

## Is Circumcision Unethical and Unlawful? A Response to Morris et al.

J. Steven Svoboda

*Executive Director, Attorneys for the Rights of the Child*

Peter W. Adler

*Adjunct Professor of International Law at University of Massachusetts in Lowell,  
Massachusetts*

Robert S. Van Howe\*

*Clinical Professor, Department of Pediatrics and Human Development, Michigan  
State University College of Human Medicine*

### Abstract

*In 2016, we argued that non-therapeutic male circumcision before the age of consent is unethical and unlawful. In a response article published in 2018, Morris and colleagues sought to undermine our claims, raising a number of arguments that, we will demonstrate in the present essay, lack both logical and empirical support. The authors also advanced the unprecedented suggestion that physicians have an ethical duty to recommend male circumcision to parents. Here, we evaluate this novel suggestion and find it lacking. Indeed, as we will argue, the opposite is true: physicians are ethically proscribed from recommending and performing medically unnecessary surgery on healthy children, including the genitalia of both boys and girls. Moreover, boys have the same legal rights as girls under US and international law to bodily integrity and self-determination; parents' constitutional rights do not extend to modifying their healthy children's bodies; and even if parents had such rights, it is unlawful for physicians to circumcise healthy boys.*

### Introduction

In most countries around the world, physicians discharge healthy babies, both girls and boys, in a genitally intact condition: the condition

---

\* DOI 10.7590/221354019X15538518338616 2213-5405 2019 Journal of Medical Law and Ethics

in which they were born.<sup>1</sup> Moreover, they strictly avoid medically unnecessary surgeries – that is, surgeries that are not required to address an aberrant physical state that poses a serious and immediate threat to the child’s welfare<sup>2</sup> – on vulnerable infants and other non-consenting children. Physicians in the United States, however, continue to circumcise or surgically remove the healthy, functioning foreskin from the penises of more than 1 million boys per year.<sup>3</sup> In 2012, the American Academy of Pediatrics (AAP) released a policy statement asserting, but not demonstrating,<sup>4</sup> that the medical benefits of newborn circumcision outweigh the associated risks, albeit not to a sufficient degree to justify recommending the procedure.<sup>5</sup> In response, more than two dozen senior physicians from Europe and Canada, including heads and representatives of national medical bodies, wrote a response piece, contending that the AAP 2012 committee had failed in its duty to provide an unbiased evaluation of the literature.<sup>6</sup> The mostly European authors further stated that circumcision of healthy boys is neither medically nor ethically appropriate prior to the age of consent. The ethical and legal status of involuntary, non-therapeutic male circumcision remains a matter of great contention, and it is important for boys, and for the men they become, to resolve the debate surrounding this issue.

In October 2013, J. Steven Svoboda, representing the non-profit human rights organization, Attorneys for the Rights of the Child, and Michael Brady, representing the 2012 American Academy of Pediatrics (AAP) Task Force on Circumcision, formally debated the issue in a public forum, leading to a pair of publications in the *Journal of Law, Medicine, and Ethics* in June 2016. Along with his co-authors, who also join on the present essay, Svoboda argued that

---

<sup>1</sup> UNAIDS, “Neonatal and Child Male Circumcision: A Global Review”, *Joint United Nations Program on HIV/AIDS* (2010), 1-103.

<sup>2</sup> For a definition of ‘medically necessary’ and a discussion of its ethical importance, see Brian D. Earp, “The Child’s Right to Bodily Integrity” in David Edmonds (ed.), *Ethics and the Contemporary World* (Abingdon and New York: Routledge, in press), [www.academia.edu/37138614/The\\_childs\\_right\\_to\\_bodily\\_integrity](http://www.academia.edu/37138614/The_childs_right_to_bodily_integrity).

<sup>3</sup> Bcheraoui et al., “Rates of Adverse Events Associated with Male Circumcision in U.S. Medical Settings, 2001-2010”, *JAMA Pediatrics* 168(7) (July 2014), 625-634.

