JOURNAL OF FAMILY LAW
University of Louisville School of Law

Volume Twenty-three 1984-85 Number Three

CIRCUMCISION AS CHILD ABUSE: THE LEGAL AND CONSTITUTIONAL ISSUES

by William E. Brigman*

I. INTRODUCTION

> The maltreatment of children is as old as recorded history. Infanticide, ritual sacrifice, exposure, mutilation, abandonment, brutal discipline and the near slavery of child labor have existed in all cultures at different periods, and have been justified by disparate beliefs—that they were necessary to placate a god, to expel spirits, to maintain the stability of a race or simply to inculcate learning. Practices viewed today as vicitimizing children were accepted for long periods in civilized communities as "in the best interest" of society. The Spartans with their exposure of infants, the English and New England owners of factories partly "manned" by children of eight or ten, the Southern slave owners, were all convinced that their treatment was beneficial to the community and perhaps to the children themselves.[1]

Despite the great concern about child abuse among scholars and legislators in the past twenty years, the same type of cultural astigmatism which prevented past generations from perceiving their actions as child abuse prevents contemporary Americans from perceiving or acknowledging the most widespread form of child abuse in society today: child mutilation through routine neonatal circumcision of males. In a society

* Assistant Professor, specializing in the relationship of law and society, public law and the American judicial system. University of Houston—Downtown. B.A., 1958, Ph.D., 1966, University of North Carolina.

[1] Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L. Q. 1,3 (1975).

in which over 89% of all males are circumcised within a few hours of birth, it may be difficult to conceive of circumcision as mutilation. However, from the perspective of a neutral outsider, neonatal circumsision is as barbarous as female circumcision, the removal of earlobes, fingers or toes, the binding of infant female feet or other disfiguring practices around the world.

Since 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 burn, carries 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. This paper will examine the medical and psychological case against routine neonatal circumcision and discuss the potential legal and constitutional barriers to treating the practice as child abuse.

II. History and Practice of Circumcision

Male circumcision has three forms: 1) simple circumcision, which involves only the removal of the foreskin or prepuce; 2) subincision (also known as arilthа), found among Australian aborigines, which involves longitudinally cutting the urethra from the glans to the scrotum and opening the urethral canal, giving the penis a flat and sometimes bifurcated appearance; and 3) superincision, used in Polynesia, which involves longitudinally cutting the preputium from the upper surface and extending the cut to the pubic region.[2]

While male circumcision is a relatively common practice, female circumcision of various types is not so widespread; it is not surprising that such mutilation is normally found only in preliterate societies.[3]

Circumcision may be the oldest form of surgery.[4] The Egyptians, who probably acquired the practice from African tribes, practiced circumcision as early as 4000 B.C., and it was common practice in Egypt in 2400 B.C. In the Jewish religion, the origin of circumcision is attributed to Abraham, who established a "blood covenant" with God

---

[2] *See* 3 Encyclopedia of Religion and Ethics 659, 660 (J. Hasting ed. 1951).

[3] *Id.* at 667-69.

[4] *See generally id.* at 670-80. *See also* Zimmerman, *Origin and Significance of the Jewish Rite of Circumcision*, 38 Psychoanalytic Rev. 103 (1951); R. Romberg, Circumcision (forthcoming); E. Wallerstein, Circumcision: An American Health Fallacy (1980).

through circumcision. The practice is also part of the pre-Islamic Arabic tradition and became a near prerequisite to becoming a Moslem. The practice is very widespread and is unknown only to Indo-Germanic people, the Mongols, and non-Moslem Finno-Ugrian races. Circumcision, although known, is not widely practiced in India.[5]

Anthropologists,[6] psychologists, and psychiatrists[7] have offered a variety of explanations for the practice: enhanced or decreased sexual performance, societal prestige, sacrifice to fertility gods, tribal signs, tests for endurance, reincarnation, and hygienic reasons. However, with the exception of Jews, for whom circumcision has long been a tribal sign, widespread circumcision in the United States appears to be largely a late nineteenth-century development. For non-Jews, it serves neither as a means of tribal integration, or separation and identification, nor as an initiation rite to establish male identity. The customary justification for the mutilation is hygienic, but it seems to have been primarily grounded in anti-masturbation hysteria of the late 1800's. It was feared that the boy with a foreskin which had to be pulled back while cleaning would learn to masturbate—a practice widely believed to lead to insanity and numerous other illnesses.[8]

With the blessing and active cooperation of the medical profession, removal of the foreskin of newborns became part of standard hospital practice. The exact number of neonatal circumcisions performed each year is unknown since no systematic record is kept of ritual, religious or medical circumcisions. However, informed estimates are that 80% to 90% of all male infants are routinely circumcised. For example, George Washington University Medical Center reported that 79% of male infants were circumcised between 1978 and 1980;[9] the

---

[5] 3 ENCYCLOPEDIA OF RELIGION AND ETHICS, *supra* note 2, at 659.

