnerable than adults because of their youth, and the newborn boys on whom MGC is usually performed in the U.S. are completely vulnerable. In *Oriak v. Loyola University Health System*, the Illinois Supreme Court stated that it is “beyond doubt” that the physician-patient relationship is a fiduciary one, “in which the patient places great trust and confidence in the physician’s advice and recommendations.”<sup>113</sup> Accordingly, courts impose upon physicians a strict fiduciary duty to act in the best interests of the patient.<sup>114</sup> Physicians have a parallel duty under the American Medical Association Code of Medical Ethics:

The relationship between a patient and a physician is based on trust, which gives rise to physicians’ ethical responsibility to place patients’ welfare above the physician’s own self-interest or obligations to others, to use sound medical judgment on patients’ behalf, and to advocate for their patients’ welfare.<sup>115</sup>

Physicians’ have many duties, which healthy individuals and patients suffering from a medical condition are trusting that they will ad-

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<sup>111</sup> See generally *Terry v. Terry*, 273 S.E. 2d 674, 677–79 (N.C. 1981) (involving fiduciary duties in the sale of a business interest (“Plaintiff bottoms his cause of action on the assertion that [defendant] . . . first won and then abused his trust and confidence”).

<sup>112</sup> *Canterbury v. Spence*, 464 F.2d 772, 780–82 (D.C. Cir. 1972).

<sup>113</sup> *Orlak v. Loy. Univ. Health Syst.*, 885 N.E.2d 999, 1010 (Ill. 2007).

<sup>114</sup> See generally Thomas L. Hafemeister & Richard M. Gulbrandsen, Jr., *The Fiduciary Obligation of Physicians to “Just Say No” if an “Informed” Patient Demands Services that Are Not Medically Indicated*, 39 SETON HALL L. REV. 335, 367–80 (2009) (discussing physicians’ fiduciary duties and the best interests rule, and citing numerous cases) [hereinafter *Hafemeister, Just Say No*]. See also *Parham v. JR*, 442 U.S. 584, 618–19 (1979) (holding that where three physicians using their independent medical judgment had determined that it was in the best interests of a boy to commit him to a psychiatric institute, the commitment was justified).

<sup>115</sup> AMA, CODE OF MEDICAL ETHICS, Opinion 1.1.1.

here to and thus are fiduciary in nature. A physician's fiduciary duties include: complying with the ethical and legal rules governing the practice of medicine, such as respecting patients' rights<sup>116</sup> and preferences;<sup>117</sup> being loyal to the patient;<sup>118</sup> being completely honest in all professional dealings;<sup>119</sup> using sound medical judgment in determining whether treatment is needed and what treatments are appropriate;<sup>120</sup> and not betraying the patient's trust in the slightest way.<sup>121</sup> Physicians also have a fiduciary duty to disclose what is in the patient's best interests including different treatment alternatives and the alternative of doing nothing.<sup>122</sup> The legal scholars Hafemeister and Gulbrandsen observe,

Physicians are well-educated, well-trained professionals who are and should be responsible for determining *whether a requested course of treatment is medically appropriate*. . . . [Physicians] must appraise whether a requested treatment is medically indicated for a given patient. . . . The physician is not a subservient pawn in the patient's life, but an erudite and trustworthy partner dedicated to promoting and protecting a patient's medical well-being. . . . [P]hysicians breach their fiduciary duty to patients when they abdicate their responsibility to exercise independent medical judgment and provide their patients with access to medical services that are not medically indicated (emphasis added).<sup>123</sup>

Importantly, Hafemeister and Gulbrandsen reason that fiduciary doctrine establishes and addresses behaviors in which no physician

<sup>116</sup> AMA, CODE OF MEDICAL ETHICS, Opinion 1.1.7.

<sup>117</sup> See *supra* notes 39–55 and accompanying text; see also Hafemeister, *Just Say No*, *supra* note 114 (discussing the duties of loyalty, honesty, and using sound judgment in medicine).

<sup>118</sup> See, e.g., *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (“Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons”).

<sup>119</sup> *Id.* at 224–25 (quoting then-Judge Cardozo, “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior”).

<sup>120</sup> AM. MED. ASS'N, CODE OF MEDICAL ETHICS, Opinion 1.1.3.

<sup>121</sup> *Rhodes v. Jones*, 61 S.E. 2d 725, 726 (N.C. 1950) (“A course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party,” internal quotations omitted); *Stilwell v. Walden*, 320 S.E. 2d 329, 332 (N.C. 1984) (“It is just because confidence in others inherently and inevitably begets influence that the law of constructive fraud is needed, lest that influence be exerted for the benefit of the one having it, rather than that of the one whose confidence created it.”).

<sup>122</sup> *Canterbury v. Spence*, 464 F.2d 772, 781–82 (D.C. Cir. 1972).

<sup>123</sup> Hafemeister, *Just Say No*, *supra* note 114, at 376.

should engage, such as failing to exercise independent medical judgment or providing services that are not medically indicated.<sup>124</sup> This is exactly what physicians who circumcise do: although they advance medical reasons for circumcision, they leave it to parents to weigh the medical pros and cons—which the parents, who lack a medical education, are incapable of doing—and to decide whether or not to have their son circumcised, thus abdicating their fiduciary duty as trained physicians to exercise their independent medical judgment and to make a medical recommendation. In such circumstances, it does not matter what explanations, excuses, or legal defenses that physicians or by extension their medical associations have advanced or might advance in defense of the impermissible behavior. Such conduct, “crosses [a] line [where] regardless of the explanation given for that behavior . . . [legal] consequences should flow” (emphasis added).<sup>125</sup>

Adults and children pronounced healthy are trusting, or would be trusting if able to reason, that the physician will respect their rights and their preference, express or implied, to be left alone and to make important decisions about their own bodies that can be deferred for themselves; will determine that they do not need to undergo an invasive procedure;<sup>126</sup> and accordingly will discharge them bodily intact, and as physicians worldwide ordinarily do. Conversely, they are trusting that the physician will not excise healthy, living tissue from their bodies, here the foreskin tissue, except after diagnosing a medical condition requiring it, determining that it is medically necessary after efforts to save the body part have failed, and when the operation cannot be deferred so as to obtain the patient’s consent.<sup>127</sup>

We note parenthetically that the medical definition of a patient is “a sick individual especially when awaiting or under the care and treatment of a physician or surgeon;”<sup>128</sup> that is, a person with a medical condition requiring treatment. AMA Code of Medical Ethics Opinion 1.1.1 similarly states that a patient-physician relationship exists when a physician serves a patient’s medical needs.<sup>129</sup> Once a physician examines a boy for medical conditions and pronounces him healthy, he no longer has medical needs. Since no care needs to be provided and no suffering needs to

<sup>124</sup> *Id.* at 378–79.

<sup>125</sup> *Id.* at 379.

<sup>126</sup> *Id.* at 370–71, n. 179 (citing *Washington v. Glucksberg*, 521 U.S. 702,731 (1997) (noting that “trust . . . is essential to the doctor-patient relationship”).

<sup>127</sup> See Marilyn Fayre Milos & Donna Macris, *Circumcision: A Medical or a Human Rights Issue?*, 37 J. NURSE-MIDWIFERY, 87S, 87S (1992) (arguing circumcision is a “betrayal of infant trust”).

<sup>128</sup> *Medical Definition of “patient”*, MERRIAM-WEBSTER MED. DICTIONARY, <https://www.merriam-webster.com/dictionary/patient#medicalDictionary> (last visited June 30, 2020).

<sup>129</sup> AM. MED. ASS’N, *supra* note 120.

be alleviated, a patient-physician relationship no longer exists. We therefore suggest that the healthy boys that physicians in the U.S. are operating on are not patients and no patient-physician relationship exists.

It also appears self-evident that adults of any sex are in the best position to decide whether they want an operation or not—in this case to keep the nervous tissue of their own genitals intact, and it is known by their conduct that they typically do want this—rather than their parents, to whom physicians who circumcise in the U.S. leave the circumcision decision.<sup>130</sup> It is in any event a breach of a physician's fiduciary duty to boys to defer medical assessments to parents.<sup>131</sup> It is the duty of physicians licensed to practice medicine to determine whether a patient needs surgery, and if so they should recommend it. If not, they should counsel against it, as thirty-eight medical experts representing medical associations in Northern Europe and Canada did in response to the AAP's 2012 guidelines.<sup>132</sup>

The Queensland Law Reform Commission likewise concluded that boys should not be circumcised unless it is medically necessary and in the boy's best interests.<sup>133</sup> "The basis of this attitude is the respect which must be paid to an individual's bodily integrity."<sup>134</sup> Similarly, in a 2016 circumcision case, a U.K. judge held that it is in the best interests of two boys—whose father wanted them to be circumcised for religious reasons over the mother's objection—to respect the boys' right to autonomy, and to defer the operation until the boys become old enough to decide the fate of their own foreskin for themselves.<sup>135</sup> In a U.S. Supreme Court case, *Pegram v. Herdrich*, the Court expressly stated that "excessive surgery is not in the patient's best interest."<sup>136</sup> Excessive surgery is more surgery than needed or unnecessary surgery.

In 2010, the Royal Dutch Medical Association wrote that the rule is, do not operate on healthy children.<sup>137</sup> Healthy children are not suitable candidates for surgery. MGC is a breach of fiduciary duty in the U.S. because: (1) it is the best interests of boys and the men they become for physicians to respect their preference and their right to bodily integrity and self-determination, and therefore to leave their healthy genitals

<sup>130</sup> Task Force on Circumcision, *Male Circumcision*, 130 PEDIATRICS e756, e760 (2012) (discussing who decides about circumcision).

<sup>131</sup> AM. MED. ASS'N, *supra* note 120 (stating that the physicians' responsibility is to the patient and no one else).

<sup>132</sup> *Frisch Cultural Bias*, *supra* note 7. See also ROYAL DUTCH MED. ASSOC., NON-THERAPEUTIC CIRCUMCISION OF MALE MINORS 5 (2010) ("a powerful policy of deterrence should be established").

<sup>133</sup> QUEENSLAND L. REFORM COMM'N, *supra* note 91.

<sup>134</sup> *Id.*

<sup>135</sup> Re L and B (Children) [2016] EWHC 849 [143].

<sup>136</sup> *Pegram v. Herdrich*, 530 U.S. 211, 234 (2000).

<sup>137</sup> ROYAL DUTCH MED ASS'N., *supra* note 132.

alone; and contrary to their best interests to ignore their preference, violate their rights, and expose them to the risks and harms of the removal of the foreskin; (2) physicians who circumcise accept money in exchange for the removal of healthy genital tissue, and thereby enrich themselves at the child's expense instead of being loyal to the child; and (3) physicians who circumcise also place perceived obligations to parents and the parents' personal preferences ahead of their obligations to the parents' sons to whom they owe a strict duty of loyalty.<sup>138</sup>

### B. Constructive Fraud

United States case law shows that a breach of fiduciary duty that causes damage also constitutes a constructive fraud. Constructive fraud includes "all acts, omissions, and concealments involving breach of equitable or legal duty, trust or confidence, and resulting in damage to another."<sup>139</sup> For example, Georgia's statute provides that "[c]onstructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another."<sup>140</sup> The California appeals court observed in *Salahutdin v. Valley of California, Inc.* in 1994 that "[m]ost acts by an agent in breach of his fiduciary duties [to the principal] constitute constructive fraud."<sup>141</sup>

When a fiduciary wins a vulnerable person's trust and violates that trust, and the plaintiff alleges that the defendant took advantage of his position of trust to harm a plaintiff, a *presumption of fraud* arises called constructive fraud.<sup>142</sup> Thus, where there is a breach of fiduciary duty, U.S. courts impute, infer, presume, or deem fraud to have occurred by operation of law. Importantly, a "fiduciary is liable to his principal for *constructive fraud* even though his conduct is not actually fraudulent"<sup>143</sup> (emphasis original). The purpose of the constructive fraud doctrine is to prevent the same unfair adverse consequences for the plaintiff as if he had been intentionally defrauded.<sup>144</sup>

In a Texas Court of Appeals case, *Crundwell v. Becker*, a patient suffering from abdominal pain gave evidence that a physician informed her that she had cancer when she did not, and only as a result did she agree to an unnecessary total hysterectomy. The patient's expert testified

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<sup>138</sup> AM. MED. ASS'N, *supra* note 120; 4 *Elements of a Breach of Fiduciary Duty Claim*, GRIFFITHS LAW P.C. (2018), <https://www.griffithslawpc.com/resources/elements-breach-fiduciary-duty-claim/>.

<sup>139</sup> *Id.*

<sup>140</sup> GA. CODE ANN. § 23-2-51 (2010).

<sup>141</sup> *Salahutdin v. Valley of California, Inc.*, 24 Cal. App. 4th 555, 562 (1994).

<sup>142</sup> *Terry v. Terry*, 273 S.E. 2d 674, 677-79 (N.C. 1981).

<sup>143</sup> *Salahutdin*, 24 Cal. App. at 562.

<sup>144</sup> *In Re King Street Partnerships*, 219 B.R. 848, 856 (B.A.P. 9th Cir. 1998).

that there were less radical treatment alternatives to control her pain. On appeal, the court allowed her constructive fraud claim to proceed to trial.<sup>145</sup> United States case law substantiates that constructive fraud also arises from a false statement or omission that misleads the plaintiff such as a negligent misrepresentation<sup>146</sup> (and therefore also a reckless misrepresentation); a material omission<sup>147</sup> or failure to disclose what a fiduciary knew or should have known;<sup>148</sup> unfair conduct such as self-dealing;<sup>149</sup> acting in bad faith, disloyally, consciously disregarding duties, or for personal gain;<sup>150</sup> and taking advantage of a position of trust,<sup>151</sup> gaining an advantage,<sup>152</sup> or obtaining a possible benefit.<sup>153</sup> As documented in Part IV below, physicians in the U.S. who circumcise healthy boys engage in all of these unfair and deceptive practices as well, further examples of breach of fiduciary duty and constructive fraud.

### C. *Unjust Enrichment*

In *Dema v. Tenet Physician Services-Hilton Head, Inc.*, the Supreme Court of South Carolina found that the employees of a medical center had performed over 200 unauthorized therapeutic cardiac catheterizations, even though they were not licensed to do so.<sup>154</sup> The court held that the defendant corporation was undoubtedly unjustly enriched, as it “realized a benefit in the form of tremendous revenues and profits from performing these highly lucrative, yet unlawful, procedures.”<sup>155</sup> Similarly, MGC unjustly enriches physicians at the expense of their patients. By rough estimates, physicians and hospitals in the U.S. have derived \$100 billion in revenues from having circumcised more than 100 million boys since 1875.<sup>156</sup> We thus infer that the industry is extremely profitable. Moreover, Dr. Peter Charles Remondino observed as early as the

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<sup>145</sup> *Crundwell v. Becker*, 981 S.W.2d 880 (Tex. Ct. App. 1998).

<sup>146</sup> *See, e.g., Federal Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439 (Tex. 1991).

<sup>147</sup> *Cantwell v. De La Garza*, No. CV-18-272-D, 2018 WL 5929638, at \*3 (W.D. Okla. Nov. 13, 2018).

<sup>148</sup> *See, e.g., Karle v. Seder*, 214 P.2d 684 (Wash. 1950).

<sup>149</sup> *Terry v. Terry*, 273 S.E. 2d 674, 679 (N.C. 1981).

<sup>150</sup> *See Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007) (stating that instances of bad faith include when “the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of known duty to act, demonstrating a conscious disregard for his duties.”).

<sup>151</sup> *White v. Consolidated Planning, Inc.*, 603 S.E.2d 147, 156 (N.C. 2004).

<sup>152</sup> *Dawson v. Hummer*, 649 N.E.2d 653, 661 (Ind. Ct. App. 1995).

<sup>153</sup> *Id.*

<sup>154</sup> *Dema v. Tenet Physician Services-Hilton Head*, 678 S.E.2d 430, 432 (S.C. 2009).

<sup>155</sup> *Id.* at 435.

<sup>156</sup> Assuming a historical inflation adjusted cost of \$1,000 per circumcision for the past 150 years, circumcision has generated at least \$100 billion in revenues for physicians and hospitals.

Nineteenth Century that “[f]or skin-transplanting there is nothing superior to the plants offered by the prepuce of a boy.”<sup>157</sup> Without the boys’ permission and unknown to their parents, hospitals sometimes sell the foreskins that they have unlawfully obtained to pharmaceutical and cosmetics companies, also multibillion dollar per year industries.<sup>158</sup>

#### D. *Unfair and Deceptive Acts and Practices*

Finally, many states have enacted consumer protection statutes to protect consumers who may lack knowledge, experience, or capacity from any false, misleading, unfair, deceptive, bad faith or unconscionable trade practice.<sup>159</sup> In North Carolina, conduct that constitutes a breach of fiduciary duty and constructive fraud is sufficient to support an unfair and deceptive trade practice claim.<sup>160</sup> A Massachusetts case shows reluctance to impose such liability, but insofar as MGC involves unfair and deceptive conduct, claims, and omissions, and it is unlawful, it may well violate a state’s consumer protection act, depending upon the statute’s wording.