<sup>4</sup> See Brian D. Earp & David M. Shaw, “Cultural Bias in American Medicine: The Case of Infant Male Circumcision”, *Journal of Pediatric Ethics* 1 No. 1 (2017), 8-26. As these authors discuss, the AAP 2012 committee did not use any recognised method of assigning weights to individual benefits or risks, much less balancing them against each other. Instead, their assertion that the benefits outweigh the risks seems to have been an entirely subjective judgment based on the personal opinion of the 8 committee members, one of whom later revealed extra-scientific, political motivations on the part of the AAP committee to ‘protect’ the parental option to circumcise in the face of growing legal challenges. See Andrew L. Freedman, “The Circumcision Debate: Beyond Benefits and Risks”, *Pediatrics* 137 No. 5 (6 April 6 2016), e20160594, <https://doi.org/10.1542/peds.2016-0594>.

<sup>5</sup> American Academy of Pediatrics Task Force on Circumcision, “Circumcision Policy Statement”, *Pediatrics* 130, no. 3 (2012), 585-586.

<sup>6</sup> M. Frisch, Y. Aigrain, Y. Barauskas et al., “Cultural bias in the AAP’s technical report and policy statement on male circumcision”, *Pediatrics* 131 (2013), 796-800.

circumcision is unethical and unlawful, while Brady argued the converse.<sup>7</sup> Subsequently, the Australian circumcision advocate Brian Morris and three co-authors published a critique of our article (“the Critique”)<sup>8</sup> contending that our main claims, supporting arguments and evidence are flawed. Because Morris has adopted by far the most extreme position in favor of circumcision in the contemporary literature, his views have been subjected to widespread criticism from mainstream commentators,<sup>9</sup> often in the form of responses to his attempted rebuttals. However, it is prohibitive to respond to every such rebuttal, since, as others have noted, they largely repeat claims and arguments raised in previous rebuttals that have already been addressed.<sup>10</sup> In this case, however, a response does seem necessary given the importance of the subject matter – the health and human rights of vulnerable male children – and the extraordinary contention of Morris et al. in the Critique that physicians have an ethical duty to recommend male circumcision to parents. In this Reply, we address some of the main weaknesses in their position. Ultimately, we argue that circumcision of healthy boys before the age of consent violates the cardinal rules of biomedical ethics – autonomy, beneficence, non-maleficence, proportionality and justice – and that it is unlawful as well. Hence, there is no ethical duty to recommend such circumcision; rather, physicians are proscribed from offering to perform and from performing the procedure.

## I. The Role Of Rhetoric In Promoting Circumcision

In this first section, we address a matter that is important for understanding the background and structure of this debate. Arguments about

- 
- <sup>7</sup> M.T. Brady, “Newborn male circumcision with parental consent, as stated in the AAP circumcision policy statement is both legal and ethical”, *Journal of Law, Medicine & Ethics* 44 (2016), 256-62; J.S. Svoboda, P.W. Adler & R.S. Van Howe, “Circumcision is unethical and unlawful”, *Journal of Law, Medicine & Ethics* 44 (2016), 263-82 (“Original Article”).
- <sup>8</sup> B.J. Morris, J.N. Krieger, J.D. Klausner & B.E. Rivin, “The ethical course is to recommend infant male circumcision – arguments disparaging American Academy of Pediatrics affirmative policy do not withstand scrutiny”, *Journal of Law, Medicine & Ethics* 45 (2017), 647-63 (“Critique”). The authors’ position is that male circumcision, especially when performed on an infant, is safe, prevents diseases and is not harmful (Critique at 656).
- <sup>9</sup> See, for example, J.A. Bossio et al., “Response to: The Literature Supports Policies Promoting Neonatal Male Circumcision in N. America”, *Journal of Sexual Medicine* 12 (2015), 1306; Science Media Centre, quoting Kevin Pringle, [www.sciencemediacentre.co.nz/2014/04/04/circumcision-health-risks-and-benefits-experts-respond/](http://www.sciencemediacentre.co.nz/2014/04/04/circumcision-health-risks-and-benefits-experts-respond/) (downloaded 26 June 2018); and B. Donovan, “Review of ‘In favour of circumcision’ by Brian J. Morris”, *Venerology* 12 (1999), 68-69. Available at [www.historyofcircumcision.net/index.php?option=content&task=view&id=64](http://www.historyofcircumcision.net/index.php?option=content&task=view&id=64).
- <sup>10</sup> B.D. Earp, “The unbearable asymmetry of bullshit”, *Health Watch* 101 (Spring 2016), 4-5. Available at [www.researchgate.net/publication/294584001\\_The\\_unbearable\\_asymmetry\\_of\\_bullshit](http://www.researchgate.net/publication/294584001_The_unbearable_asymmetry_of_bullshit). M. Frisch, “Author’s response to: does sexual function survey in Denmark offer any support for male circumcision having an adverse effect?”, *International Journal of Epidemiology* 41(2012), 312-4. Available at: <https://doi.org/10.1093/ije/dyr181>.