[6] Kitahara, *Social Contact Versus Bodily Contact: A Qualitative Difference Between Father and Mother for the Son's Masculine Identity*, 13 BEHAV'L. SCI. RESEARCH 273 (1978); Kitahara, *Significance of the Father for the Son's Masculine Identity*, 10 BEHAV'L. SCI. RESEARCH 1 (1975).

[7] *See* B. BETTELHEIM, SYMBOLIC WOUNDS (1954); S. Freud, *Totem and Taboo* (1913) in BASIC WRITINGS OF SIGMUND FREUD (A. Brill ed. 1938); S. FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS (1933); T. REIK, RITUAL (1946); Daly, *The Psycho-biological Origins of Circumcision*, 31 INT'L J. PSYCHOANALYSIS 217 (1950); Nunberg, *Circumcision and Problems of Bisexuality*, 28 INT'L J. PSYCHOANALYSIS 145 (1947).

[8] E. WALLERSTEIN, *supra* note 4, at 13, 32-38; T. SZASZ, THE MANUFACTURE OF MADNESS Ch. 11 (1970).

[9] Letter to the Editor from H. Bennet, M.D. 68 PEDIATRICS 750 (1981).

largest hospital in Salt Lake County, Utah, reported an average circumcision rate of 92% from 1975 to 1979;[10] and a survey of physicians in 1981 found that 80% of them believed that over 90% of their male patients were circumcised.[11]

III. The Case Against Routine Neonatal Circumcision

Although physicians were early proponents of circumcision for hygienic reasons, the preponderance of medical opinion today is opposed to the practice. A major development in the move away from routine circumcision occurred in 1949 when *The British Medical Journal* published a study by Dr. Douglas Gairdner which informed physicians that it was perfectly normal for an infant's prepuce (foreskin) to be nonretractable for up to four years and that nonretractability of the foreskin was therefore not a justification for circumcision.[12] Not only is routine surgery unwarranted, but an article published in 1966 in *The Canadian Medical Association Journal* reported a complication rate running as high as 55% for hospital-performed routine neonatal circumcisions.[13] Other studies showed that approximately 10% of all circumcisions had to be repeated.[14] While most of the surgical complications were minor, Dr. Robert L. Baker, writing in a 1979 issue of *Sexual Medicine Today* calculated that 229 infants died in the United States per year as a result of circumcision.[15]

In 1970 the *Journal of the American Medical Association* published a well-documented study entitled *Whither the Foreskin?* which concluded that "circumcision of the newborn is a procedure that should no longer be considered routine."[16] The following year the Committee on the Fetus and the Newborn of the American Academy of Pediatrics concluded that there were no valid medical reasons for routine neonatal circumcision. That position was reaffirmed by its Ad Hoc Task Force

---

[10] Letter to the Editor from L. Osborn, M.D., *id.*

[11] Osborn, Metcalf & Mariani, *Hygienic Care in Uncircumcised Infants*, 67 Pediatrics 365 (1981).

[12] Gairdner, *The Fate of the Foreskin*, 1949(2) British Med. J. 1433.

[13] Patel, *The Problem of Routine Circumcision*, 95 Can. Med. A. J. 576, 580 (1966).

[14] *Id.*

[15] Baker, *Newborn Male Circumcision: Needless and Dangerous*, Sexual Med. Today, Nov. 1979, at 35.

[16] Preston, *Whither the Foreskin? A Consideration of Routine Neonatal Circumcision*, 213 J.A.M.A. 1853, 1858 (1970).

on Circumcision.[17] The *British Medical Journal*, which had given birth to the movement with its 1949 article, officially stated *The Case Against Circumcision* in May, 1979. It pointed out that while over 80% of American males are circumcised, only 6% of male infants in England and Wales undergo the practice and that circumcision is virtually unknown in Scandinavia, with no adverse effects seen in the unshorn.[18]

Amazingly, it has been argued that the infant suffers little or no pain in the circumcision process. The evidence which is offered is that in the ritual Jewish circumcision, the infant, who is given an alcohol teat during surgery, cries little and almost immediately goes to sleep. That argument shows an ignorance of the effects of alcohol on infants and fails to acknowledge that "sleep" may be response to pain. Studies of infants circumcised in hospitals show that the surgery is physiologically stressful. Talbert and others examined adrenal-cortical response to circumcision and found responses congruent with severe stress.[19] Three studies of non-REM sleep patterns following circumcision of infants lead to the same conclusion.[20] Although there is some disagreement as to the effect of the intervening variable of wakefulness (itself a stress indicator), the studies clearly demonstrate a pattern of sleep disorganization consistent with major physical stress.