### III. CLAIMS ARISING FROM UNLAWFUL MEDICAID BILLING

#### A. *Unlawful Medicaid Billing*<sup>161</sup>

Under the federal Medicaid Act, 42 USC § 1396 et seq.,<sup>162</sup> practitioners must furnish only medically necessary care.<sup>163</sup> Physicians must certify that each medical service that they provide is medically necessary in order to be reimbursed for it.<sup>164</sup> Numerous U.S. Supreme Court cases state that the purpose of the joint federal and state Medicaid program, 42 U.S.C. §§ 1396 et seq., is to provide federal financial assistance to states

<sup>157</sup> PETER CHARLES REMONDINO, *THE HISTORY OF CIRCUMCISION FROM THE EARLIEST TIMES TO THE PRESENT* 207 (2007).

<sup>158</sup> Ingrid Kesa, *Beauty Industry Part of Foreskin Flesh Trade, Anti-Circumcision Activists Warn*, VICE (Mar. 27, 2018, 4:35 AM), [https://www.vice.com/en\\_uk/article/43bxgm/the-beauty-industry-is-part-of-a-baby-foreskin-flesh-trade-anti-circumcision-activists-warn](https://www.vice.com/en_uk/article/43bxgm/the-beauty-industry-is-part-of-a-baby-foreskin-flesh-trade-anti-circumcision-activists-warn).

<sup>159</sup> See, e.g., Mass. Gen. Laws Ann. ch. 93A, § 2 (2020).

<sup>160</sup> *Daviris v. Petros*, 442 Mass. 274, 279 (2004) (listing cases holding that unfair trade practice suits against doctors are limited to business activities, such as billing and advertising, and not medical activities.).

<sup>161</sup> This Part reprises and builds upon the argument made in a 2010 law review article that it is unlawful and possibly fraudulent for physicians and hospitals in the United States to charge the federal and state Medicaid program for MGC. See generally Peter W. Adler, *Is It Lawful to Use Medicaid to Pay for Circumcision?*, 19 J. LAW MED. 335 (2011) [hereinafter *Adler Medicaid*].

<sup>162</sup> *Harris v. McRae*, 448 U.S. 297, 301 (1980).

<sup>163</sup> See 42 C.F.R. § 456.1 (requiring “methods and procedures to safeguard against unnecessary utilization of care and services”).

<sup>164</sup> See 42 U.S.C. § 1320c-5 (requiring healthcare providers compensated by Medicaid to show procedure was “supported by evidence of medical necessity”); *Assoc. of Am. Phys. & Surg. v. Weinberger*, 395 F. Supp. 125, 129–30 (N.D. Ill. 1975).



that choose to reimburse certain costs of *medically necessary treatment*.<sup>165</sup> Medicaid's purpose is to enable each state to meet the costs of *necessary medical services* for individuals whose income and resources are insufficient.<sup>166</sup> "Congress has opted to subsidize *medically necessary services* generally" (emphasis added).<sup>167</sup> Federal regulations also require physicians to show evidence of medical necessity for all services provided.<sup>168</sup>

Further, pursuant to 42 U.S.C. § 1396a(a)(30), all states must establish utilization review boards and procedures to reduce unnecessary Medicaid expenditures.<sup>169</sup> As an example, Massachusetts Medicaid regulations only allow payment for inpatient hospital services that are medically necessary.<sup>170</sup> Massachusetts does not pay a provider for services that are not medically necessary; that are "not reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure *conditions in the member*" (emphasis added); or where another comparable but more conservative or less costly alternative exists.<sup>171</sup> In addition, the care must be substantiated by records of medical necessity and must meet professionally recognized standards of health care.<sup>172</sup> Massachusetts law also expressly prohibits using Medicaid to pay for cosmetic surgery, except when needed to treat a medical condition.<sup>173</sup> MGC fails each of these tests, and it is not a covered benefit.

Indeed, as of 2011, 18 U.S. states had stopped allowing physicians and hospitals to use Medicaid to pay for MGC, whether by legislation or by its Medicaid office giving notice by letter that it is not a covered benefit.<sup>174</sup> Those states determined that physicians are not allowed to charge Medicaid for medically unnecessary circumcisions. Therefore, U.S. federal and state governments have claims against physicians who perform circumcisions for potentially billions of dollars for unlawful Medicaid billing,<sup>175</sup> possibly dating back to the beginning of the program in 1965.<sup>176</sup>

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<sup>165</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297, n.1 (1980). The Court used the phrase "medically necessary" 75 times.

<sup>166</sup> *Schweiker v. Hogan*, 457 U.S. 569, 573 (1982) (citing 42 U.S.C. § 1396a(a)(10)(C)); *Beal v. Doe*, 432 U.S. 438, 444 (1977).

<sup>167</sup> *Harris*, 448 U.S. at 316–17.

<sup>168</sup> See 42 U.S.C. § 1320c-5(a).

<sup>169</sup> *Emp. of Dep't Pub. Health & Welfare Mo. v. Dep't Pub. Health & Welfare, Mo.*, 411 U.S. 279, 298 (1973).

<sup>170</sup> 130 MASS. CODE REGS. 450.204 (2020).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 130 MASS. CODE REGS. 410.405 (2020) ("The MassHealth agency does not pay for the following services: (2) cosmetic surgery.").

<sup>174</sup> *Adler Medicaid*, *supra* note 161.

<sup>175</sup> *Id.* at 343.

<sup>176</sup> *Id.*

## B. Medicaid Fraud

The U.S. Government Accountability Office designated Medicaid as a program that is at “high risk for improper payments,” including for those that were not medically necessary.<sup>177</sup> The Fifth Circuit has stated where “the government has conditioned payment of a claim upon a claimant’s certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.”<sup>178</sup> In *United States v. Laughlin*, the Tenth Circuit held that a person who makes a false Medicaid claim and knows the claim to be false can be convicted for Medicaid fraud.<sup>179</sup> The American Academy of Ophthalmology similarly states that “[c]laiming reimbursement for unnecessary surgery could also constitute fraud under Medicare/Medicaid or private insurance policies.”<sup>180</sup>

Physicians who circumcise bill Medicaid using the billing code Z41: “Encounter for procedures for purposes other than remedying health state,” the subsidiary billing code Z41.2, “Encounter for routine and ritual male circumcision” in the absence of medical indication, and they use the diagnosis group #795 for “Normal newborn.”<sup>181</sup> The physicians are thus certifying to the Medicaid program that they are circumcising healthy newborn boys, without the requisite diagnosis of a medical condition and recommendation that the surgery is medically necessary.<sup>182</sup> Physicians licensed to practice medicine must know that “normal newborn” is not a diagnosis; however, that is the diagnosis that they often place on the circumcision consent form. Physicians who know that MGC is not a covered benefit but who bill Medicaid for it anyway therefore commit intentional Medicaid fraud. Given that it is obvious that MGC is unnecessary, and that physicians use false diagnoses to bill for it, we suggest that the other physicians are recklessly violating Medicaid law.<sup>183</sup> The Supreme Court has observed that in some areas of the law recklessness is considered to be a form of intentional conduct. In addition, as shown above, a reckless misrepresentation by a physician is a

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<sup>177</sup> CTRS. FOR MEDICARE & MEDICAID SERVS., LAWS AGAINST HEALTH CARE FRAUD RESOURCE GUIDE 1 (2014).

<sup>178</sup> *United States ex rel. Marcy v. Rowan*, 520 F.3d 384, 389 (5th Cir. 2008) (internal quotations omitted).

<sup>179</sup> *United States v. Laughlin*, 26 F.3d 1523, 1526 (10th Cir. 1994).

<sup>180</sup> AM. ACAD. OPHTHALMOLOGY, ADVISORY OPINION OF THE CODE OF ETHICS: DETERMINING THE NEED FOR MEDICAL OR SURGICAL INTERVENTION 1 (2016).

<sup>181</sup> ICD-10-CM Code Z41.2, ICD.CODES, <https://icd.codes/icd10cm/Z412> (last visited Sept. 22, 2020).

<sup>182</sup> Peter W. Adler, *Is Circumcision Legal?*, 16.3 RICH. J. L. & PUB. INT. 439, 468 (2013) [hereinafter *Adler Legal*].

<sup>183</sup> N.C. Medicaid and Health Choice Clinical Coverage Policy No: 1A-22 § 3.2.2(a) (2015).

breach of fiduciary duty and constructive fraud.<sup>184</sup> Therefore, physicians who bill Medicaid commit either intentional fraud or constructive fraud.

It also is a violation of 18 U.S.C. § 1347 to knowingly and willfully execute a scheme to defraud any health care benefit program.<sup>185</sup> In *United States v. Bajoghli*, the court held that the owner of a surgery center had engaged in a lucrative fraudulent scheme of performing unnecessary surgeries.<sup>186</sup> The American Academy of Pediatrics (AAP) knows that MGC is unnecessary as it calls it non-therapeutic, meaning not necessary for therapeutic purposes, and elective, meaning optional and, again, unnecessary.<sup>187</sup> The AAP also observed in 2012 that, “more families may be choosing not to have a circumcision because of a sense that it is not medically necessary.”<sup>188</sup> Aware of declining Medicaid coverage and hence declining circumcision rates and revenues, the AAP’s 2012 circumcision policy statement contains an unprecedented plea that physicians be reimbursed for it.<sup>189</sup> The AAP contends that the “preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure,”<sup>190</sup> and claims that “recent efforts by state Medicaid programs to curb payment for newborn male circumcision affect those population that could benefit the most from the procedure.”<sup>191</sup> The claim then is that MGC has actual or potential medical benefits, but the argument fails because MGC harms all males with little prospect of benefiting them; any potential medical benefits can be achieved without the surgery; and regardless, unnecessary surgery is not a covered benefit. We suggest that the AAP has engaged in an intentional scheme to defraud the federal and state Medicaid programs. Under federal law, state Medicaid agencies must conduct internal investigations of any report of fraud and must refer suspected provider or beneficiary fraud to the state’s fraud control unit or “appropriate

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<sup>184</sup> *Adler Legal*, *supra* note 182.

<sup>185</sup> 18 U.S.C. § 1347 (2012).

<sup>186</sup> *United States v. Bajoghli*, 785 F.3d 957, 967 (4th Cir. 2015).

<sup>187</sup> American Academy of Pediatrics, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585–6 (2012) [hereinafter *2012 AAP Statement*].

<sup>188</sup> American Academy of Pediatrics, *Circumcision Speaking Points* (Aug. 27, 2012) [hereinafter *AAP Speaking Points*].

<sup>189</sup> *2012 AAP statement*, *supra* note 187 (“Although health benefits are not great enough to recommend routine circumcision for all male newborns, the benefits of circumcision are sufficient to justify access to this procedure for families choosing it and to warrant third-party payment for circumcision of male newborns.”).

<sup>190</sup> *2012 AAP Statement*, *supra* note 187. See also S.L. Sansom, V.S. Prabhu & A.B. Hutchinson et al., *Cost-effectiveness of newborn circumcision in reducing lifetime HIV risk among U.S. males*, 5 PLoS ONE, e8723 (2010).

<sup>191</sup> *2012 AAP Technical Report*, *supra* note 33, at e777. See also *AAP Speaking Points*, *supra* note 188 (“A growing number of state Medicaid programs have stopped paying for circumcision, thereby reducing access to the service.”).

law enforcement agency,”<sup>192</sup> and we call upon Medicaid agencies to do so.<sup>193</sup>

#### IV. INTENTIONAL FRAUD

In cases involving unnecessary surgery on adults, physicians often fraudulently misrepresent or omit facts to induce a healthy individual or a patient with a medical condition who does not need the surgery into consenting to it. If physicians told people the truth—that they do not need the operation—no one would consent to it, except for adults requesting cosmetic surgery. For example, in *United States v. Bajoghli*, cited above, a grand jury issued a 60-count indictment including an allegation of fraud against the owner of a lucrative surgical practice who had routinely diagnosed patients with skin cancer, even though they did not have cancer, and consequently performed medically unnecessary surgery on benign tissue.<sup>194</sup> Similarly, in *Lloyd v. Kramer*, cited above, a physician falsely diagnosed a patient as having hammer toe and performed unnecessary surgery on her for that medical condition when she had a different and easily distinguishable condition.<sup>195</sup> The patient alleged that the physician had made intentionally fraudulent and material misrepresentations both as to the nature of her medical condition and as to the need for surgery to correct it.<sup>196</sup> The court allowed her to proceed to trial on her counts of battery, breach of fiduciary duty, fraud, and punitive damages.<sup>197</sup>

The question thus arises as to whether physicians and/or their medical associations, which are also trade associations, intentionally defraud parents, who are acting on behalf of their sons as their legal proxies, about circumcision, and thereby also deceive their sons. Fraud is commonly understood to mean “trickery,” “deception,” or “deceit.”<sup>198</sup> “Intentional fraud” consists of “deception *intentionally* practiced to induce another to part with property or to surrender some legal right,” (emphasis original).<sup>199</sup> The elements of a claim for fraudulent misrepresentations and omissions are: “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting dam-

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<sup>192</sup> 42 C.F.R. § 455.14–15 (2011).

<sup>193</sup> In addition, in some states such as Massachusetts, taxpayers can bring suit to force state Medicaid agencies to end such coverage. Mass. Gen. Laws Ann. ch. 12, § 5C(2) (2006).

<sup>194</sup> *United States v. Bajoghli*, 785 F.3d 957, 959–60 (4th Cir. 2015).

<sup>195</sup> *Lloyd v. Kramer*, 503 S.E.2d 632, 634 (Ct. App. Ga. 1998).

<sup>196</sup> *Id.* at 633.

<sup>197</sup> *Id.* at 635.

<sup>198</sup> *Brown v. State*, 868 N.E.2d 464, 468 (Ind. S. Ct. 2007).

<sup>199</sup> *See, e.g., Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984); *see also Brown*, 868 N.E.2d at 466, n.1.

age.”<sup>200</sup> Conduct can also be fraudulent.<sup>201</sup> The plaintiff must prove intent to defraud by clear and convincing evidence, but circumstantial evidence can be used to show it.<sup>202</sup> Defendants also may be held liable for fraud even if they lack knowledge of falsity, when they make reckless misrepresentations and omissions.<sup>203</sup>

## A. *The Past as Prologue*

### 1. Early False Medical Claims

Physicians in the United States have resolutely, but falsely, portrayed circumcision as a positive practice since the late Nineteenth Century.<sup>204</sup> As a result, it has long been a deeply embedded cultural norm in the United States,<sup>205</sup> such that when a father is circumcised, the parents are likely to be biased in favor of it.<sup>206</sup> The practice is thus self-perpetuating.

In the Nineteenth Century, physicians demonized the foreskin.<sup>207</sup> “Where the uncircumcised penis had been regarded as pure, healthy, natural, beautiful, masculine, and good,” physicians “succeeded in portraying it as ‘polluted, unnatural, harmful, alien, effeminized and disfigured’”<sup>208</sup> and as a source of moral and physical decay. One physician called it a toxic “cesspool” inviting infection.<sup>209</sup> Surgery hoped to replace soap and water.<sup>210</sup> In 1975, the AAP stated that a “program of education leading to continuing good personal hygiene would offer all the advantages of circumcision without the attendant surgical risk.”<sup>211</sup>

<sup>200</sup> See, e.g., *Buckland v. Threshold Enterprises*, 155 Cal. App. 4th 798, 806–07 (2007).

<sup>201</sup> See, e.g., *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003).

<sup>202</sup> *Larson Mfg. Co. of S.D. v. Aluminart Prods. Ltd.*, 559 F.3d 1317, 1340 (Fed. Cir. 2009).

<sup>203</sup> See, e.g. *Ellerin v. Fairfax Savings*, 337 Md. 216 (Md. Ct. App. 1995) (“The plaintiff in an action of fraud or deceit must prove that the defendant either knew that the representation was false or made the representation with ‘reckless indifference’ as to its truth.” And, “the tort of fraud or deceit may be committed by a defendant who is recklessly indifferent to the truth of the statement that deceives the plaintiff.”); see generally *Fraudulent Misrepresentation*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/fraudulent\\_misrepresentation](https://www.law.cornell.edu/wex/fraudulent_misrepresentation).

<sup>204</sup> See Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL’Y & L. 497, 501 (2002) (discussing the shift of opinion on circumcision from the Nineteenth Century).

<sup>205</sup> Sarah E. Waldeck, *Using Male Circumcision to Understand Social Norms as Multipliers*, 72 UNIV. CIN. L. REV. 455, 457 (2003) (“the practice of male circumcision is a quintessential social norm”).