The potential long-term physiological and psychological consequences of circumcision are not known.

> This lack of information is particularly troubling, since the human brain is especially vulnerable to both exogenous and endogenous influences during the interval from the latter part of pregnancy to about 18 months of age. Since animal studies reveal long-term behavioral, physiological, anatomical and neuro-pharmacological effects of minor events in early life, the effects of circumcision on newborns should not be considered short-lived in the absence of evidence to the contrary.[21]

---

[17] Committee on the Fetus and the Newborn, *Report of the Ad Hoc Task Force on Circumcision*, 56 PEDIATRICS 610 (1975).

[18] *The Case Against Neonatal Circumcision*, 1979(1) BRIT. MED. J. 1163-64.

[19] Talbert, Kraybill & Potter, *Adrenal Cortical Response to Circumcision in the Neonate*, 48 OB. & GYN. 208 (1976).

[20] Anders & Chalemain, *The Effects of Circumcision on Sleep-Wake States in Human Neonates*, 36 PSYCHOSOMATIC MED. 174 (1974); Brackbill, *Continuous Stimulation and Arousal Level in Infancy: Effects of Stimulus Intensity and Stress*, 46 CHILD DEV. 364 (1975); Emde, Harmon, Metcalf, Koenig & Wagonfeld, *Stress and Neonatal Sleep*, 33 PSYCHOSOMATIC MED. 491 (1971).

[21] Grimes, *Routine Circumcision Reconsidered*, 80 AM. J. NURSING 108, 109 (1980).

There are no adequate studies of the effect of circumcision on later sexual performance and attitudes. In a 1959 study, Dr. Winkelman of the Mayo Clinic contended that the foreskin itself is a specific type of erogenous zone and that its removal was significant:

> [T]he specific type of erogenous zone is found in the mucocutaneous regions of the body. Such specific sites of acute sensation in the body are the genital regions, including the prepuce, penis, clitoris, and external genitalia of the female, and the peri-anal skin, lip, nipple and conjunctiva. It is the special anatomy of these regions that requires the use of the term "specific" when one speaks of erotic sensations originating in the skin. This anatomy favors acute perception.[22]

Similarly, Dr. John Foley argues that "after circumcision when the glans is exposed to soiled diapers and rough clothing, this membrane becomes ten times thicker, and the free nerve-endings disappear. The surface becomes covered with an adherent layer of dead cells, rough, dry and insensitive."[23]

To the contrary, however, Masters and Johnson found no significant differences in sensitivity of thirty-five non-circumcised and thirty-five circumcised males of similar ages. "Routine neurologic testing for both exterceptive and light tactile discrimination were conducted on the ventral and dorsal surfaces of the penile body, with particular attention directed toward the glans. No clinically significant difference could be established between the circumcised and uncircumcised glans...."[24]

Even if the findings of Masters and Johnson are accepted as conclusive, they merely establish that later sensitivity of the glans is not diminished. Their findings do not reach the critical objection that routine circumcision at birth is an unwarranted cruelty.

IV. Constitutional and Legal Issues

Since circumcision is medically unwarranted mutilation and disfigurement, it would appear to be a clear case of child abuse. A literal reading of criminal statutes gives that impression since mayhem,

---

[22] Winkelman, *The Erogenous Zones: Their Nerve Supply and Its Significance*, 34 Proc. Staff Meetings Mayo Clinic, Jan. 21, 1959, at 39.

[23] Foley, *The Unkindest Cut of All*, Fact Magazine, July-Aug. 1966, at 3, 7.

[24] W. Masters & V. Johnson, Human Sexual Response 190 (1966).

assault and battery, even when committed by parents or physicians, are punishable crimes in every state criminal code. Furthermore, child abuse, commonly defined as the intentional, non-accidental use of physical force that results 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."[25] The code goes on to state:

> [A]ny person who wilfully inflicts upon any child any ... injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3, or 4 years or in the county jail for not more than one year.[26]

However, before it can be concluded that the state can, should, or has already outlawed the practice of circumcision through the adoption of general criminal statutes or child abuse statutes, the contemporary state of child abuse law and the social and religious views toward circumcision necessitate analysis of several major constitutional and legal issues, including the constitutional rights of parents, the nature of the family and its relationship to the state, and the right to privacy.

A. The Constitutional Rights of Parents and Family Autonomy

Parental rights to the custody and control of their minor children are as old as civilization itself. Thomas Aquinas used the education of one's offspring as one of the most obvious examples of the operation of natural law.[27] Modern judges refer to parents' custodial rights as "sacred," as a matter of "natural law,"[28] and as "inherent natural rights, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed."[29]

Because the right to bear and raise children is so basic, some believe it antedates the state.

---

[25] CAL. PENAL CODE § 11165(g) (West 1982).

[26] CAL. PENAL CODE § 273(d) (West Supp. 1984).

[27] T. Aquinas, *Summa Theologica, Treatise on Law, Question 94*, in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS 772 (A. Pegis ed. 1945).

[28] People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952).

[29] Lacher v. Venus, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922).

> Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society than the assumption that it is the individual who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families.
>
> . . .
>
> ...[T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.[30]

For this reason, as well as because of the historical exclusion of family matters from the concern of the state, there has been great reluctance on the part of the courts to become involved in family governance. The position is well stated by the New York Court of Appeals:

> The court cannot regulate by its processes the internal affairs of the home. Disputes between parents when it [sic] does not involve anything immoral or harmful to the welfare of the child is [sic] beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.[31]

The rights of parents to the care and custody of their children is not expressly stated in the Constitution. However, the United States Supreme Court has upheld the fundamental right of family integrity and recognized that there exists a private realm of family life beyond state control. Significantly, the Court has not yet decided a case which it perceived as presenting a clear conflict between the rights of the parent and the child.

Many of the cases which uphold parental rights are based upon

---

[30] Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 772-73 (1973).

[31] People *ex rel.* Sisson v. Sisson, 245 A. D. 151, 155, 285 N.Y.S. 41, 44-45 (1936).

a preference for traditional parent-controlled family life and involve parental rights to control the education of their children. The first major case was *Meyer v. Nebraska*[32] in which the Court, in striking down a law prohibiting the teaching of German in the public schools, specifically addressed the rights of parents to control their children's education. The Court held that the due process clause of the fourteenth amendment included the right to "marry, establish a home, and bring up children."[33] Two years later in *Pierce v. Society of Sisters*,[34] the Court struck down an Oregon compulsory school-attendance law which effectively outlawed private schools. Justice McReynolds, speaking for the Court, argued that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[35]

In one of the few non-education, non-religious cases touching on parental rights, *May v. Anderson*,[36] the Supreme Court stated that one of the most fundamental rights is the "immediate right to the care, custody, management and companionship of ... minor children."[37] Using this logic, the Court held that a sister state did not have to honor an ex parte Wisconsin custody decree.

In *Ginsberg v. New York*[38] a majority of the Court justified a law prohibiting the sale of pornography to a minor on the grounds that the law supplemented parental guidance which was not always present. In clear obiter dicta it stated that "[c]onstitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic to the structure of the society."[39] Since the Court could have easily upheld the law without reference to parental authority, the dicta serve as an indication of the depth of judicial feeling on the subject of parental rights.

Perhaps the strongest statement by the Supreme Court is found

---

[32] 262 U.S. 390 (1923).
[33] *Id.* at 399.
[34] 268 U.S. 510 (1925).
[35] *Id.* at 535.
[36] 345 U.S. 528 (1953).
[37] *Id.* at 533.
[38] 390 U.S. 629 (1968).
[39] *Id.* at 639.

in *Stanley v. Illinois*[40] which struck down a state law depriving fathers of the custody of their illegitimate children after the death of the mother. The Court noted that it had

> frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious ... than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Nineteenth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965)(Goldberg, J., concurring).[41]

Stanley made it very clear that the mere assertion of a parens patriae interest in the protection of the child was insufficient to warrant abridgement of parental rights unless the potential harm to the child was significant. The opinion in *Griswold v. Connecticut*,[42] which gave married couples access to contraceptive devices and information, is based on the constitutional status of the home and family as well as the right to privacy:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence from the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.... The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.[43]

---

[40] 405 U.S. 645 (1972).

[41] *Id.* at 651.

[42] 381 U.S. 479, (1965).

[43] *Id.* at 495 (Goldberg, J., concurring)(quoting Poe v. Ullman, 367 U.S. 497, 551-52 (1961)).

The relationship of the right to privacy to the circumcision issue will be addressed in Section C of this discussion.

The generalized claims of parental constitutional rights have not been without challenge; courts at all levels of the judicial hierarchy have occasionally intruded into the family relationship to protect children. The most important Supreme Court cases reflecting state and judicial intervention are *Prince v. Massachusetts*,[44] and the cases involving the rights of teenage females to have abortions.[45] In *Prince*, the Court sustained the conviction of a Jehovah's Witness for violating a state law prohibiting street solicitation by children. The Court explicitly rejected the mother's due process and religious freedom arguments. It also refused to accept the mother's claim on behalf of the nine-year-old girl who had enthusiastically volunteered to sell religious tracts in public streets. While acknowledging that there were "sacred private interests" associated with the mother's claims, the Court held that the state had the power to limit parental control in the interest of children. The essence of the opinion is captured in the statement that "[p]arents may be free to become martyrs themselves. But it does not follow they are free ... to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[46]