<sup>206</sup> Chris Rediger & Andries J. Muller, *Parents’ Rationale for Male Circumcision*, 59 CAN. FAM. PHYSICIAN e110, e110–e113 (2013) (“newborn male circumcision rates continue to be heavily influenced by the circumcision status of the child’s father”).

<sup>207</sup> See *Darby Temptation*, *supra* note 46, at 4.

<sup>208</sup> *Id.*

<sup>209</sup> Miller, *supra* note 204, at 538.

<sup>210</sup> Bond, *supra* note 60, at 359.

<sup>211</sup> 1975 AAP Statement, *supra* note 38.

One reason that boys were circumcised in ancient times was to suppress male sexuality,<sup>212</sup> just as FGC was performed and continues to be performed to suppress female sexuality.<sup>213</sup> In the late Nineteenth Century, the erogenous properties of the foreskin was common knowledge among physicians, so they began to prescribe male circumcision as a means to curb sexual desire and prevent masturbation.<sup>214</sup> This resonated with puritanical parents, even though masturbation had previously been considered normal and not harmful.<sup>215</sup> Similarly, “some doctors recommended clitoridectomies for women to cure the same ‘ailments,’ [although] the procedure was not as widespread and doctors eventually abandoned [it] by the 1930’s.”<sup>216</sup>

After creating needless hysteria about masturbation among the American public, and spreading fear about its consequences to males who practiced it, physicians since the beginning of the 20th century have falsely claimed that MGC prevents or cures a great many diseases,<sup>217</sup> including insanity,<sup>218</sup> epilepsy,<sup>219</sup> eye problems,<sup>220</sup> genital irritation lead-

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<sup>212</sup> MOSES MAIMONIDES, *THE GUIDE OF THE PERPLEXED* 609 (Schlomo Pines trans., Univ. Chi. Press 1963) (“Similarly with regard to circumcision, one of the reasons for it is, in my opinion, the wish to bring about a decrease in sexual intercourse and a weakening of the organ in question, so that this activity be diminished and the organ be in as quiet a state as possible. . . . The fact that circumcision weakens the faculty of sexual excitement and sometimes perhaps diminishes the pleasure is indubitable. For if at birth this member has been made to bleed and has had its covering taken away from it, it must indubitably be weakened.”). See also Dunsmuir & Gordon, *supra* note 15, at 1.

<sup>213</sup> Sarah W. Rodriguez, *Rethinking the History of Female Circumcision and Clitoridectomy: American Medicine and Female Sexuality in the Late Nineteenth Century*, 63 *J. HIST. MED. & ALLIED SCI.* 323, 323–24 (2008).

<sup>214</sup> Robert Darby, *The Masturbation Taboo and the Rise of Routine Male Circumcision: A Review of the Historiography*, 36 *J. SOC. HIST.* 737, 737–39 (2003).

<sup>215</sup> *Is Masturbation Normal?*, U.K. NAT’L HEALTH SERV. (Nov. 9, 2018); Darby *Temptation*, *supra* note 46.

<sup>216</sup> Bond, *supra* note 60, at 358.

<sup>217</sup> David L. Gollaher, *From Ritual to Science: The Medical Transformation of Circumcision in America*, 28.1 *J. SOC. HIST.* 5, 8 (1994) [hereinafter *Gollaher Ritual to Science*] (“From its earliest appearance in the surgical repertoire circumcision has been touted as the miracle cure for a bewildering, and unbelievable, array of diseases, bodily conditions and disapproved behaviour [sic.]. In roughly chronological order it has been advocated and imposed as a preventive of or cure for masturbation, phimosis, epilepsy, syphilis, cancer of the penis, paralysis, polio, tuberculosis, bilharziasis (a tropical parasite), hip joint disease, bed-wetting, pimples, brass poisoning, ‘nervousness’, cervical cancer in women, prostate cancer, herpes, urinary tract infections and AIDS – to name a few. One collector of medical curiosities has identified no fewer than 390 reasons to circumcise.”).

<sup>218</sup> *Id.*

<sup>219</sup> Lewis A. Sayre et al., *Circumcision versus Epilepsy, etc.: Transcription of the New York Pathological Society Meeting of June 8, 1870*, 5 *MED. REC.* 233–34 (1870).

<sup>220</sup> M. Landesberg, *On Affections of the Eye Caused by Masturbation*, 3 *MED. BULL.* 79 (1881).

ing to paralysis,<sup>221</sup> and “nearly all physical and mental illness[es].”<sup>222</sup> The psychologist Ronald Goldman lists 50 conditions and behaviors that people have claimed circumcision could “prevent or cure.”<sup>223</sup> Whenever one medical claim about MGC was disproved or found not to justify the practice, U.S.-based physicians advanced another in its place, suggesting the possibility that physicians had advanced some if not many of the reasons in bad faith.<sup>224</sup> Physicians also claimed, perhaps in good faith but perhaps not, that circumcision prevented whatever disease was of greatest concern to the public at any given time—first masturbation, then venereal disease, then penile cancer, then sexually transmitted infections (STIs), and as discussed below, now HIV.<sup>225</sup> A timeline shows<sup>226</sup> that physicians in the U.S. thereby caused the circumcision rate to climb from virtually zero in 1875 to the point where physicians were routinely circumcising boys by the mid-1900s.<sup>227</sup>

Although medically unnecessary genital cutting is always inconsistent with a state of perfect health, and painful, risky, and harmful,<sup>228</sup> to persuade parents to elect it, physicians “needed to convince them that circumcision was a minor procedure, neither dangerous nor unduly painful.”<sup>229</sup> Thus, physicians in the U.S. have fraudulently portrayed MGC

<sup>221</sup> Lewis A. Sayre, *Partial Paralysis from Reflex Irritation, Caused by Congenital Phimosis and Adherent Prepuce*, 21 TRANSACTIONS AM. MED. ASS’N 205 (1870).

<sup>222</sup> Richard L. Miller & Donald C. Snyder, *Immediate Circumcision of the Newborn Male*, 65.1 AM. J. OBSTETRIC GYNECOLOGY 1, 3 (1953).

<sup>223</sup> See *Historical Medical Claims About Circumcision*, CIRCUMCISION RESOURCE CENTER, <https://circumcision.org/historical-medical-claims-about-circumcision/>. This brings to mind useless and sometimes adulterated “snake oil” elixirs that its proponents falsely claimed would cure many or all diseases. Peter W. Adler, *Is Circumcision Quackery*, 10.1 ATT’Y RTS. CHILD NEWSL. 1, 5–6 (2013).

<sup>224</sup> *Gollaher Ritual to Science*, *supra* note 217, at 27 (“Old arguments about reflex irritation, phimosis and adherent prepuce are forgotten, but new theories have arisen to take their place.”).

<sup>225</sup> See *infra* notes 330–40 and accompanying text. It could be countered that science must progress in such a way, with the positing of hypotheses, their testing, and subsequent proof or disproof using rigorous scientific methodology, and likely some of the medical arguments made in favor of circumcision were advanced in in good faith. As Darby wrote, however, circumcision was touted as a miracle cure for such a “bewildering and unbelievable array of diseases,” one after another, including claims that appealed to the public at the time, such as that it prevented masturbation during the Puritanical era, and they made specious claims as well. The circumstantial evidence is strong that many of these early false medical claims were made with the bad faith intent of perpetuating circumcision.

<sup>226</sup> *The Medicalization of Circumcision Timeline*, INT’L COAL. FOR GENITAL INTEGRITY, <http://www.icgi.org/medicalization/>.

<sup>227</sup> Teri M. Mitchell & Claudia Beal, *Shared Decision Making for Routine Infant Circumcision: A Pilot Study*, 24.3 J. PERINATAL EDUC. 188, 188 (2015). Even though the circumcision rate had declined to 58.3% in the U.S. by 2013, physicians sometimes still refer to it as “routine infant circumcision.”

<sup>228</sup> See *supra*, Introduction.

<sup>229</sup> Gollaher, *supra* note 217, at nn. 15–16 (“Before the 1870s the primary medical indications for circumcision were cancerous lesions and phimosis, an abnormal constriction or tight-

from 1875 to the present as a simple, painless, harmless, procedure that removes a useless piece of skin.<sup>230</sup> Many people in the United States believe this, as the operation is sometimes referred to as a “snip”. Physicians who circumcise have not corrected this clearly erroneous belief.<sup>231</sup> By the mid-1900s, physicians in the U.S. were routinely circumcising boys, falsely implying that MGC was medically necessary.<sup>232</sup> Physicians also falsely diagnosed congenital phimosis or a tight foreskin, which is normal, as reasons for the operation,<sup>233</sup> when there are non-invasive treatment options.<sup>234</sup>

## 2. Early Specious Claims

Physicians have given many plainly specious reasons for MGC, which they would not do if they could justify it on medical grounds. For example, they have claimed that the circumcised penis is aesthetically superior,<sup>235</sup> that being circumcised avoids embarrassment in the locker room,<sup>236</sup> that it is difficult to clean the foreskin,<sup>237</sup> and that the “procedure”—they rarely call it “surgery,” which likely would set off alarm bells among parents—is “best-tolerated during the newborn period”.<sup>238</sup> In fact, newborns do not tolerate it well,<sup>239</sup> and there is no reason why healthy newborn boys should be forced to tolerate any pain at all.<sup>240</sup> The

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ening of the foreskin interfering with normal function. . . . Cases of phimosis severe enough to require surgery were uncommon though and down through the ages it was considered a rare affliction.”).

<sup>230</sup> See, e.g. *Anatomy of the Penis, Mechanics of Intercourse*, CIRCUMCISION INFO. RES. PAGE (Sept. 30, 2013), <http://www.cirp.org/pages/anat/> (“The foreskin is not a ‘flap’ of skin on the end of the penis, and it is not ‘useless’ or ‘redundant’ skin.”).

<sup>231</sup> See Peter Aggleton, “*Just a Snip*”?: *A Social History of Male Circumcision*, 15 REPRODUCTIVE HEALTH MATTERS 15, 15 (2007).

<sup>232</sup> Indeed, at least some laypeople believed that male circumcision was medically necessary. For example, in 2010, a spokesperson for National Public Radio stated that the circumcision debate “centers on two strongly differing beliefs about whether circumcision for a baby boy is medically necessary.” Alicia C. Shepard, *Interview about Circumcision: Not the Whole Story*, NAT’L PUB. RADIO (Sept. 9, 2010, 1:09 PM), <https://www.npr.org/sections/publiceditor/2010/09/09/129732264/interview-about-circumcision-not-the-whole-story>. The interviewee, a member of the AAP Committee on Bioethics, Douglas Diekema, did not correct the mistake.

<sup>233</sup> See *Gollaher Ritual to Science*, *supra* note 217, at 25.

<sup>234</sup> See Sukbir Kaur Shahid, *Phimosis in Children*, ISRN UROLOGY 707329 (2012); Yutaro Hayashi et al., *Prepuce: Phimosis, Paraphimosis, and Circumcision*, 11 SCI. WORLD J. 289, 289 (2011).

<sup>235</sup> Gairdner, *supra* note 5, at 1436.

<sup>236</sup> E. Noel Preston, *Whither the Foreskin? A Consideration of Routine Neonatal Circumcision*, 213 JAMA 1853, 1853–54 (1970).

<sup>237</sup> 1975 AAP Statement, *supra* note 38 (“Circumcision . . . eliminates much of the need for careful penile hygiene.”)

<sup>238</sup> AAP *Speaking Points*, *supra* note 188.

<sup>239</sup> F.L. Porter, C.M. Wolf, J. Gold, D. Lotsoff & J.P. Miller, *Pain and pain management in newborn infants: a survey of physicians and nurses*, 100 PEDIATRICS 626 (1997).

<sup>240</sup> R.L. Poland, R.J. Roberts, J.F. Guitierrez-Mazorra & E.W. Fonkalsrud, *Committee on Fetus and Newborn, Committee on Drugs, Section on Anesthesiology, Section on Surgery:*



AAP has even claimed that “[f]actors such as climate, the social and emotional reaction of prospective parents to penile cleansing, and the ability to understand and facilitate good hygiene, etc. should be taken into account when recommending whether circumcision should be performed.”<sup>241</sup>

The AAP’s 2012 technical report also asserts that male circumcision, “is one of the most common procedures in the world.”<sup>242</sup> This claim by a medical association in a scientific report seems to imply that it is commonly performed for medical reasons. That is misleading because circumcision is usually performed worldwide by Muslims for religio-cultural reasons.<sup>243</sup>

### 3. Early Unfair and Deceptive Practices

Stories also abound online, and there is no reason to question their veracity, by parents claiming that physicians who circumcise took unfair advantage of them (and thereby their son) in various ways.<sup>244</sup> For example, hospital admission forms reportedly often contained a consent form for circumcision.<sup>245</sup> Hospitals must have known that mothers and fathers would not read such a provision, given the urgency of the onset of labor. Moreover, many cultures do not practice circumcision and some parents do not speak English, so they would not understand what circumcision is when offered.<sup>246</sup> There also are many reports of boys being circumcised in hospitals in the United States against their parents’ wishes.<sup>247</sup> During the mid-1900s, when physicians were routinely circumcising boys, some and perhaps many physicians circumcised boys without parental consent,<sup>248</sup> implying that circumcision is medically necessary and that parental consent to surgery on a child is not necessary, when the opposite is true.<sup>249</sup> Physicians in the U.S. did not turn this violence into an industry

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*Neonatal anesthesia*, 80 PEDIATRICS 446 (1987). See also 2012 AAP Statement, *supra* note 187.

<sup>241</sup> 1975 AAP Statement, *supra* note 38.

<sup>242</sup> 2012 AAP Technical Report, *supra* note 39.

<sup>243</sup> See *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability*, WHO & UNAIDS 1, 1 (2007), [https://www.unaids.org/sites/default/files/media\\_asset/jc1360\\_male\\_circumcision\\_en\\_0.pdf](https://www.unaids.org/sites/default/files/media_asset/jc1360_male_circumcision_en_0.pdf).

<sup>244</sup> See, e.g., *Protection of Infant Boys from Wrongful Circumcision in American Hospitals*, CIRCUMCISION INFO. RES. PAGES (Mar. 16, 2002), <http://www.cirp.org/pages/parents/protection/> [hereinafter *Protection of Infant Boys*].

<sup>245</sup> *Id.*

<sup>246</sup> See FLESH AND BLOOD: PERSPECTIVES ON THE PROBLEM OF CIRCUMCISION IN CONTEMPORARY SOCIETY 87 (George C. Denniston et al., eds., 2013).

<sup>247</sup> See *Protection of Infant Boys*, *supra* note 244.

<sup>248</sup> See *Adler Legal*, *supra* note 182, at 480.

<sup>249</sup> See *Protection of Infant Boys*, *supra* note 244.

over a 150 year period by being honest about it.<sup>250</sup> Nor did they tolerate opposition to the practice: a nurse and founder of the anti-circumcision movement, Marilyn Milos, for example, lost her job after opposing circumcision.<sup>251</sup>

#### 4. Not Medically Justified

In 1971, the AAP stated that there is no medical indication for circumcision during the newborn period,<sup>252</sup> and in 1977, that it is not an essential component of health care.<sup>253</sup> In 1999, the American Medical Association stated that although there is evidence that circumcision has potential medical benefits, the data are not sufficient to sufficient to recommend routine neonatal circumcision.<sup>254</sup> The AMA observed, for example, that behavioral factors are the principal cause of STIs and HIV, and that “circumcision cannot responsibly be viewed as protecting against such diseases.”<sup>255</sup> In 1999, Matthew Giannetti suggested that the pro-circumcision claims of the AAP were unscientific, negligent, and possibly intentionally fraudulent, designed to perpetuate physicians’ profits,<sup>256</sup> and he showed that this could expose the AAP to trade association liability.<sup>257</sup> The remainder of this Part builds upon Giannetti’s accusations.

#### B. *Motives to Defraud Today*

As three surgeons have written, some surgeons perform unnecessary surgery for *financial gain*.<sup>258</sup> Parents are likely unaware that the AAP “is not a dispassionate scientific research body: it is a medical association but also a trade association for pediatricians”<sup>259</sup> with a multibillion dollar

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<sup>250</sup> See *Medical Organization Statements, Drs. Opposing Circumcision* (Mar. 2016), <https://www.doctorsopposingcircumcision.org/for-professionals/medical-organization-statements/> (listing misconceptions propagated by the American Academy of Pediatrics and the medical profession writ large).

<sup>251</sup> *Voices – Marilyn Milos, RN, Intact Am.* (Sept. 20, 2019), <https://intactamerica.org/marilyn-milos-rn/>.

<sup>252</sup> *Standards and Recommendation for Hospital Care of Newborn Infants*, AAP (1971), <http://www.cirp.org/library/statements/aap/#a1971> [hereinafter *1971 AAP Statement*].