On first impression, *Prince v.Massachusetts* appears to have been significantly narrowed in 1972 by *Wisconsin v. Yoder*[47] which upheld Amish parents' rights to refuse to educate their children beyond the eighth grade. The freedom of parents to impose their values on their children, which had been elaborated upon in *Meyer* and *Pierce* and restricted in *Prince*, was very broadly restated in *Yoder*, especially when those parental values are based on a strong and distinct religious belief. Implying that the Court might have taken a different view if it had not been convinced of the sincerity of the parents' beliefs, Chief Justice Burger relied heavily on *Pierce* and the "history and culture of Western civilization [which] reflect[s] a strong tradition of parental concern for the nurture and upbringing of their children."[48]

---

[44] 321 U.S. 158 (1944).

[45] Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Serv. Int'l., 431 U.S. 678 (1977).

[46] *Prince*, 321 U.S. at 170.

[47] 406 U.S. 205 (1972).

[48] *Id.* at 232.

Under *Yoder*, parental authority and discretion may be challenged only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[49] The *Yoder* Court specifically pointed to the *Georgetown College* case,[50] which allowed the giving of a transfusion contrary to the wishes of the parents, as an example of the kind of situation in which child jeopardy might warrant interference with parental authority.

Is the assertion of parental rights in *Wisconsin v. Yoder* a barrier to state intervention to prevent circumcision? The answer is a clear "no" in cases where religious convictions are not involved. *Yoder* is controlling, if at all, in those *criminal* cases in which parents are being prosecuted for refusal to perform an act which is contrary to their strongly held religious beliefs. At most, *Yoder* creates an exception to the general rule stated in *Prince v. Massachusetts* that parents' actions harmful to their children are actionable in courts. The heavy emphasis on the great sincerity and the exceptional religious beliefs of the Amish in *Yoder* clearly requires limiting the case to similar situations.

Furthermore, the majority in *Yoder* explicitly noted that the rights of the parents and not the rights of the children were being decided:

> Contrary to the suggestion of the dissenting opinion ... our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent.[51]

Because the Court explicitly refused to consider the rights of the children involved in the controversy, or to determine if their interests were contrary to those of their parents, the Court effectively limited the precedential value of *Yoder* to those cases where parents and their children do not have conflicting interests. *Yoder* was decided in a vacuum in which the harm to the child was either hypothetical or not established. The Court seemed to assume, as Justice Douglas pointed out in dissent, that all Amish children would remain in Amish communities (although the evidence was to the contrary) and therefore might

---

[49] *Id.* at 234.

[50] Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

[51] *Yoder*, 406 U.S. at 230-31.

not suffer detriment from the imposition of parental values.

Such a conclusion, and a resultant avoidance of a determination of children's rights, is not possible with regard to circumcision. Once a child is subjected to circumcision, painful and medically unwarranted disfigurement is inevitable, affecting every child on whose behalf the choice is made. Moreover, the loss of education can be at least partially remedied at a later point. Circumcision is irreversible. These factors distinguish circumcision from the denial of education involved in *Yoder* and make the case inapplicable as a precedent. *Prince v. Massachusetts* is the controlling precedent, and parents who impose the unnecessary pain and suffering of circumcision on their children can be made answerable to state law.

B. Freedom of Religion

Assuming arguendo that the state can outlaw circumcision under its general criminal laws and/or child abuse statutes, must it provide a religious exception for members of those religious sects for whom the practice is an essential part of the religion? A specific analysis of this issue is necessary because of the importance of circumcision in the Jewish and Muslim religions. It requires an evaluation of the cases decided under the religion clause of the first amendment to determine the basis for which religious groups have been granted exemptions from general law.

The first major constitutional conflict between free exercise of religion and secular law reached the Supreme Court in *Reynolds v. United States*[52] and involved the prosecution of a Mormon for bigamy. The Court distinguished between religious beliefs and religious practices and ruled that while the government could not interfere with religious beliefs, it could limit practices performed in the name of religion that were harmful to society. To rule otherwise, according to the Court, would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[53]

Since the *Reynolds* decision in 1878, the belief-action dichotomy has been used to regulate activities which the state thought harmful to the participants or to the public. Thus, freedom of religion cannot

---

[52] 98 U.S. 145 (1878).
[53] *Id.* at 167.

be a pretext for engaging in commercial fortune telling; it cannot be used as a guide for the unlicensed practice of medicine despite the sincere belief of its practitioners; it cannot be used to void local anti-noise ordinances; it presents no protection against prosecution for fraud other than to diminish intent; and, most relevant for our purposes, religious freedom has not been an adequate defense against a state law specifically outlawing the handling of poisonous and non-poisonous snakes as an integral, essential part of a religious service.[54]