<sup>253</sup> *Committee on Fetus and Newborn: Report of the Ad Hoc Task Force on Circumcision*, 56 PEDIATRICS 610 (1975), <http://www.cirp.org/library/statements/aap/#a1977>.

<sup>254</sup> *Council on Scientific Affairs. Report 10: Neonatal Circumcision*, AM. MED. ASS’N (1999), <http://www.cirp.org/library/statements/ama2000/> [hereinafter *1999 AMA Statement*] (“[E]xisting scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data are not sufficient to recommend routine neonatal circumcision.”).

<sup>255</sup> *Id.*

<sup>256</sup> Giannetti, *supra* note 6, at 1553.

<sup>257</sup> *Id.* at 1545.

<sup>258</sup> Stahel, et al., *supra* note 63, at 2.

<sup>259</sup> *Earp Bad Ethics*, *supra* note 8.

per year financial bias in favor of MGC.<sup>260</sup> One committee member represented the AAP's finance committee.<sup>261</sup> The guidelines refer to member physicians as "stakeholders," a term usually reserved for investors in a for-profit enterprise, whereas physicians have a fiduciary duty to ignore their own financial interests, and to act in the best interests of boys and the men they become.<sup>262</sup> As discussed in Part III above, the AAP's 2012 guidelines reveal that the committee was very concerned about the decline in Medicaid revenues, which adversely impacted the income of AAP members as Medicaid pays for about one-third of all circumcisions.<sup>263</sup> A member of the AAP's 2012 committee wrote in 2016 that, given the serious efforts in both the United States and Europe to ban circumcision outright, the AAP wanted to protect the option for parents to elect circumcision.<sup>264</sup> Protecting that option for parents also conveniently protects the circumcision industry.<sup>265</sup> If physicians wanted to help parents, who want to protect their children, they would not offer circumcision to them, and would warn parents against it.<sup>266</sup> Doctors Opposing Circumcision concluded that the AAP is in it for the money of its member pediatricians.<sup>267</sup> Obstetricians also perform circumcisions, and the American College of Obstetricians and Gynecologists endorsed the AAP's 2012 statement. Insofar as ACOG makes the same claims as the AAP, it faces the same liability as the AAP discussed in this Article.<sup>268</sup> In addition, one member of the 2012 Task Force on Circumcision that issued the 2012 AAP Statement had an undisclosed religious bias in favor of circumcision. He stated in an interview, "I circumcised him myself . . . for religious, not medical reasons."<sup>269</sup>

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<sup>260</sup> According to the AAP, the average cost of a circumcision is "upwards of \$1,750." *AAP Speaking Points*, *supra* note 193. More than one million boys are circumcised per year in the United States. Thus, circumcision is upwards of a \$1.75 billion per year industry, not counting hospitals selling foreskins to industry.

<sup>261</sup> See *Commentary on American Academy of Pediatrics 2012 Circumcision Policy Statement*, DRS. OPPOSING CIRCUMCISION 1,1 (Apr. 2013), <https://www.doctorsopposingcircumcision.org/wp-content/uploads/2016/08/commentary-on-american-academy-of-pediatrics-2012-circumcision-policy-statement.pdf> [hereinafter *DOC Commentary*].

<sup>262</sup> Maxwell J. Mehlman, *Why Physicians are Fiduciaries for Their Patients*, 12 *IND. HEALTH L. REV.* 1, 8 (2015).

<sup>263</sup> See Sarah J. Clark et al., *Coverage of Newborn and Adult Male Circumcision Varies Among Public and Private US Payers Despite Health Benefits*, 30 *HEALTH AFFS.* 2355, 2356 (2011).

<sup>264</sup> Andrew L. Freedman, *supra* note 31, at 2.

<sup>265</sup> See *DOC Commentary*, *supra* note 261, at 7.

<sup>266</sup> See *Medical Organization Statements*, *supra* note 250.

<sup>267</sup> See *DOC Commentary*, *supra* note 261, at 7.

<sup>268</sup> See *id.* at 1–2.

<sup>269</sup> Ted Merwin, *Fleshing Out Change On Circumcision*, *N.Y. JEWISH WK.* (Sept. 19, 2012).

### C. *Intentional Fraud by the AAP in 2012*

To reiterate, physicians, whose job is to serve each patient's medical needs, bear the burden of justifying all interventions on medical grounds and of proving that the intervention is in the best interests of the patient.<sup>270</sup> They also comply with all rules of medical ethics and the law. In the face of credible accusations dating back to 1985 that MGC is child abuse and a battery, and now breach of fiduciary duty and constructive fraud, physicians bear the burden of proving that it is lawful and that it does not take unfair advantage of boys.

This subpart suggests that the AAP, a medical and trade organization representing physicians who circumcise, failed to meet that burden in the various statements it published in 2012: its widely publicized press release;<sup>271</sup> circumcision policy statement;<sup>272</sup> supporting technical or scientific report;<sup>273</sup> and confidential "Speaking Points" to its member pediatricians to help them answer questions by the media, which would also help them answer questions that parents might have when offered circumcision.<sup>274</sup> Although the 2012 guidelines automatically expired five years later in 2017,<sup>275</sup> and the AAP did not replace them or revoke them, they remain the AAP's last word disseminated to the public on the subject.<sup>276</sup> Medicaid officials previously cited<sup>277</sup> and they continue to cite the AAP's 2012 guidelines as reasons to continue Medicaid coverage.<sup>278</sup> This Part of the Article suggests that the AAP's claims in 2012 were knowingly false, intended to mislead parents and the public about cir-

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<sup>270</sup> See *supra* Part II.A. and n.101.

<sup>271</sup> See *New Evidence Points to Greater Benefits of Infant Circumcision, But Final Say is Still Up to Parents, Says AAP*, AAP (Aug. 27, 2012), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/New-Benefits-Point-to-Greater-Benefits-of-Infant-Circumcision-But-Final-Say-is-Still-Up-to-parents-Says-AAP.aspx> [hereinafter *AAP Press Release*].

<sup>272</sup> 2012 AAP Statement, *supra* note 187.

<sup>273</sup> 2012 AAP Technical Report, *supra* note 39.

<sup>274</sup> AAP Speaking Points, *supra* note 188.

<sup>275</sup> See *Policy Statements*, AAP: MENTAL HEALTH INITIATIVES (2020), <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Mental-Health/Pages/AAP-Policy-Statements.aspx>.

<sup>276</sup> 2012 AAP Statement, *supra* note 187; see also *Policy Statements*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Mental-Health/Pages/AAP-Policy-Statements.aspx> ("All policy statements from the American Academy of Pediatrics automatically expire 5 years after publication unless reaffirmed, revised, or retired at or before that time.").

<sup>277</sup> *Adler Medicaid*, *supra* note 161.

<sup>278</sup> Letter from the Massachusetts Office of Medicaid to Ronald Goldman (May 12, 2017) ("MassHealth coverage of clinical services is based on recommendations of professional medical societies and expert panels, a review of existing peer-reviewed literature, and the most recent data as detailed below," including the American Academy of Pediatrics Circumcision Policy Statement in 2012).

cumcision, did deceive them, and continues to deceive them, and thus that the AAP's claims satisfy the elements of intentional fraud.<sup>279</sup>

### 1. Fraudulent Medical Claims and Omissions

As discussed above, non-therapeutic or unnecessary circumcision is violence, the opposite of medicine. It was performed in the past and it continues to be performed for religious, cultural, and esthetic reasons having nothing to do with medicine. Non-therapeutic medical circumcision, or circumcision that is not needed to treat a medical condition, is an oxymoron. Physicians popularized it and caused the public to perceive as medicine by demonizing the foreskin; by advancing many new false claims about its medical benefits; and by falsely portraying the procedure as having few disadvantages, if any. As discussed below, in 2012, the AAP continued to use these time-tested strategies to promote the practice. The AAP's 2012 circumcision policy statement makes a variety of claims that we will show are unsustainable, as follows.

Systematic evaluation of English-language peer-reviewed literature from 1995 through 2010 indicates that preventive health benefits of elective circumcision of male newborns outweigh the risks of the procedure. Benefits include significant reductions in the risk of urinary tract infection in the first year of life and, subsequently, in the risk of heterosexual acquisition of HIV and the transmission of other sexually transmitted infections.

The procedure is well tolerated when performed by trained professionals under sterile conditions with appropriate pain management. Complications are infrequent; most are minor, and severe complications are rare. Male circumcision performed during the newborn period has considerably lower complication rates than when performed later in life.

Although health benefits are not great enough to recommend routine circumcision for all male newborns, the benefits of circumcision are sufficient to justify access to this procedure for families choosing it and to warrant third-party payment for circumcision of male newborns. It is important that clinicians routinely inform parents of the health benefits and risks of male newborn circumcision in an unbiased and accurate manner.

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<sup>279</sup> See *supra* Part IV.A.1.

Parents ultimately should decide whether circumcision is in the best interests of their male child. They will need to weigh medical information in the context of their own religious, ethical, and cultural beliefs and practices. The medical benefits alone may not outweigh these other considerations for individual families.<sup>280</sup>

This policy statement shows that the AAP knows that MGC is painful; that it risks complications, the only dispute being to what extent; and that the AAP does not recommend the operation for all newborns.<sup>281</sup> This leads to the conclusion that MGC is still not medically justified, as the AMA essentially concluded in 1999 in its only circumcision statement.<sup>282</sup> The AMA Code of Medical Ethics Opinion 5.5 makes clear that when a physician has a patient, a person with medical needs, physicians “should only recommend and provide interventions that are medically appropriate—i.e., scientifically grounded—and that reflect the physician’s considered medical judgment about the risks and likely benefits of available options in light of the patient’s goals for care.”<sup>283</sup> Medical experts representing pediatric associations in Northern Europe,<sup>284</sup> ethicists,<sup>285</sup> and legal scholars<sup>286</sup> have exposed the AAP’s claims as unsustainable, for the reasons discussed below. The nearby Canadian Pediatric Society, which has historically endorsed the AAP position on

<sup>280</sup> 2012 AAP Statement, *supra* note 187.

<sup>281</sup> *Id.*

<sup>282</sup> 1999 AMA Statement, *supra* note 254. As to UTIs, the AMA cited one model of decision making concluding that, “the incidence of UTI would have to be substantially higher in uncircumcised males to justify circumcision as a preventive measure against this condition.” As to penile cancer, it stated, “because this disease is rare and occurs later in life, the use of circumcision as a preventive practice is not justified.” As to STIs and HIV, it stated, “behavioral factors are far more important risk factors for acquisition of HIV and other sexually transmissible diseases than circumcision status, and circumcision cannot be responsibly viewed as ‘protecting’ against such infections.”

<sup>283</sup> AMA CODE OF MEDICAL ETHICS, Opinion 5.5 (2001).

<sup>284</sup> Frisch Cultural Bias, *supra* note 7.

<sup>285</sup> Brian D. Earp & David M. Shaw, *Cultural Bias in American Medicine: The Case of Infant Male Circumcision*, 1 J. PEDIATRIC ETHICS 8 (2017); Brian D. Earp, *Do the Benefits of Male Circumcision Outweigh the Risks? A Critique of the Proposed CDC Guidelines*, 3 Frontiers in Pediatrics 88 (2015) [hereinafter *Earp Critique*]; Alex Myers & Brian D. Earp, *What Is The Best Age to Circumcise? A Medical and Ethical Analysis*, BIOETHICS 10 (2020).

<sup>286</sup> J. Steven Svoboda and Robert S. Van Howe, *Out of Step: Fatal Flaws in the Latest AAP Policy Report on Neonatal Circumcision*, 39 J. MED. ETHICS 434 (2013) (“The policy statement and technical report suffer from several troubling deficiencies, [including] the exclusion of important topics and discussions, an incomplete and apparently partisan excursion through the medical literature, improper analysis of the available information, poorly documented and often inaccurate presentation of relevant findings, and conclusions that are not supported by the evidence given.”).

circumcision, failed to follow the AAP's lead in its 2015 policy statement, which remains in effect.<sup>287</sup>

a. Material Omissions

The AAP's 2012 circumcision policy statement does not disclose to parents that physicians in most countries outside the United States leave the genitals of healthy boys alone,<sup>288</sup> nor that it is rarely necessary to circumcise boy in childhood or men in adulthood.<sup>289</sup> It does not discuss the anatomy and physiology of the foreskin, the body part being removed, or the diagnosis, since the procedure is unlikely to be medically indicated;<sup>290</sup> it does not disclose that boys and men may be angry at their parents for having given permission for it, or that parents may regret having done so,<sup>291</sup> nor that Giannetti accused the AAP of possible fraud in 1999.<sup>292</sup> These facts, together with the AAP's incomplete and biased review of the medical literature, its failure to disclose and entertain alternative paradigms,<sup>293</sup> its failure to disclose opposition to the practice,<sup>294</sup> and its failure to acknowledge or discuss the 2012 Cologne case holding that circumcision is a crime, all evince an intent to mislead the public and parents about circumcision in order to perpetuate it.

b. Undisclosed Disadvantages and Understated Risks

The AAP's statement does not disclose that males value the foreskin or that MGC is harmful, even though pain and the loss of the foreskin constitute harms and indeed substantial harms.<sup>295</sup> The AAP bears the burden of justifying all of its claims, including the claim that circumcision pain is "well-tolerated," but it gives no evidence that the claim is true. Countless videos online of newborn boys undergoing the surgery show the opposite, and a plethora of clinical studies shows that infant circumcision is painful whether or not anesthetic is used.<sup>296</sup> The AAP

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<sup>287</sup> S. Todd Sorokan et al., *Newborn Male Circumcision*, 20 PAEDIATRICS & CHILD HEALTH 311 (2015).

<sup>288</sup> 2012 AAP Statement, *supra* note 187.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Giannetti, *supra* note 6, at 1563.

<sup>293</sup> Robert S. Van Howe, *Response to Vogelstein: How the 2012 AAP Task Force on Circumcision Went Wrong*, 32 BIOETHICS 77 (2018) [hereinafter *Van Howe Response*].

<sup>294</sup> Opposition groups in the U.S. include INTACT AMERICA, <http://www.intactamerica.org>; DOCTORS OPPOSING CIRCUMCISION, <https://www.doctorsopposingcircumcision.org>; ATTORNEY FOR THE RIGHTS OF THE CHILD, <https://www.arclaw.org>; and THE BLOODSTAINED MEN, <https://www.bloodstainedmen.com>.

<sup>295</sup> 2012 AAP Statement, *supra* note 187.

<sup>296</sup> R.S. Van Howe, J.S. Svoboda, *Neonatal pain relief and the Helsinki Declaration*, 36 J. L. MED. ETHICS 803 (2008).

also did not disclose<sup>297</sup> that MGC also causes post-operative pain.<sup>298</sup> Thus, the AAP intentionally downplayed pain.<sup>299</sup>

The AAP's claims that "[c]omplications are infrequent" and that "severe complications are rare" were not made in good faith because the AAP stated in its technical report that the rate and severity of complications following the procedure are unknown.<sup>300</sup> There also is no central registry for reporting severe complications or post-operative complications. Dr. Brady of the AAP committee claimed a significant acute complication rate of 1 in 500 infants circumcised or .2%, when European centers report a much higher 1.2% to 3.8% complication rate for circumcision in both the newborn and non-newborn periods;<sup>301</sup> clinical studies have reported an average post-circumcision rate of meatal stenosis of 5–20%;<sup>302</sup> and insofar as circumcision removes the erogenous foreskin, the complication rate is 100%. Thus, the AAP intentionally downplayed complications, intentionally misled the public, parents, and thereby their sons about them, and continues to do so since it has not renounced its 2012 guidelines.

In 1999, the AAP stated that circumcision risks causing many minor and serious injuries. The AAP's failure to disclose the same risks again when widely publicizing its 2012 statement evinces an intent to hide those risks. The AAP had a duty to disclose but failed to disclose that "badly performed circumcisions, causing discomfort or poor cosmetic outcomes, often necessitating repeat operations and repair jobs, are common,"<sup>303</sup> which it must know since those operations keep pediatric urologists busy. The AAP acknowledges that MGC can be fatal when ritual circumcisions are performed in a non-sterile setting but falsely implies that it is never fatal when performed in a sterile hospital setting,<sup>304</sup> even though Gairdner disclosed that it can be in his famous 1949 article.<sup>305</sup> Shortly thereafter, the United Kingdom's National Health Service

<sup>297</sup> 2012 AAP Statement, *supra* note 187.

<sup>298</sup> Caglar Munevveroglu & Mehmet Gunduz, *Postoperative pain management for circumcision; Comparison of frequently used methods*, 36 PAK. J. MED. SCI. 91, 91 (2020).

<sup>299</sup> Frisch *Cultural Bias*, *supra* note 7, at 631–32.

<sup>300</sup> 2012 AAP Technical Report, *supra* note 33, at e772.

<sup>301</sup> 2012 AAP Technical Report, *supra* note 33, at e772–73.

<sup>302</sup> M. Frisch & J. Simonsen, *Cultural Background, Non-Therapeutic Circumcision and the Risk of Meatal Stenosis and Other Urethral Stricture Disease: Two Nationwide Register-Based Cohort Studies in Denmark 1977–2013*, 16 SURGEON 108 (2018).

<sup>303</sup> R. Darby, *The Sorcerer's Apprentice: Why Can't We Stop Circumcising Boys?*, 4 CONTEXTS 34, 37 (2005).

<sup>304</sup> AAP Speaking Points, *supra* note 188, claiming, "Isolated cases of morbidity and mortality after ritual circumcision have been reported in the U.S., [but they] have been related to circumcisions that were not performed under sterile conditions."

<sup>305</sup> Gairdner, *supra* note 5. Gairdner did not explicitly state that all of these deaths occurred in a sterile setting, but he refers to circumcision operations in hospitals, so likely many of the deaths occurred in a sterile hospital setting.



stopped paying for non-therapeutic circumcision.<sup>306</sup> The AAP evidently does not want parents to know that their son might die from the operation. The AAP knows from protests that many men are angry that they were circumcised, but it failed to disclose in its policy statement that MGC can cause psychological harm.<sup>307</sup>

The AAP fraudulently claims that circumcision does not appear to adversely affect penile sexual function,<sup>308</sup> when changing form changes function and removing the foreskin plainly destroys its ability to fold and unfold as it was sexually selected to do by evolution.<sup>309</sup> In addition, in 1999, the AAP acknowledged anecdotal reports that “penile sensation and sexual sensitivity are decreased for circumcised males.” In 2012, the AAP makes the *ipse dixit* claim that MGC “does not appear to adversely affect penile sexual . . . sensitivity”,<sup>310</sup> without mentioning or refuting the anecdotal reports it mentioned before showing that it might.<sup>311</sup> Common sense suggests that irreversibly removing highly vascularized and densely innervated tissue with a surface area of up to 90•cm<sup>2</sup> from the penis will reduce sexual sensitivity for life. At a 2013 debate, when asked how removing the innervated and mobile foreskin could not affect penile sensitivity and function, Dr. Brady replied, “The question is, then, are the other portions of the penis capable of providing accommodation to maintain the same level of sensitivity and function? . . . [T]here’s no evidence that there is a valid loss . . . there wouldn’t be a loss . . . it turns out that we can’t identify a loss.”<sup>312</sup> Dr. Brady’s claim, then, is that although MGC removes the nerves of the foreskin, somehow other parts of the penis make up for the loss, but the AAP does not know how.<sup>313</sup> The AAP seems intent on claiming that circumcision does not reduce sexual sensitivity and function despite evidence to the contrary; thus, this is another intentionally fraudulent medical claim.

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<sup>306</sup> E. Charlissee Caga-anan & Anthony J. Thomas, Jr., *Requests for “non-therapeutic” interventions in children: male circumcision*, in *CLINICAL ETHICS IN PEDIATRICS* 44 (Douglas S. Diekema et al. eds., 2011).

<sup>307</sup> 2012 AAP Statement, *supra* note 187.

<sup>308</sup> 2012 AAP Technical Report, *supra* note 39, at e769.

<sup>309</sup> *Earp Critique*, *supra* note 285.

<sup>310</sup> 2012 AAP Technical Report, *supra* note 39, at e756.

<sup>311</sup> American Academy of Pediatrics Task Force on Circumcision, *Circumcision Policy Statement*, 103 *PEDIATRICS* 686 (1999) [hereinafter *1999 AAP Statement*].

<sup>312</sup> Debate between Steven Svoboda, Attorneys for the Right of the Child, and Michael Brady & Douglas Diekema, Task Force on Circumcision, American Academy of Pediatrics, at The Twentieth Pitts Lectureship in Medical Ethics at the Medical University of South Carolina in Charleston, South Carolina (Oct. 18–19, 2013), <https://www.arclaw.org/debates/arc-releases-video-from-charleston-debate-victory-over-american-academy-of-pediatrics> [hereinafter *Debate*].

<sup>313</sup> *Id.*

c. Exaggerated and Irrelevant Claims About Actual and Potential Medical Benefits

“PREVENTS DISEASES”.<sup>314</sup> The AAP’s technical report states that “[s]pecific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some sexually transmitted infections, and penile cancer.”<sup>315</sup> This must have been intended to defraud as MGC does not prevent any of these diseases. Men who rely upon this false claim might forego protection and thereby contract HIV, called “risk compensation.”<sup>316</sup> The 1978 case of *Simcusi v. Saeli* is on point.<sup>317</sup> There, the New York Court of Appeals stated that a physician had falsely and fraudulently assured the plaintiff that a treatment had been effective.<sup>318</sup> The AAP knows that MGC only has “potential benefits” or slightly reduced risks, as that is what it called them in its 1999 guidelines.<sup>319</sup> The AAP’s argument that MGC reduces the risk of UTIs by 1%<sup>320</sup> also fails to consider confounding factors that can impact testing rates and accurate UTI detection.<sup>321</sup> Even if true, UTIs can easily be treated with antibiotics without tissue loss.<sup>322</sup>

“REDUCES THE RISK OF HIV ACQUISITION”.<sup>323</sup> This argument likewise fails. Although the AAP claimed in 1999 that “there is a substantial body of evidence that links non-circumcision in men with risk for HIV infection,” it nonetheless concluded that “behavioral factors appear to be far more important than circumcision status” in acquiring HIV.<sup>324</sup> The AMA concluded that same year that “circumcision cannot be responsibly viewed as ‘protecting’ against such infections.”<sup>325</sup> It is irresponsible for the AAP and physicians in the U.S. to promote circumcision as reducing the risk of HIV acquisition because men who engage in unprotected heterosexual sex still risk contracting it. The AAP limited its discussion to studies of African men, ignoring completed studies performed in North America.<sup>326</sup> None of the studies in North America found that circumci-

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<sup>314</sup> 2012 AAP Technical Report, *supra* note 33, at e756.

<sup>315</sup> *Id.*

<sup>316</sup> See, e.g., *Definition of Risk Compensation*, FREE DICTIONARY: MED. DICTIONARY, <https://medical-dictionary.thefreedictionary.com/Risk+Compensation>.

<sup>317</sup> *Simcusi v. Saeli*, 377 N.E.2d 713 (N.Y. 1978).

<sup>318</sup> *Id.* at 719.

<sup>319</sup> 1999 AAP Statement, *supra* note 311.

<sup>320</sup> 2012 AAP Technical Report, *supra* note 33, at e767.

<sup>321</sup> Van Howe RS, *Effect of confounding in the association between circumcision status and urinary tract infection*, 51 J. INFECTIONS 59 (2005).

<sup>322</sup> *Frisch Cultural Bias*, *supra* note 7, at 7.

<sup>323</sup> 2012 AAP Technical Report, *supra* note 33, at e764.

<sup>324</sup> 1999 AAP Statement, *supra* note 311.

<sup>325</sup> 1999 AMA Statement, *supra* note 254.

<sup>326</sup> See, e.g., Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 JAMA 1052 (1997) (finding “no significant

sion significantly reduces the risk of HIV infection.<sup>327</sup> Shortly before the release of the AAP's 2012 guidelines, one study from Puerto Rico found that circumcised men were at significantly *greater* risk of HIV than intact men.<sup>328</sup> Even granting the AAP's claim of a 60% relative risk reduction in HIV in Africa,<sup>329</sup> where the prevalence of HIV is high (note that the 60% relative risk reduction in this content is a 1.3% absolute risk reduction),<sup>330</sup> in a country such as the United States where the prevalence is much lower, if the relative risk reduction were the same, the absolute risk reduction would be much lower as well.<sup>331</sup> After finding numerous flaws in the African study, Boyle and Hill wrote in 2012, "Condom use after male circumcision is essential for HIV prevention.' What is the purpose of male circumcision, if condom use is still needed to prevent sexual transmission of HIV?"<sup>332</sup> The AAP should be warning all men *against* using circumcision as a preventive measure against HIV because more effective, less invasive, and much less expensive alternatives are readily available, such as limiting exposure to infected sexual partners, pre-exposure prophylaxis, and the use of condoms.<sup>333</sup> Boys are not at risk of sexually transmitted diseases anyway. It is fraudulent to advance HIV as a reason for parents to elect circumcision or to perform the operation.

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differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases.").

<sup>327</sup> See, e.g., Zohar Mor, et al., *Declining Rates in Male Circumcision amidst Increasing Evidence of its Public Health Benefit*, 2 PLoS ONE e861 (2007); Anne G. Thomas, et al., *Prevalence of Circumcision and Its Association With HIV and Sexually Transmitted Infections in A Male US Navy Population*, NAVAL HEALTH RES. CTR. Report No. 04-10 (July 2004); Lee Warner, et al., *Male Circumcision and Risk of HIV Infection among Heterosexual African American Men Attending Baltimore Sexually Transmitted Disease Clinics*, 199 J. INFECTIOUS DISEASE 59 (2009).

<sup>328</sup> Carlos E. Rodriguez-Diaz, et al., *More than Foreskin: Circumcision Status, History of HIV/STI, and Sexual Risk in a Clinic-Based Sample of Men in Puerto Rico*, 9 J. SEXUAL MED. 2933 (2012).

<sup>329</sup> 2012 AAP Technical Report, *supra* note 33, at e784.

<sup>330</sup> Gregory J. Boyle & George Hill, *Sub-Saharan African Randomised Clinical Trials into Male Circumcision and HIV Transmission: Methodological, Ethical and Legal Concerns*, 19 J. L. MED. 316, 326 (2011).

<sup>331</sup> This is a matter of simple arithmetic. Assume that the relative risk reduction (1 - (percentage positive in treatment group/percentage positive in control group)) is 60%. If the infection rate in African studies is 0.86666% in the treatment group, this would mean an infection rate of 2.16666% in the control group. The absolute risk reduction (percentage positive in control group - percentage positive in treatment group) would be 1.3%. If the infection rate in the control group in the United States were 0.216666%, then to maintain a 60% relative risk reduction, the infection rate in the treated group would be 0.0816666%, and the absolute risk reduction would be only 0.13%.

<sup>332</sup> Boyle and Hill, *supra* note 330, at 317.

<sup>333</sup> See, e.g., *HIV Basics: Prevention*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prevention.html>.

“THE BENEFITS OUTWEIGH THE RISKS”.<sup>334</sup> This claim, the centerpiece of the AAP’s now-expired 2012 circumcision statement, as announced to the public in the contemporaneous press release, is unsustainable. First, the AAP never made this claim before in its circumcision policy statements between 1971 and 2012; it is the only national-level pediatric society in the world, to our knowledge, to make this claim; and it employed no recognized method of weighing or balancing either benefits or risks.<sup>335</sup> Second, the AAP stated in its 2012 technical report that “[t]he true incidence of complications after newborn circumcision is unknown,”<sup>336</sup> so it cannot logically conclude that the benefits outweigh the risks. Moreover, in 2013, the AAP backpedaled, writing, “[t]hese benefits were *felt* to outweigh the risks of the procedure”(emphasis added).<sup>337</sup> That is speculation, not science. Third, the AAP assigned no value to the foreskin and thus left it out of the equation despite its manifest importance.<sup>338</sup> Fourth, men who have a foreskin and men injured by circumcision or unhappy to have been circumcised would beg to differ with the AAP’s claim.<sup>339</sup> Fifth, since MGC harms all boys and men with little prospect of benefiting any boy or man, the disadvantages outweigh the advantages.<sup>340</sup> To comply with the ethical rule of proportionality,<sup>341</sup> physicians must advise men to use the easier and more effective methods to avoid penile cancer, such as washing the penis,<sup>342</sup> and to avoid STDs, such as safe sexual practices, human papilloma virus vaccination, and cancer screening, which avoid the risks and harms of circumcision.<sup>343</sup> Finally, regardless, as Frisch et al. write, “[t]he cardinal medical question should not be whether circumcision can prevent disease, but how can disease can best be prevented.”<sup>344</sup> Boys are not at risk of adult diseases, so they “do not represent compelling reasons for surgery before boys are old enough to decide for themselves.”<sup>345</sup> Even if the

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<sup>334</sup> 2012 AAP Statement, *supra* note 187.

<sup>335</sup> See generally, The AAP Task Force on Circumcision 2012, *The AAP Task Force on Neonatal Circumcision: a call for respectful dialogue*, 39 J. MED. ETHICS 1 (2013) [hereinafter *Respectful Dialogue*].

<sup>336</sup> 2012 AAP Technical Report, *supra* note 33.

<sup>337</sup> *Respectful Dialogue*, *supra* note 335.

<sup>338</sup> 2012 AAP Technical Report, *supra* note 33.

<sup>339</sup> See e.g., Gary Nunn, *Foreskin Reclaimers: the “Intactivists” Fighting Infant Male Circumcision*, GUARDIAN (July 20, 2019), <https://www.theguardian.com/society/2019/jul/21/foreskin-reclaimers-the-intactivists-fighting-infant-male-circumcision> (quoting from a male that there was “immense loss and grief” not have the chance “to experience sex the way nature intended it”).

<sup>340</sup> Frisch *Cultural Bias*, *supra* note 7, at 799.

<sup>341</sup> Göran Hermerén, *The Principle of Proportionality Revisited: Interpretations and Application*, 15 MED. HEALTH CARE & PHILOS. 373, 374 (2012).

<sup>342</sup> 1975 AAP Statement, *supra* note 38.

<sup>343</sup> Frisch *Cultural Bias*, *supra* note 7, at 798.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

potential medical benefits did outweigh the risks, unnecessary genital surgery without consent still violates boys' rights.<sup>346</sup> Circumcision thus "fails to meet the commonly accepted criteria for the justification of preventive medical procedures in children."<sup>347</sup> A European physician writes: "[T]he [AAP's] claim, that there are health benefits in excising a piece of healthy tissue from the penis of a healthy neonate, is as absurd as would be the claim that amputating the left little finger of a neonate has health benefits."<sup>348</sup> Unproven, uncertain benefits exist for both interventions: a missing left little finger would avoid the risk of a potential peronychia infection in that finger.

"MALE AND FEMALE GENITAL CUTTING ARE NOT ANALOGOUS". The AAP's 2012 "Speaking Points" for members stated in answer to the question, "Why does the AAP support male circumcision but oppose female genital cutting?":

The two procedures are not analogous. Female genital cutting is mutilation. Female genital cutting is not circumcision. The scientific evidence of female genital cutting indicates only harms and no health benefits. In male circumcision, the anatomy is different, and the procedure is different. Male circumcision has been shown scientifically to provide benefits to the person being circumcised, and has a proven track record for safety.<sup>349</sup>

Granted, some scholars support the view that the procedures are not analogous,<sup>350</sup> but that view is untenable.<sup>351</sup> The male and female prepuce, in males the foreskin of the penis and in females the clitoral hood,<sup>352</sup> are so-called homologous parts. They are identical in early gestation, and their anatomy and physiology are similar.<sup>353</sup> Both MGC and FGC are painful, risky, and harmful, and both can result in mutilation, as the AAP has

<sup>346</sup> *Violating Children's Rights: Harmful Practices Based on Tradition, Culture, Religion or Superstition*, INT'L NGO COUNCIL ON VIOLENCE AGAINST CHILD. 22 (2013), <https://resourcecentre.savethechildren.net/library/violating-childrens-rights-harmful-practices-based-tradition-culture-religion-or>.

<sup>347</sup> *Frisch Cultural Bias*, *supra* note 7, at 799–800; *see also* Comm. on Bioethics, *Policy Statement: Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088 (2010), <https://pediatrics.aappublications.org/content/pediatrics/early/2010/04/26/peds.2010-0187.full.pdf> [hereinafter *Female Minors*].

<sup>348</sup> *European Doctors Say, "Routine Circumcision is Insane"*, INTACTION (Jan. 22, 2013), <https://intaction.org/european-doctors-say-routine-circumcision-is-insane/>.

<sup>349</sup> *AAP Speaking Points*, *supra* note 188.

<sup>350</sup> *See, e.g.*, Ruari D. McAlister, *A Dangerous Muddying of the Waters?*, 24 MED. L. REV. 259, 263 (June 2016).

<sup>351</sup> *See* Brigman, *supra* note 29, at 338.

<sup>352</sup> *See* Christopher J. Cold & Kenneth A. McGrath, *Anatomy and Histology of the Penile and Clitoral Prepuce in Primates*, MALE & FEMALE CIRCUMCISION 19 (Denniston et al., eds., Plenum Pub. N.Y. 1999).