A second group of cases has involved attempts to force Jehovah's Witnesses to comply with state laws on a variety of subjects. In the first case to apply the free exercise clause through the fourteenth amendment, *Cantwell v. Connecticut*,[55] the Supreme Court found that a state could not prosecute a Jehovah's Witness for soliciting money without a permit. In *Board of Education v. Barnette*,[56] the Supreme Court invalidated statutes requiring Jehovah's Witness children to salute the flag in public schools. The reasoning of the Court in the *Barnette* case is important for the present discussion. The Court found that the flag salute statute violated the religious establishment and free exercise clauses of the first amendment and emphasized that *the refusal to salute would have no effect on others*. This impact test is important and we will return to it later.

In the "Sunday Closing" cases,[57] the Court upheld a group of state laws which placed heavy economic burdens on Orthodox Jews, Sabbatarians, and others whose religions already required them to abstain from work on Saturday. Disagreeing with a dissenting Justice Brennan, who argued that the Sunday closing laws required the religious to choose between their business and their religion, the majority argued that the laws did not make any religious practice illegal and simply regulated secular activity. The Court admitted that the laws placed a burden on some but it actually affected "only those who believe it necessary to work on Sunday."[58] The Court argued that "[t]o strike

---

[54] See Galanter, *Religious Freedom in the United States: A Turning Point*, 1966 WIS. L. REV. 217 for a discussion of these and other cases.

[55] 310 U.S. 296 (1940).

[56] 319 U.S. 624 (1943).

[57] McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961).

[58] *Braunfeld*, 366 U.S. at 605.

down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[59] Thus, the essence of the Sunday Closing cases is that where the state enacts a general law designed to advance legitimate secular goals, the law is valid despite its indirect burden on religious practices.

Implicit in the Sunday Closing cases is the requirement that the state use the least intrusive means to accomplish its legitimate purpose. This principle was made explicit in *Sherbert v. Verner*[60] which was decided the same day the Supreme Court struck down required Bible reading in the public school.[61] *Sherbert* involved a woman denied unemployment compensation because she refused to take a job requiring her to work on her Sabbath. In overturning the state policy, the Court set forth a "compelling state interest" test which laws even indirectly limiting religious freedom had to meet: "[I]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly constitutional area,'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[62]

Sherbert restates the rule set forth in the Sunday Closing cases but the outcome is different: the closing laws met the "least intrusive means" test, but the denial of unemployment compensation in *Sherbert* could not. The state could have established an administrative procedure to allow reasonable exception to the requirement that a person must accept a job for which he or she is qualified or lose benefits.

The "least intrusive means" rule has been used to limit other state actions which have an indirect effect on religious freedom. It was the basis of the decision by the California Supreme Court that an ordinance making it illegal to possess peyote was an unconstitutional limitation on the religious freedom of the Navajo Indians.[63] The California court determined that peyote was such an integral part of the religious ritual that the Navajos could not practice their religion without

---

[59] *Id.* at 606.
[60] 374 U.S. 398 (1963).
[61] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).
[62] *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)).
[63] People v. Woody, 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

it. Unlike the Mormon case where polygamy was part of the religious belief but not part of the ceremony, the use of peyote was essential to the Navajo ceremony and therefore indispensable. The result of enforcing the anti-peyote law would have been to terminate the religious practice and perhaps the religion itself.

The *Sherbert* least-intrusive doctrine also assisted the Amish, who relied very heavily on it in *Wisconsin v. Yoder*.[64] The Amish successfully argued that the essential element of their faith was individual salvation achieved through a religious community separate from the outside world. Since the Amish religion, by its very nature, must be pervasive in the lives of its adherents, to prevent the Amish parents from withdrawing their children from public schools would have the effect of destroying the religion itself. The Supreme Court agreed:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance the legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[65]

The Court was convinced that the non-public-school education of Amish children was adequate and therefore the exemption would not gravely undermine the legislative purpose. Citing *Sherbert*, the Court said:

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. ... By preserving doctrinal flexibility and recognizing the need for a sensitive and realistic application of the Religion Clauses "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a tight rope and one we have successfully traversed."[66]

Yoder appears to provide a constitutional framework for setting aside an objectively legitimate state law so that a religious group can follow the dictates of its conscience. The Court seems to be saying that

> [d]espite the needs of contemporary society, there is apparently room under the Constitution for those religions whose tenets dictate that

---

[64] 406 U.S. 205 (1972).
[65] *Id.* at 215.
[66] *Id.* at 220-21 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970)).

> they not depart from the past. The holding puts religion and conscience on a firmer constitutional pedestal and raises interesting implications for potential claims for exemption by future religious groups.[67]

Since the rite of circumcision is the *sine qua non* of Orthodox Judaism, in somewhat the same sense that isolation from the outside world is for the Amish, *Yoder* appears to be particularly apt precedent in the circumcision controversy. Though it could be argued that circumcision is merely an initiation rite and not a way of life, and that *Yoder* is not a valid precedent, that argument misapprehends the extreme importance of circumcision to Orthodox Jews. It is difficult to overstate the significance of the ceremonial rite of circumcision. It is the token of the covenant between God and Abraham:

> And God said unto Abraham: "And as for thee, thou shalt keep My covenant, thou and thy seed after thee throughout their generations. This is My covenant, which ye shall keep, between Me and you and thy seed after thee: every male among you shall be circumcised. And ye shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant betwixt Me and you. And he that is eight days old shall be circumcised among you, every male throughout your generations...."[68]

The importance of the ritual for Orthodox Jews is evidenced by the fact that it is one of the few acts permitted to be performed on the Sabbath if the eighth day falls there, notwithstanding the prohibition of work and other activities on the Sabbath. Even more compelling is the requirement for the circumcision of dead infants:

> [A]n infant who dies before circumcision, whether within the eight days or thereafter, must be circumcised at the grave, in order to remove the foreskin which is a disgrace to him, but no benedictions should be pronounced over this circumcision. He should be given a name to perpetuate his memory and that mercy may be shown him from Heaven to be included in the resurrection of the dead, and that he may then have sufficient understanding to recognize his father and his mother.[69]

---

[67] Case Note, *Wisconsin v. Yoder: The Right to be Different-First Amendment Exemption for Amish Under the Free Exercise Clause*, 22 DEPAUL L. REV. 539, 540 (1972).

[68] *Genesis* 17:9-12 (Masoretic Text, Jewish Publication Society).

[69] CODE OF JEWISH LAW—KITZUR SHULHAN ARUH, ch. 163, § 7 (S. Ganzfried 1963).

Does the importance of circumcision in Orthodox Judaism constitutionally necessitate an exception to a general anti-circumcision statute? The answer is no. Despite the emphasis in *Yoder* on the sincerity of Amish beliefs, sincerity or intensity of belief cannot alone justify a religious dispensation from compliance with general laws. First, under the Constitution, the courts may not determine the legitimacy or intensity of religious beliefs.[70] Secondly, even if it were constitutionally permissible, it is extremely difficult to test or measure intensity of belief. How could a court properly distinguish between the intensity of Orthodox Jews' commitment to circumcision and adherence to polygamy by the early Mormons in *Reynolds* or to snake handling in *Hill v. Alabama*?[71] Even though by highlighting the intensity of belief as a justification, the Court in *Wisconsin v. Yoder* appears to offer dispensation based on that intensity, the facts in *Yoder* limit it to situations in which there is no conflict between the rights of the parent and the rights of the child.

Equally important, the *Yoder* Court notes that the state may interfere with parental discretion "if it appears that parental decisions will jeopardize the health and safety of the child, or have the potential for significant social burdens."[72] Although the example which the Court uses to illustrate its point involves a life threatening denial of a transfusion, the inclusion of "significant social burdens" in the definition broadens it considerably. To the extent that circumcision has potential for creating such social burdens, then it seems susceptible to state interference; moreover, circumcision can jeopardize the health, safety or even life of the child, as explained in Part III.

In short, there are two significant differences between the denial of education by parents on religious grounds and the religious rite of circumcision: (1) denial of education is at least partly reversible, whereas the disfigurement caused by removal of a body part is not, and (2) the physical pain and suffering, with potentially significant surgical and general health complications, inflicted on infants by circumcision

---

[70] This conclusion is based on United States v. Ballard, 322 U.S. 78 (1944). *See also* B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES pt. 3. "[I]t must be recognized that the neutrality principle does generally foreclose any governmental inquiry into the truth or falsity of religious belief, the good faith of those adhering to such beliefs, or the extent to which particular beliefs are in the public interest." *Id.* at 657.

[71] 38 Ala. App. 404, 88 So. 2d 880 (1956).

[72] *Yoder*, 406 U.S. at 233-34.

is not found in parents' denial of education to their adolescent children.

Are these differences sufficient to prevent the creation of an exception to general laws prohibiting circumcision? The answer to this question requires a judgment as to the personal and societal costs of inflicting pain and suffering on infants versus the value of maintaining a religious rite which is considered essential by adherents to a specific religion. The state can make an exception to application of its laws, as several states have in exempting Christian Scientists from child neglect laws,[73] but such an exception is not constitutionally required.