<sup>353</sup> *See* Baskin et al., *supra* note 19.

acknowledged.<sup>354</sup> Indeed, MGC, like FGC, meets the definition of mutilation—“destroying, removing, or severely damaging a limb or other body part of a person”<sup>355</sup>—in every case.

d. Usually Not Performed for Medical Reasons Anyway

In a 2016 article, Dr. Andrew Freedman of the 2012 AAP committee stated,

To understand the [AAP’s 2012] recommendations, one has to acknowledge that when parents decide on circumcision, the health issues are only one small piece of the puzzle. *In much of the world, newborn circumcision is not primarily a medical decision. Most circumcisions are done due to religious and cultural tradition.* In the West, although parents may use the conflicting medical literature to buttress their own beliefs and desires, *for the most part parents choose what they want for a wide variety of nonmedical reasons.* There can be no doubt that religion, culture, aesthetic preference, familial identity, and personal experience all factor into their decision. Few parents when really questioned are doing it solely to lower the risk of urinary tract infections or ulcerative sexually transmitted infections. (emphasis added)<sup>356</sup>

Similarly, the U.S. Centers for Disease Control & Prevention stated in 2008, “[m]any parents now make decisions about infant circumcision based on cultural, religious, or parental desires rather than health concerns.”<sup>357</sup>

The implications are profound. As discussed above<sup>358</sup> and in this section,<sup>359</sup> physicians have spent the past 150 years unsuccessfully attempting falsely to portray MGC, which is violence, as medicine, only to acknowledge at last that boys are usually not circumcised for medical reasons anyway.<sup>360</sup> Like FGC, MGC is a harmful traditional religio-cul-

<sup>354</sup> See 1975 AAP Statement, *supra* note 38.

<sup>355</sup> See *Definition of Mutilation*, MERRIAM-WESTER DICTIONARY, <http://www.merriam-webster.com/dictionary/mutilation>.

<sup>356</sup> Freedman, *supra* note 31; *Consent for Circumcision*, BRIGHAM & WOMEN’S HOSP., <https://www.brighamandwomens.org/assets/BWH/pediatric-newborn-medicine/pdfs/circumcision-consent-form.pdf> [hereinafter *BWH Consent Form*] (“many parents are interested in having circumcision done for ethnic, cultural, religious or social reasons”).

<sup>357</sup> U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *MALE CIRCUMCISION AND RISK FOR HIV TRANSMISSION AND OTHER HEALTH CONDITIONS: IMPLICATIONS FOR THE UNITED STATES*, at 4 (Jan. 31, 2008).

<sup>358</sup> See *supra* Part IV.A.1.

<sup>359</sup> For example, the technical or scientific report supporting the AAP’s 2012 circumcision policy statement is 29 pages long and contains 248 footnotes.

<sup>360</sup> *Id.*

tural practice cloaked as medicine, not a legitimate medical practice.<sup>361</sup> Frisch concluded a 2017 article by paraphrasing Hans Christian Anderson that the emperor of circumcision has no clothes.<sup>362</sup> In this article we have exposed the AAP, which supports circumcision, as having no clothes either.<sup>363</sup>

## 2. Fraudulent Legal Claims

As background, the AAP made an indefensible legal proposal in the context of FGC that would have benefited parents and physicians but not girls.<sup>364</sup> It recommended that physicians should be sensitive to the cultural and religious reasons that motivate parents to seek female genital cutting, and proposed that federal and state laws enable pediatricians to reach out to such families by offering a ritual nick of a girl's clitoris, this would avoid the greater harm of female genital cutting.<sup>365</sup> As stated, Congress found that female genital cutting violated girls' federal and state constitutional and statutory rights.<sup>366</sup> It also violates their inalienable common law right to bodily integrity and constitutes a breach of fiduciary duty, so the legislation that the AAP proposed would have been legally invalid. In the face of widespread opposition, the AAP quickly retired the guideline.<sup>367</sup> Thus, the AAP could not be trusted to respect girls' legal rights. As discussed below, its legal advice about MGC cannot be trusted either.

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<sup>361</sup> See Freedman, *supra* note 31, 610–11.

<sup>362</sup> Morten Frisch, *Denmark Doctors Declare Circumcision of Healthy Boys 'Ethically Unacceptable'*, HUFFINGTON POST (Jan. 12, 2017), [https://www.huffpost.com/entry/denmarks-29000-doctors-declare-circumcision-of-healthy\\_b\\_58753ec1e4b08052400ee6b3](https://www.huffpost.com/entry/denmarks-29000-doctors-declare-circumcision-of-healthy_b_58753ec1e4b08052400ee6b3).

<sup>363</sup> See *DOC Commentary*, *supra* note 268, at 8 (“A task force composed of Europeans, some medically trained and some not, from historically non-circumcising cultures, would have been much more scientifically honest and ultimately more credible. . . . The American Academy of Pediatrics has transparently overplayed its hand and should repudiate this travesty of a medical pronouncement immediately, before the Academy loses any more of its lingering – and endangered – bioethical credibility.”).

<sup>364</sup> “However, the ritual nick suggested by some pediatricians is not as physically harmful and is much less extensive than routine newborn male genital cutting. There is reason to believe that offering such a compromise may build trust between hospitals and immigrant communities, save some girls from undergoing disfiguring and life-threatening procedures in their native countries, and play a role in the eventual eradication of FGC. It might be more effective if federal and state laws enabled pediatricians to reach out to families by offering a ritual nick as a possible compromise to avoid greater harm.” *Policy Statement—Ritual Genital Cutting of Female Minors*, 125 AM. ACAD. PEDIATRICS 1088, 1092 (2010), <https://pediatrics.aappublications.org/content/pediatrics/early/2010/04/26/peds.2010-0187.full.pdf> [hereinafter *Female Minors*].

<sup>365</sup> *Id.*

<sup>366</sup> 18 U.S. Code § 116. Female genital mutilation.

<sup>367</sup> Kathleen Loudon, *AAP Retracts Controversial Policy on Female Genital Cutting*, MEDSCAPE MED. NEWS (June 2, 2010), <https://www.medscape.com/viewarticle/722840#:~:text=opposes%20%22All%20Forms%22%20of%20FGC,recommend%20it%20to%20its%20members.%22>.

a. “Parents Have the Right to Elect Circumcision”

Beginning in 1975, shortly after the AAP stated in 1971 that there is no medical indication for circumcision during the newborn period,<sup>368</sup> and continuing to the present, the AAP has expressly claimed—evidently as an alternative to the claim that circumcision has actual or potential medical benefits—that parents have the right to decide the fate of their son’s foreskin. Since physicians do not ask parents why they elected circumcision, the claim is that parents have the unfettered right to elect it. This is an important legal claim; indeed, it is a centerpiece of the AAP’s position in 2012 after the claim that MGC has medical benefits.<sup>369</sup>

Legal scholars have argued that parents do not have the legal authority to consent to the surgical amputation of normal, healthy tissue from their infant children, and the AAP has the burden of refuting these credible claims and proving otherwise, but it has not done so. In fact, the AAP’s 2012 guidelines do not cite a single legal authority for the claim that parents have such a right.<sup>370</sup> At a 2013 debate about the ethics and legality of circumcision, Michael Brady of the AAP’s 2012 committee devoted only one slide to the law, claiming that no jurisdiction in the United States has any law prohibiting male newborn circumcision if performed with appropriate informed consent of parents.<sup>371</sup> This argument fails. For example, there was no law on the books in Germany prohibiting circumcision either before 2012 when a court held that it constitutes criminal assault: religious circumcision had always met the definition of a crime in Germany but the crime had not previously been prosecuted.<sup>372</sup> As discussed, the rights of every individual to personal security and self-determination or autonomy are also inalienable common law rights<sup>373</sup> and constitutional rights;<sup>374</sup> and autonomy is the most fundamental rule of medical ethics.<sup>375</sup> As the German court held in 2012,<sup>376</sup> children’s

<sup>368</sup> See 1971 AAP Statement, *supra* note 252.

<sup>369</sup> 2012 AAP Statement, *supra* note 187, Abstract.

<sup>370</sup> 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 J. GENDER, SOC. POL’Y & THE LAW 87 (1999).

<sup>371</sup> Michael Brady, *supra* note 312.

<sup>372</sup> See *Cologne Decision*, *supra* note 103.

<sup>373</sup> See *supra* notes 69–71; see generally *Equal and Inalienable Rights*, DOCUMENTS FREEDOM, <https://www.docsoffreedom.org/student/readings/equal-and-inalienable-rights>.

<sup>374</sup> See *supra* notes 76–77.

<sup>375</sup> Informed Consent, *Code of Medical Ethics Opinion 2.1.1*, AMA, <https://www.ama-assn.org/delivering-care/ethics/informed-consent>. See also J. Steven Svoboda, *Circumcision of male infants as a human rights violation*, 39 BRIT. MED. J. 469, 470 (2016) (“Informed consent is crucial in protecting patients from aggressive, unnecessary or unwanted medical intervention and protecting doctors from criminal charges or legal actions being brought against them. The informed consent process grew out of respect for personal autonomy: the ability of an individual to have control over his own person.”).

<sup>376</sup> *Cologne Decision*, *supra* note 103.



rights to intact genitalia supersede their parents' rights to circumcise their children.<sup>377</sup> To the same effect in the United States, in 1979 in *Parham v. J.R.*, the U.S. Supreme Court held that although parents have responsibility for the upbringing of their child, a child has a liberty interest in not being confined unnecessarily for medical treatment—in that case for mental illness—and although parents may seek to institutionalize a child for mental illness, their doing so is subject to independent medical judgment.<sup>378</sup>

Thus, the AAP has not responded in any meaningful way to the arguments by legal scholars dating back to 1985 that MGC is child abuse and a battery,<sup>379</sup> or to the German decision holding that it is a crime.<sup>380</sup> The German decision put the AAP on notice that MGC might not only be unlawful in the United States but also a crime. Instead, the AAP has ignored the legal controversy. If the AAP had a good argument that it is legal for parents to elect to amputate a healthy part of their child's body, and for physicians to take orders from parents to do so, it would have cited some law to that effect by now, but there is no such law. Thus, the AAP's claim that parents have the unfettered right to elect circumcision and its failure to disclose the legal controversy is intentionally fraudulent.

Similarly, despite nearly 100 publications available at the time addressing the substantial ethical issues associated with infant male circumcision, the AAP's 2012 Task Force did not seriously address the ethical controversy in its circumcision policy statement or technical report.<sup>381</sup> Since autonomy is a fundamental ethical concept, and MGC violates the child's autonomy, it will never be possible for the AAP to refute the claim that MGC is unethical.

b. "Parents Will Need to Take Their Personal Preferences Into Account"

The AAP has long claimed, again without citing a single statute or case, that not only is it legitimate for parents to make the circumcision decision, but they should take non-medical factors into consideration in doing so include their personal preferences.<sup>382</sup> These factors include the parents' religious, cultural, and personal aesthetic preferences;<sup>383</sup> the climate;<sup>384</sup> "the social and emotional reaction of prospective parents to pe-

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<sup>377</sup> Kulish, *supra* note 102.

<sup>378</sup> *Parham v. J.R.*, 442 U.S. 584, 585 (1979).

<sup>379</sup> Brigman, *supra* note 29.

<sup>380</sup> Kulish, *supra* note 102.

<sup>381</sup> *Van Howe Response*, *supra* note 293 (Abstract).

<sup>382</sup> *2012 AAP Statement*, *supra* note 187.

<sup>383</sup> Freedman, *supra* note 31.

<sup>384</sup> *1975 AAP Statement*, *supra* note 38.

nile cleansing, and the ability to understand and facilitate good hygiene” if circumcision is not elected;<sup>385</sup> and even social pressures.<sup>386</sup> The AAP’s 2012 guidelines further state:

Parents ultimately should decide whether circumcision is in the best interests of their male child. They *will need to* weigh medical information in the context of their own religious, ethical, and cultural beliefs and practices. The medical benefits alone may not outweigh these other considerations for individual families (emphasis added).<sup>387</sup>

In our opinion, taking any such parental preference into consideration in deciding whether to circumcise a boy is absurd, as they have nothing to do with the child’s health. In its 2019 circumcision guidelines, the British Medical Association advises its physicians to “be alert to situations in which parents’ decisions appear to be contrary to their child’s interests.”<sup>388</sup> Sprinkling parents’ non-medical preferences on top of an operation that is not medically justified does not make the operation medically justified.<sup>389</sup>

Since physicians do not ask parents why they elect to have their son circumcised, and the AAP believes that “parents are afforded wide authority for determining what constitutes appropriate child-rearing and child welfare, [so] it is legitimate for the parents to take into account their own cultural, religious, and ethnic traditions, in addition to medical factors, when making this choice,”<sup>390</sup> it follows logically that the AAP is falsely claiming that parents have the unfettered right to elect MGC.<sup>391</sup> As a result of this laissez-faire approach, which abandons the physician’s fiduciary duty to exercise sound medical judgment, discussed above,<sup>392</sup> the AAP apparently has no objection even to so-called spite circumcisions, where a malevolent father wants to circumcise the son to spite the mother from whom he is separated or divorced, and the son states that he does not want to be circumcised.<sup>393</sup> In sharp contrast, the British Medical Association observes that “where a child (with or without competence)

<sup>385</sup> *Id.*

<sup>386</sup> Task Force on Circumcision, *Report of the Task Force on Circumcision (RE9148)*, 84 PEDIATRICS 388 (1989), <https://pediatrics.aappublications.org/content/84/2/388> [hereinafter *1989 AAP Statement*].

<sup>387</sup> *2012 AAP Statement*, *supra* note 187.

<sup>388</sup> BRIT. MED. ASS’N, NON-THERAPEUTIC MALE CIRCUMCISION (NTMC) OF CHILDREN – PRACTICAL GUIDANCE FOR DOCTORS 13 (2019) [hereinafter *BMA Guidance*].

<sup>389</sup> *Id.*

<sup>390</sup> *2012 AAP Technical Report*, *supra* note 33, at e759.

<sup>391</sup> *Id.*

<sup>392</sup> *Hafemeister, Just Say No*, *supra* note 114, at 360 & n.139.

<sup>393</sup> *See, e.g., the Hironimus case in Florida. Marc Freeman, Mom Signs Consent for Son’s Circumcision to Get Out of Jail — but Now Faces New Criminal Charge*, SUN SENTINEL (May

refuses [non-therapeutic male circumcision], the BMA cannot envisage a situation in which it will be in the child's best interest to perform the circumcision, irrespective of the parents' wishes."<sup>394</sup>

Just as most parents know little or nothing about medicine and have no reason or ability to question the AAP's medical claims, they know little or nothing about the law and have no reason or ability to question the AAP's legal claims. The AAP's 2012 committee included a lawyer, and the AAP has, arguably, access to the country's best lawyers.<sup>395</sup> Parents do not own their children, however, and the claim that parents can do whatever they want to their children's bodies as if they were chattel is a dead dogma.<sup>396</sup>

Courts recognize that parents "may at times be acting against the interests of their children."<sup>397</sup> AMA Opinion 2.2.1 gives parents and physicians further guidance: "[i]n giving or withholding permission for medical treatment for their children, parents/guardians are expected to safeguard their children's physical health and well-being and to nurture their children's developing personhood and autonomy."<sup>398</sup> To respect their son's autonomy and protect their health, parents must decline the invitation to elect circumcision. The AAP's 45-year-old claim (dating back to 1975) that parents have the right to elect to have their son circumcised based on the parents' own preferences is false and fraudulent.<sup>399</sup> Parents as surrogate decision makers:

should base their decisions on the *substituted judgment* standard; in other words, they should use their knowledge of the patient's preferences and values to determine as best as possible what the patient would have decided herself. If there is not adequate evidence of the incapacitated or incompetent patient's preferences and values, the decision should be based on the best interests of the

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22, 2015), <https://www.sun-sentinel.com/local/palm-beach/fl-circumcision-mother-court-hearing-20150522-story.html>.

<sup>394</sup> *BMA Guidance*, *supra* note 388.

<sup>395</sup> *AAP Technical Report*, *supra* note 39, at e778 (referring to task force member Steven Wegner, MD, JD).

<sup>396</sup> Robert S. Van Howe, *Infant Circumcision: The Last Stand for the Dead Dogma of Parental (Sovereign) Rights*, 7 J. MED. ETHICS 475 (2013).

<sup>397</sup> *Bartley v. Kremens*, 402 F. Supp. 1039, 1047–48 (1975), vacated and remanded, 431 U. S. 119 (1977).

<sup>398</sup> AMA, CODE OF MEDICAL ETHICS, Opinion 2.2.1.

<sup>399</sup> See American Academy of Pediatrics, Committee on Bioethics, *Informed consent, parental permission, and assent in pediatric practice*, 95 PEDIATRICS 314 (1995).

patient (what outcome would most likely promote the patient's well-being).<sup>400</sup>

Applying those standards, parents are only allowed to give permission to circumcision surgery when the child needs the operation and the operation cannot be deferred. In fact, in Germany, parents who give permission to have their healthy son circumcised unwittingly commit an assault themselves,<sup>401</sup> and in the U.S. parents unwittingly commit child abuse and a battery.

c. "Parents Have the Right to Elect Circumcision for Religious Reasons"

In lawsuits, Jewish organizations claim that parents have a religious right to elect MGC under the First Amendment Freedom of Religion clause.<sup>402</sup> This claim deserves special attention. There is no such right in the United States, however, as the German<sup>403</sup> and U.K. case<sup>404</sup> discussed above found. Merkel and Putzke write, "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."<sup>405</sup> This result does not stem from animus toward Jews and Muslims.<sup>406</sup> First, constitutional rights are personal rights that adhere to individuals. A person's constitutional rights do not allow him or her to inflict bodily harm on another person.<sup>407</sup> Merkel and Putzke write, "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."<sup>408</sup> Second, "[i]f parents do not have a right to determine their child's religious affiliation for the child's lifetime, why should they

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<sup>400</sup> Danielle Hahn Chaet, *AMA Code of Medical Ethics' Opinions on Patient Decision-Making Capacity and Competence and Surrogate Decision Making*, AMA J. ETHICS (July 2017) (citing AMA, CODE OF MEDICAL ETHICS, Opinion 2.1.2).

<sup>401</sup> Kulish, *supra* note 102.

<sup>402</sup> *Boldt v. Boldt*, 176 P.3d 388 (Or. 2008), *cert. denied*, 555 U.S. 814 (2008). In this 2007 Oregon case, a Jewish father wanted to circumcise his son, but the son did not want to be circumcised. The American Jewish Congress, Union of Orthodox Jewish Congregations of America, American Jewish Committee, and Union of Orthodox Jewish Congregations of America filed amicus curiae briefs on behalf of the father. Thus, Jewish organizations want Jewish fathers to be able to elect to have their son circumcised, even when the son and mother do not want it. We note parenthetically that Jewish and Muslim boys being circumcised are exposed to the same risks and suffer the same pain and harms as Gentiles.

<sup>403</sup> *Cologne Decision*, *supra* note 103.

<sup>404</sup> UK Case, *supra* note 87.

<sup>405</sup> Merkel & Putzke, *supra* note 107, at 445.

<sup>406</sup> *Id.* at 446. Kay-Alexander Scholz, *Circumcision Remains Legal in Germany*, DW (Dec. 12, 2012), <https://www.dw.com/en/circumcision-remains-legal-in-germany/a-16399336>.

<sup>407</sup> Merkel & Putzke, *supra* note 107, at 447.

<sup>408</sup> *Id.* at 446.

have a right to permanently mark their children's bodies with a symbol of that affiliation?"<sup>409</sup> Third, the U.S. Supreme Court held in *Prince v. Massachusetts* in 1944 that parents are not allowed to expose their children even to the risk of physical or psychological harm, let alone actually harm them, as MGC and FGC do, based on the parents' religious beliefs.<sup>410</sup> The court in *Prince* famously stated that parents may martyr themselves, but not their children.<sup>411</sup> Merkel and Putzke write that insofar as MGC is more than merely a religious rite, but a significant bodily harm to the child, "this, inevitably, brings the law onto the scene."<sup>412</sup>

d. "Physicians Are Allowed to Take Orders from Parents"

Even if parents had the right to elect circumcision for non-medical reasons, physicians, who are licensed only to practice medicine, are not permitted as implied to act as cultural brokers who take orders from parents to circumcise their healthy boys for non-medical reasons.<sup>413</sup> The AAP's own Committee on Bioethics made this clear in 1995:

Thus 'proxy consent' poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses. Although impasses regarding the interests of minors and the expressed wishes of their parents or guardians are rare, the pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent.<sup>414</sup>

In 1949 the physician Douglas Gairdner wrote, "In order to decide whether a child's foreskin should be ablated the normal anatomy and function of the structure at different ages should be understood; the danger of conserving the foreskin must then be weighed against the hazards of the operation," which he stated were unknown.<sup>415</sup> It seems shocking that despite that warning, and the despite the AAP having issued circumcision guidelines over a 50-year period, the AAP still does not know the extent of complications that the operation causes.<sup>416</sup> The AAP cannot accomplish its mission of helping children attain or in this case retain optimal physical and mental health without knowing the anatomy and

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<sup>409</sup> *Id.* at 447.

<sup>410</sup> *Prince v. Massachusetts*, 21 U.S. 158, 169–70 (1944).

<sup>411</sup> *Id.* at 170.

<sup>412</sup> Merkel & Putzke, *supra* note 107, at 447.

<sup>413</sup> Committee on Bioethics, *supra* note 399.

<sup>414</sup> *Id.*

<sup>415</sup> Gairdner, *supra* note 5.

<sup>416</sup> 2012 AAP Statement, *supra* note 187.

function of the foreskin and the hazards of the operation. The AAP's 2012 technical report calls for more research, but eight years later none has been forthcoming, nor do the authors know of any such studies underway.

#### D. *Intentional Fraud by Many Physicians Who Circumcise*

The question then arises whether physicians in the U.S. who perform circumcisions also intend to deceive parents to obtain their permission. The practice has long been a surgical temptation<sup>417</sup> for U.S. physicians for financial reasons, and some (perhaps many) physicians in the U.S. perform the operation because it pays well.<sup>418</sup> Dr. Thomas Wiswell, a zealous circumcision advocate, admitted this when he stated that he had friends who are obstetricians who look at a foreskin and see a price tag on it, and the procedure does not take long either.<sup>419</sup> We suggest that many physicians who circumcise intentionally deceive parents, and thereby their sons and the public, about circumcision for personal financial gain.<sup>420</sup>

##### 1. The "Question"

Since the 1970s, it has been common for medical professionals in the United States to ask the parents of newborn boys whether they want to have their son circumcised or not (the "Question").<sup>421</sup> In legal terms, the "Question" is an offer to sell unnecessary genital surgery to the parents.<sup>422</sup> Such forms of solicitation are considered unethical by the AMA.<sup>423</sup> The "Question" forces parents to answer when they might well otherwise never have considered having their son circumcised.<sup>424</sup> Parents may not speak English well or at all.<sup>425</sup> If they do, they might understand

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<sup>417</sup> See generally *Darby Temptation*, *supra* note 46. To "tempt" is "to entice to do wrong by promise of pleasure or gain." Merriam-Webster dictionary.

<sup>418</sup> See *DOC Commentary*, *supra* note 260.

<sup>419</sup> *Id.*

<sup>420</sup> See *id.* at 7 ("To increase the income of their members, the [AAP is] willing to put healthy American boys under the circumcision knife and expose them all to the risks of any surgery, and the unique risks, harms, and losses of circumcision itself.").

<sup>421</sup> See *Adler Legal*, *supra* note 182, at 443.

<sup>422</sup> *Id.*

<sup>423</sup> AMA COUNCIL ETHICAL & JUD. AFFS., *THE CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS* 2.19 (1997).

<sup>424</sup> See J. Steven Svoboda, *fs*, *Tortured Doctrines: Informed Consent as a Legal Fiction Inapplicable to Neonatal Circumcision*, in *GENITAL CUTTING: PROTECTING CHILDREN FROM MEDICAL, CULTURAL, AND RELIGIOUS INFRINGEMENTS* 1, 7–8, 18–19 (George C. Denniston et al. eds., 2013) [hereinafter *Svoboda Tortured Bodies*].

<sup>425</sup> See Richard Robinson et al., *Consent for Non-Therapeutic Male Circumcision on Religious Grounds*, 91 *ANNALS ROYAL COLL. SURGEONS ENG.* 152, 152–53 (2009).

the “Question” to constitute a recommendation.<sup>426</sup> The “Question” falsely implies that circumcision is medicine, that parents have the right to elect it, that it is good or not bad for their son’s health to elect it, and that physicians are permitted to take orders from parents to perform it.<sup>427</sup> As exposed in this Article, none of those implied claims are true.<sup>428</sup>

The “Question” also may take the parents by surprise.<sup>429</sup> Physicians should know that this takes unfair advantage of the parents. Susan Blank, the chair of the AAP’s 2012 committee, stated in a press release that “[i]t’s a good idea to have this conversation during pregnancy . . . so you have time to make the decision,”<sup>430</sup> thus acknowledging that when asked in the hospital without having had this conversation before, some the parents might not have time or be able to make a fully informed decision.<sup>431</sup> Adults sometimes obtain a second opinion before consenting to surgery, but parents whose consent is solicited in the hospital will not have that option.<sup>432</sup> The mothers—who are recovering from labor, often on medications, after giving birth, and who are distracted by beginning to nurse their newborn son—may be legally incapacitated,<sup>433</sup> which physicians knowledgeable about medicine and accustomed to obtaining consent should know, but the mothers will not.<sup>434</sup> This is analogous to the obstetric violence that is common in Brazil, where many physicians advance specious reasons for Cesarean sections and episiotomies.<sup>435</sup> Fathers, who may be left to make the circumcision decision on their own, also may be tired, distracted, surprised, and unable to think clearly.<sup>436</sup> In addition, nurses and physicians are busy people, and they give parents only a few minutes to decide the fate of their son’s foreskin.<sup>437</sup>

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<sup>426</sup> Chris Ciesielski-Carlucci, Nancy Milliken & Neal H. Cohen, *Determinants of Decision Making for Circumcision* 5 CAMBRIDGE Q. HEALTHCARE ETHICS 228, 234 (1996).

<sup>427</sup> See Adler *Legal*, *supra* note 182, at 471–72.

<sup>428</sup> *Id.* at 472–73, 475–76.

<sup>429</sup> See *Svoboda Tortured Bodies*, *supra* note 424, at 19.

<sup>430</sup> AAP Press Release, *supra* note 271.

<sup>431</sup> See *Svoboda Tortured Bodies*, *supra* note 424, at 19.

<sup>432</sup> *Id.* at 8, 19.

<sup>433</sup> Legal incapacity is judicially determined following definitions from state-specific codes and statutes. See, e.g., In Re Estate of Card, 2001 WL 1335957 No. 224309 at \*1 (Oct. 30, 2001). Generally, however, legal incapacity is understood as the mental or physical inability to care for or consider something as fully required. BLACK’S LAW DICTIONARY (9th ed. 2009). We stipulate here that the period immediately after birth may qualify a woman for incapacity on the grounds that the process of childbirth is extremely exhausting, as well as physically, mentally, and emotionally taxing, and therefore potentially leading to a temporary impairment of the facilities required to make legally binding decisions.

<sup>434</sup> *Svoboda Tortured Bodies*, *supra* note 424, at 14–15, 19–20.

<sup>435</sup> Vanessa Barbara, *Hairy Baby? Better Get a C-section. Gingivitis? C-section. Scoliosis? C-section.*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/cesarean-section-childbirth-brazil.html> (“C-sections are routinely prescribed under an endless number of pretexts, many of them . . . implausible.”).

<sup>436</sup> See, e.g., *infra* note 454.

<sup>437</sup> *Svoboda Tortured Bodies*, *supra* note 424, at 19.

“[C]onsent, to be efficacious, must be free from imposition upon the patient. It is the settled rule that therapy not authorized by the patient may amount to a tort—a common law battery—by the physician.”<sup>438</sup>

## 2. The “Talk”

After asking parents the “Question,” medical professionals in most hospitals in the United States then give parents the “Talk.”<sup>439</sup> The “Talk” conveys the same pro-circumcision message as the Abstract of the AAP’s 2012 circumcision policy statement and press release announcing it.<sup>440</sup> As stated, physicians who circumcise are required to use their independent medical judgment about medical matters;<sup>441</sup> thus, they are not allowed to hide behind the false claims in the AAP’s 2012 guidelines described above.<sup>442</sup> Physicians know that any operation including MGC is painful and risks complications, and pediatricians and obstetricians know that there is opposition to the practice,<sup>443</sup> as protesters protest at the annual conferences that most attend, and sometimes outside hospitals, but physicians are unlikely to inform parents of those facts,<sup>444</sup> even though to be fully informed patients or their proxies must be given all

<sup>438</sup> *Canterbury v. Spence*, 464 F.2d 772, 783 (D.C. Cir. 1972).

<sup>439</sup> See *Adler Legal*, *supra* note 182, at 443.

<sup>440</sup> See *AAP Press Release*, *supra* note 271.

<sup>441</sup> See Hafemeister, *Just Say No*, *supra* note 114, at 367.

<sup>442</sup> See *id.* at 372–76.

<sup>443</sup> For example, at a circumcision protest in October 2016, the AAP’s bioethicist Douglas Diekema grabbed the video camera of a film maker and would have smashed it, had it not been attached to the photographer’s body. See American Circumcision Film, #AAP16: American Academy of Pediatrics Attempts to Silence Human Rights Protestors, AM. CIRCUMCISION (Oct. 31, 2016), <https://circumcisionmovie.com/2016/10/aap16-american-academy-pediatrics-attempts-silence-human-rights-protestors/>.

<sup>444</sup> For example, a physician at Brigham and Women’s Hospital in Boston, Massachusetts, which is affiliated with Harvard University, surprised one of the authors (Adler) and his wife, who was nursing at the time, with the “Question” the day after his son was born there on April 7, 1987. Adler had heard circumcision referred to as a snip and he visualized a painless and safe small snip of a piece of skin. In the “Talk,” the physician did not disclose that the foreskin is erogenous, that circumcision is painful, risky, and harmful, or that there is any opposition to the practice. The physician said that circumcision reduces the risk of UTIs, penile cancer, and sexually transmitted diseases, but that according to the American Academy of Pediatrics it is not medically justified because UTIs can be treated with antibiotics, penile cancer can be avoided by good penile hygiene, and STDs can be avoided by safe sex. The physician then said that some parents elect circumcision for religious, cultural, and personal reasons. Adler asked what do you mean, personal reasons? The physician answered that some parents want their son’s penis to look like the father’s penis. It seemed unlikely that the claim that parents have such a legal right could be true. That led to learning more about circumcision and decades later to writing this Article. When the physician asked if Adler had other questions, Adler asked, “Can’t my son decide for himself when he becomes an adult?” The physician replied that it is better to circumcise boys in infancy. Adler felt pressured and by that time had decided to decline the offer to circumcise. His son thanked him when he became an adult, and said “it is not rocket science,” meaning that it is clearly better to have a foreskin than to be circumcised.



information that might affect their decision. Consent forms may contain false claims as well.<sup>445</sup>

### 3. Coercion

In addition, nurses in hospitals may ask the parents of newborn boys on multiple occasions whether they want to have their son circumcised, pressing for an affirmative answer.<sup>446</sup> For example, J. Steven Svoboda, founder of Attorneys for the Rights of the Child, reports that when his son was born, nurses asked him and his wife that question on five separate occasions after they had said “no.”<sup>447</sup> Moreover, none of the nurses told Svoboda and his wife anything about the procedure. Svoboda became exasperated and told the nurse, “Don’t you know that it is unnecessary surgery?”, which the nurse should have been telling him because parents may not know it. The nurse replied, “I know.” Svoboda asked why she was soliciting the procedure, then, and her answer was, ‘Because parents want it,’<sup>448</sup> but Svoboda had not asked for it and did not want it.

In an often-cited case, *Canterbury v. Spence*, the court stated, “[it] is . . . clear that the consent, to be efficacious, must be free from imposition upon the patient. It is the settled rule that therapy not authorized by the patient may amount to a tort—a common law battery—by the physician.”<sup>449</sup> Badgering parents to persuade them to consent after they have declined constitutes unfair and deceptive conduct. Giving parents little or no information about circumcision, when they are entitled to be fully informed about any medical procedure on their child, including the diagnosis and the physician’s recommendation, also appears to be a fraudulent omission intended to deceive the parents into consenting.<sup>450</sup> Although nurses might wish to assert the defense that they simply take orders from their superiors, moves to place more of the informed consent and educational responsibilities on nurses also make them culpable.<sup>451</sup> The New Hampshire Board of Nursing has expressed concern about nurses engaging in deception in the provision of health care, including

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<sup>445</sup> For example, the circumcision consent form for Brigham and Women’s Hospital, a Harvard University hospital, states “there is still some medical controversy about the need for the procedure on a routine basis.” BWH Consent Form, *supra* note 356. This is a fraudulent claim: there is no medical need to circumcise boys on a routine basis or at all.

<sup>446</sup> See Adler, *supra* note 223, at 6; Adler Legal, *supra* note 182, at n.47.

<sup>447</sup> Personal communication from J. Steven Svoboda to Peter W. Adler March 10, 2020. Van Howe has personal knowledge that the practice is ubiquitous: such stories have been conveyed to him on multiple occasions.