C. *The Right to Privacy*

The constitutional right to privacy does not constitute a barrier to treating circumcision as child abuse. Current state child abuse statutes modify the traditional physician-patient privacy privilege by requiring the physician to report child abuse. The irony here is that it is frequently physicians who are the perpetrators. If circumcision is treated as a criminal act, the whole issue of privacy ceases to have meaning since the parties to an illegal conspiracy cannot claim privacy protection. Moreover, in the birth control and abortion cases basing the right to the treatment on privacy, the physicians were protecting the right to privacy of their patients, not themselves.[74] Privacy rights are inappropriate to prevent state interference with the parents' decision to subject their child to circumcision since the child is the patient, not the parent. In *Eisenstadt v. Baird*[75] the Court ruled that the right to be free from governmental intrusion is the right of an individual, rather than a right granted to the family as an entity.[76]

---

[73] *See e.g.*, ALA. CODE § 26-14-1(2)(1975 & Supp. 1984); ARK. STAT. ANN. § 42-807 (c)(1977 & Supp. 1983); IND. CODE ANN. § 31-6-4-3(a)(1)(d)(Burns Supp. 1984); MINN. STAT. ANN. § 626.556 (West 1983).

[74] In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court stated that the director of a birth control clinic and a physician "have standing to raise the constitutional rights of the married people with whom they had a professional relationship." *Id.* at 481; *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972). In Doe v. Bolton, 410 U.S. 179 (1973), an abortion case, the physicians were given standing to sue because of the possibility of a criminal suit against them. *Id.* at 188. However, there is nothing in the opinion or any others which have been searched to suggest that the physicians are entitled to a claim to the right of privacy on their own behalf. They would have standing to challenge the constitutionality of an anti-circumcision ordinance, but would have to invoke *others'* rights to privacy if the argument is based on those grounds.

[75] 405 U.S. 438, 453 (1972).

[76] *Id.* at 453.

V. REMEDIES

The previous sections have established that the constitutional rights of parents, including freedom of religion, are inadequate to prevent the states from using their authority to treat circumcision as child abuse. The extent to which laws presently in existence can be used to prevent the practice is addressed next.

The most obvious way to proceed with enforcement of circumcision prohibitions is through criminal prosecution under existing state laws prohibiting assault and battery and conspiracy to assault and batter. Every state presently has laws which can be used for this purpose if circumcision is construed as battery. However, it will be extremely difficult to get a conviction, since circumcision is not culturally acknowledged as child abuse at the present time. Additionally, in some jurisdictions it may be difficult to establish the requisite criminal intent.

For this reason, the civil law presently offers more fruitful avenues of approach. Because there are "no medical indications for routine circumcision,"[77] the doctrine of informed consent requires that parents be told that such surgery is not required, that it is painful and that there are significant rates of surgical complications. Failure to give a complete explanation warrants a suit for damages by the parents, by the child, or by a next friend acting on the child's behalf. Authorizing surgery on an infant after such a warning conceivably opens the door to a subsequent suit by the child against his parents. While state courts have been reluctant to allow suits by children against their parents, there is a growing trend to allow recovery where there is a clear adverse interest.[78]

Suits for damages against surgeons, hospitals, and conceivably parents, are possible because

> malice in the sense of ill will or a desire to cause injury is not essential to sustain a recovery for intentional wrongdoing. It is enough

---

[77] American Academy of Pediatrics, Committee on Fetus and Newborn, STANDARDS AND RECOMMENDATIONS FOR HOSPITAL CARE OF NEWBORN INFANTS 65 (1977).

[78] Binetti, *The Child's Right to "Life, Liberty, and the Pursuit of Happiness": Suits by Children Against Parents for Abuse, Neglect and Abandonment*, 34 RUTGERS L. REV. 154 (1981) surveys the present legal situation and argues for enlarging childrens' right to sue.

> for the plaintiff to show that the defendant knowingly and intentionally did the act which caused the damage and that damage was substantially certain to follow.[79]

The limitation posed by suits for negligence in this area is the same as that in the criminal law: negligence, like crime, is grounded in societally determined assumptions and expectations. Additionally, in the case of civil suits for circumcision, especially those cases without adverse medical complications, it will be difficult to establish damages other than pain and suffering. As a result, suits for damages are not likely to be numerous or very fruitful.

The most promising approach would seem to be a civil rights class action against hospitals designed to prevent routine neonatal circumcisions, that is, in cases where circumcision is not medically warranted. A class action suit would focus on the individuals most culpable since competent surgeons are aware that routine neonatal circumcision is not good medical practice. It would also have the advantage of avoiding the constitutional issues of parental rights, as well as religious issues, since the Orthodox Jewish circumcision ceremony is not normally performed in medical centers by medical personnel.

---

[79] Kalina v. General Hospital, 18 A.D.2d 757, 235 N.Y.S.2d 808, 810 (1962)(Hepburn, J., dissenting)(quoting RESTATEMENT OF TORTS § 13, comment d).