<sup>448</sup> *Id.*

<sup>449</sup> *Canterbury v. Spence*, 464 F.2d 772, 782–83 (D.C. Cir. 1972).

<sup>450</sup> See Lauren Sardi & Kathy Livingston, *Parental Decision Making in Male Circumcision*, 40 AM. J. MATERNAL/CHILD NURSING 110, 114 (2015).

<sup>451</sup> *Id.* at 111–12, 114.

fraudulent behavior toward patients that may affect the nurses' ability to safely care for patients.<sup>452</sup> The board shared particular concern about children, noting that they are especially vulnerable. Physicians in the U.K. flout the law as well: a 2009 study concluded that "[t]he data reveal a consistent non-conformity with recommended practice and the common law."<sup>453</sup>

Thus, a variety of circumstantial evidence suggests that many physicians who circumcise intend to defraud parents and thereby their sons about circumcision.<sup>454</sup> Egregious examples include high pressure sales tactics, not disclosing that circumcision is painful and risky, assigning no value to the foreskin, and claiming that parents have the right to elect the procedure because they prefer the appearance of the circumcised penis.<sup>455</sup> The consequence is that parental permission is rarely, if ever, fully informed as the law requires. The consent is thus invalid, and the operation is a battery.<sup>456</sup> The German court held that because circumcision for non-medical reasons violates the child's rights to bodily integrity and self-determination, and the child's rights supersede the parents' rights, parental consent is always invalid,<sup>457</sup> and the result would be the same under U.S. law.

As discussed above, case law shows that intentional fraud consists in deception practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.<sup>458</sup> MGC meets that definition. Physicians and nurses mislead parents and thereby their sons about circumcision through the deceptive conduct and false and deceptive medical and legal representations and omissions enumerated above. They thereby induce the parents, acting on behalf of their sons, to consent to part with something of value (the foreskin of their son's penis) and to surrender a legal right (their son's right to keep the foreskin).<sup>459</sup>

## V. LITIGATING THE FRAUD CLAIMS

Litigation considerations are favorable to the plaintiffs.<sup>460</sup> Plaintiffs might include not only circumcised boys and men but also their parents,

<sup>452</sup> Office of Professional Licensure and Certification, New Hampshire Board of Nursing (June 25, 2020).

<sup>453</sup> Robinson et al., *supra* note 425, at 153.

<sup>454</sup> See J. Steven Svoboda, Peter W. Adler & Robert S. Van Howe, *Circumcision Is Unethical and Unlawful*, 44 J. L. MED. & ETHICS 263, 275, n.242 (2016).

<sup>455</sup> *Id.* at 275. See also Adler *Legal*, *supra* note 182, at 443.

<sup>456</sup> *Canterbury v. Spence*, 464 F.2d 772, 782–83, n.34 (D.C. Cir. 1972).

<sup>457</sup> *Cologne Decision*, *supra* note 103.

<sup>458</sup> *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984).

<sup>459</sup> *Id.*

<sup>460</sup> See J. Steven Svoboda, *Circumcision—A Victorian Relic Lacking Ethical, Medical or Legal Justification*, 3 AM. J. BIOETHICS 52, 53–54 (2003).

because as parents learn more about circumcision, they may come to regret having given their permission to have their son circumcised.<sup>461</sup>

### A. *Easier than a Malpractice Suit*

It is much easier for plaintiffs to bring a lawsuit for battery, breach of fiduciary duty, and constructive fraud than for medical malpractice, as such lawsuits avoid the requirements and problems of the latter such as the need for expert testimony.<sup>462</sup> These actions address “behaviors in which no physician should engage . . . [and] regardless of the explanation given for that behavior . . . [legal] consequences should flow.”<sup>463</sup> Further, because “the plaintiff need only show that the physician’s conduct violated basic rules of conduct regarding how all physicians are expected to act . . . expert testimony may not be required.”<sup>464</sup>

### B. *Longer Statute of Limitations*

The statute of limitations will likely be longer for the fraud claims than for battery.<sup>465</sup> For example, on appeal in *Neilsen v. Kazarian*, the court observed that the statute of limitations in California in 2019 was two years for battery and intentional infliction of emotional distress, but three years for fraud and four years for breach of fiduciary duty.<sup>466</sup> Importantly, the *Neilsen* court also held that the statute of limitations does not begin until the plaintiff discovers or has reason to discover the cause of action,<sup>467</sup> called the delayed discovery rule.<sup>468</sup> Likewise, the New York Court of Appeals noted in *Simcuski v. Saeli*, “[i]t is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.”<sup>469</sup> This markedly expands the number of potential plaintiffs to include men of any age who learn that a physician and hospital took the foreskin of their penis by intentional or constructive fraud.

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<sup>461</sup> *Id.*

<sup>462</sup> See Hafemeister, *Just Say No*, *supra* note 114, at 379–80, n.215.

<sup>463</sup> *Id.* at 379.

<sup>464</sup> *Id.* at 379–80.

<sup>465</sup> See *Neilsen v. Kazarian*, Nos. B284287, B287623, 2019 Cal. App. Unpub. LEXIS 1859 (Mar. 19, 2019).

<sup>466</sup> *Id.* Additionally, in *Remis v. Fried*, a New York court stated that the statute of limitations was three years for negligent misrepresentation but “the longer of six years from the wrongful conduct or two years from when the party knew, or should have discovered, the fraud.” See 930 N.Y.S.2d 176, 176 (N.Y. Sup. Ct. 2011).

<sup>467</sup> See *Neilsen*, *supra* note 465, at 7; see also *WA Southwest 2, LLC v. First A. Title Ins. Co.*, 240 Cal. App. 4th 148, 156 (Cal. Ct. App. 2015).

<sup>468</sup> *Id.*

<sup>469</sup> *Simcuski v. Saeli*, 44 N.Y.2d 442, 448–49 (N.Y. 1978) (internal citations omitted).

### C. Right to Summary Judgment

In the aforementioned 2012 German case, the court held that circumcision is a battery without conducting a trial.<sup>470</sup> In the 2016 United Kingdom case, the court also held that boys have a right to decide the fate of the foreskin for themselves without a trial.<sup>471</sup> As it has already been discussed in this paper, it is straightforward that it is unlawful to bill Medicaid for MGC.<sup>472</sup> While it has not yet been decided within the U.S., given these outcomes and our analogous reasoning, plaintiffs should be entitled to summary judgment on those claims.

### D. Prior Admissions

In the past, physicians in the U.S. and the AAP have made many statements favorable to the plaintiffs that could be used against them if they take a contrary position without justifying the change. For example, in the AAP's circumcision policy statements or guidelines between 1971 and 2012, the AAP has stated the following: circumcision is not medically indicated;<sup>473</sup> circumcision is a non-therapeutic elective procedure;<sup>474</sup> "phimosis of the newborn" is not a valid medical indication for circumcision;<sup>475</sup> the "skin is a protective organ, and any break in its integrity affords an opportunity for infection," and the circumcision site is an open surgical wound;<sup>476</sup> "local anesthesia adds an element of risk;"<sup>477</sup> the "immediate hazards of circumcision of the newborn include local infection which may progress to septicemia, significant hemorrhage, and mutilation;"<sup>478</sup> although the AAP claims that "significant acute complications are rare" and that the benefits outweigh the risks, the AAP states that it does not the incidence of complications;<sup>479</sup> "[s]ome forms of FGC are less extensive than the newborn male circumcision;"<sup>480</sup> MGC may reduce penile sensation and sexual satisfaction;<sup>481</sup> "behavioral factors appear to be far more important than circumcision status" in preventing STIs and HIV;<sup>482</sup> "[a] program of education leading

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<sup>470</sup> See *Cologne Decision*, *supra* note 103.

<sup>471</sup> Re L and B (Children) [2016] EWHC 849 [143].

<sup>472</sup> See generally Adler Medicaid, *supra* note 161, at 353.

<sup>473</sup> 1971 AAP Statement, *supra* note 252.

<sup>474</sup> 1989 AAP Statement, *supra* note 386; see also Oh W, Merenstein G. *Fourth Edition of the Guidelines for Perinatal Care: Summary of Changes*, 100 PEDIATRICS 1021 (1997).

<sup>475</sup> 1975 AAP Statement, *supra* note 38.

<sup>476</sup> COMM. ON FETUS & NEWBORN, STANDARDS AND RECOMMENDATIONS FOR HOSPITAL CARE OF NEWBORN INFANTS 121 (6th ed. 1977) [hereinafter 1977 AAP STATEMENT].

<sup>477</sup> 1989 AAP Statement, *supra* note 386.

<sup>478</sup> 1975 AAP Statement, *supra* note 38.

<sup>479</sup> 2012 AAP Technical Report, *supra* note 39, at e772.

<sup>480</sup> *Female Minors*, *supra* note 364, at 1089.

<sup>481</sup> 1999 AAP Statement, *supra* note 311.

<sup>482</sup> *Id.*

to continuing good personal hygiene would offer all the advantages of circumcision without the attendant surgical risk”;<sup>483</sup> and the benefits are not great enough to recommend it as a routine procedure.<sup>484</sup>

### *E. Damages May Be Large, Multiplied, and Uninsured*

Attorneys for the Rights of the Child has published a list of judgments and settlements involving negligently performed or so-called botched circumcisions,<sup>485</sup> for which the damages can be large.<sup>486</sup> Even a properly performed circumcision gives rise to damages for pain and suffering and for the lost value of the foreskin,<sup>487</sup> which in our view is large. Faithless fiduciaries must make good the full amount of the loss that their breach has caused.<sup>488</sup> In business cases, plaintiffs who prevail on claims arising from breach of trust are also entitled to lost profits.<sup>489</sup> Given that unnecessary surgery unjustly enriches physicians at the expense of their patients, plaintiffs would likely be entitled to recover the physician’s and hospital’s profits from the operation. Furthermore, if the hospital sold the foreskin to a pharmaceutical or cosmetics company, the profits from its unlawful resale would also likely be recoverable.<sup>490</sup>

In addition, in some states, physicians can be held liable for multiple and/or punitive damages for battery—for example, where there is wanton or reckless disregard for a person’s rights including the preservation of health and life,<sup>491</sup> even if evil intent to harm the patient is lacking.<sup>492</sup> In our view, then, MGC does constitute wanton and reckless disregard for boys’ rights and the preservation of the health and life of boys and men. The Supreme Court has observed that punitive damages for wrongful conduct have long been a part of state tort law and that their purpose is compensation, punishment, and deterrence.<sup>493</sup> The Restate-

<sup>483</sup> 1975 AAP Statement, *supra* note 38.

<sup>484</sup> 2012 AAP Statement, *supra* note 187.

<sup>485</sup> *Legal Victories*, ATT’YS FOR RTS. CHILD, <https://www.arclaw.org/resources/legal-victories> (last visited Jun 7, 2020).

<sup>486</sup> *Id.*

<sup>487</sup> LEGAL INFO. INST., *supra* note 203.

<sup>488</sup> Prince v. Harting, 177 Cal. App. 2d 720, 731 (Cal. Ct. App. 1960).

<sup>489</sup> *Id.* at 731 (“[A] faithless fiduciary must repay to the beneficiary of his fiduciary duties the entire profit that he has caused the beneficiary to lose.”).

<sup>490</sup> *See supra* note 260.

<sup>491</sup> *See, e.g.,* James D. Ghiardi, *Punitive Damages in Wisconsin*, 60 MARQ. L. REV. 753, 757 (1977) (citing Kink v. Combs, 135 N.W.2d 789 (1965)). In Noe v. Kaiser Foundation Hosp., an Oregon court observed that where there has been a particularly aggravated disregard by a member of the medical profession of his professional duties (preservation of life and health), punitive damages are appropriate, in part to deter such conduct. 248 Or. 420, 424–25 (Or. 1967).

<sup>492</sup> *See generally* Noe, *supra* note 491, at 424–25.

<sup>493</sup> Pacific Mut. Life Ins. Co. v. Haslip et al., 499 U.S. 1, 15 (1991) (internal citation omitted).

ment (Second) of Torts § 908(2) provides: “In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to plaintiff that the defendant has caused or intended to cause and the wealth of the defendant.”<sup>494</sup> Thus, courts can award punitive damages large enough to end the practice of circumcision (and we suggest that they should).

Some consumer protection acts provide that when an unfair and deceptive act or practice has injured numerous other similarly situated individuals, any injured person can bring a class action lawsuit on behalf of the class.<sup>495</sup> Plaintiffs’ lawyers have a powerful financial incentive to bring such suits in the U.S., where an estimated 80% of males now living (roughly 132 million males) are circumcised. Because the statute of limitations in fraud suits in some states begins upon discovery,<sup>496</sup> many of those males could be part of the class. A successful class action lawsuit would be the quickest way to end the practice.

Finally, in *Cobbs v. Grant*, the court observed that physicians held liable for the intentional tort of battery might not be covered by malpractice insurance.<sup>497</sup> Depending upon the state, the physician might not be covered for any of the claims discussed in this Article because malpractice insurers are insuring against negligently performed operations, not against operations that should not have been performed at all.<sup>498</sup> Moreover, malpractice insurance contracts may expressly exclude fraud claims.<sup>499</sup> Physicians who perform MGC also risk incarceration for child abuse<sup>500</sup> and Medicaid fraud.<sup>501</sup>

## CONCLUSION AND RECOMMENDATIONS

It is a very good thing to be genitally intact, and a very bad thing to have one’s healthy genitals cut without one’s own consent. In any event, since there is no medical indication for male or female genital cutting<sup>502</sup>

<sup>494</sup> AM. LAW INST., RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

<sup>495</sup> See, e.g., Mass. Gen. Laws Ann. ch. 93A, Section 11. See generally *Class Action*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/class\\_action](https://www.law.cornell.edu/wex/class_action).

<sup>496</sup> *Statutes of Limitations and the Discovery Rule*, JUSTIA, <https://www.justia.com/injury/medical-malpractice/statutes-of-limitations-and-the-discovery-rule/> (last visited 4/10/2020).

<sup>497</sup> *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972).

<sup>498</sup> Miller, *supra* note 204, at 498.

<sup>499</sup> See, e.g., *Chart of Punitive Damages by State*, McCULLOUGH CAMPBELL & LANE, LLP, [https://www.mcandl.com/puni\\_chart.html](https://www.mcandl.com/puni_chart.html) (displaying a chart prepared by a law firm showing punitive damages by state and stating that “punitive damages are insurable unless awarded for intentional conduct”).

<sup>500</sup> See, e.g., Mass. Gen. Laws Ann. ch. 265, § 13J (2 ½ to 5 years for battery causing bodily injury and 2 ½ to 15 years for causing substantial bodily injury).

<sup>501</sup> See 18 U.S.C. § 287; 18 U.S.C. §1001; and 18 U.S. Code § 1347.

<sup>502</sup> See *supra* note 254.

and it is ethically<sup>503</sup> and legally proscribed,<sup>504</sup> it crosses a line that physicians must not cross.<sup>505</sup> Physicians in the U.S. will never meet their burden of justifying it. Circumcision is an abuse of a physician's power and breach of trust;<sup>506</sup> the innumerable sometimes plainly specious claims made in favor of it since the Nineteenth Century are pretextual; and what physicians fail to disclose—such as that the foreskin is the most sensitive part of the penis, that the AAP committee on pain has warned against causing pain to infants, that boys are often circumcised without anesthetics, that circumcision risks many severe injuries and can be fatal, and that many men resent having been circumcised—is inexcusable. MGC and FGC give rise to causes of action for battery,<sup>507</sup> breach of fiduciary duty and constructive fraud,<sup>508</sup> Medicaid fraud,<sup>509</sup> and intentional fraud in inducing consent.<sup>510</sup>

Physicians have an ethical and legal duty to stop circumcising boys, and nurses have a duty to stop assisting them. Physicians and hospitals are not allowed to bill Medicaid for it, and federal and state Medicaid officials in turn have a legal duty to stop reimbursing physicians and hospitals for non-therapeutic circumcision. States should prosecute child abuse, and federal and state legislators should issue a gender-neutral bans against unnecessary genital cutting.

None of this has happened, however, as physicians continue to promote the practice and parents and the public believe their claims. Lawsuits by men who are angry to have been circumcised as boys, by regretful parents who were pressured and not fully informed about the risks and harms, and a class action lawsuit (if a class can be certified) are needed to speed the inevitable demise of the circumcision industry and thereby end the substantial harm that circumcision causes to boys and men.

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<sup>503</sup> See *supra* Part I.B.

<sup>504</sup> See *supra* Parts I.B, II, and III.

<sup>505</sup> See *supra* note 129.

<sup>506</sup> See *supra* Part II.

<sup>507</sup> See *supra* Part I.

<sup>508</sup> See *supra* Part II.A and II.B.

<sup>509</sup> See *supra* Part III.

<sup>510</sup> See *supra* Part IV.