circumcision do not always rest on dispassionate evaluations of the best available evidence nor on fair-minded attempts to advance the discourse in the most productive way. Rather, as with other areas of science and medicine that touch on underlying disagreements about values, and here about religion as well, the debate has become polarized,<sup>11</sup> even at times “uncivil”.<sup>12</sup> Rhetorical strategies are sometimes used to press a position that goes beyond what is justified by reasonable disagreement, and this is not always immediately apparent to readers who are unfamiliar with the literature. Some such strategies, including the so-called Gish Gallop,<sup>13</sup> wherein a large volume of plausible-sounding but ultimately baseless claims are issued in rapid succession,<sup>14</sup> can, unfortunately, be seen in the Critique by Morris et al., and these need to be addressed directly and refuted. Failure to do so, we suggest, would lead to a distorted understanding of what is really at stake. We have observed in certain characteristic flaws in the Critique such as, for example, 63 self-citations in 40 different references; 33 references that do not support the claim for which they are cited; 33 references proving a different point than the point for which the reference is cited; 30 references that are irrelevant or off-topic; 8 references containing *non sequiturs*; 16 references citing low-quality studies; 16 references citing obscure counterexamples; and 7 references containing old information (the authors will provide a full list to any interested reader upon request). In what follows, we address some specific flaws in greater detail, before turning in subsequent sections to the broader ethical and legal questions that become visible once the weeds, as it were, have been cleared away.

### A. Flight of Ideas

In our article, we communicated the well-established findings that the foreskin is a complex genital structure that protects and moisturizes the head of the penis – much as the clitoral foreskin or ‘hood’ protects and moisturizes the head of the clitoris – and that it is the most sensitive portion of the penis to light touch.<sup>15</sup> On these grounds alone, it is reasonable to regard

<sup>11</sup> B.D. Earp, “Addressing polarisation in science”, *Journal of Medical Ethics* 41(2015), 782-784.

<sup>12</sup> R. Collier, “Ugly, messy and nasty debate surrounds circumcision”, (2012), E25-E26.

<sup>13</sup> See, e.g., the discussion of Gish Gallop in the Urban Dictionary at [www.urbandictionary.com/define.php?term=Gish%20Gallop](http://www.urbandictionary.com/define.php?term=Gish%20Gallop).

<sup>14</sup> B.D. Earp, “The unbearable asymmetry of bullshit”, *Health Watch* 101 (Spring 2016), 4-5. Available at [www.researchgate.net/publication/294584001\\_The\\_unbearable\\_asymmetry\\_of\\_bullshit](http://www.researchgate.net/publication/294584001_The_unbearable_asymmetry_of_bullshit).

<sup>15</sup> Jennifer A. Bossio, Caroline F. Pukall & Stephen S. Steele, “Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing”, *The Journal of Urology* 195, No. 6 (June 2016), 1848-53, <https://doi.org/10.1016/j.juro.2015.12.080>; Alexandre Rotta, “Re: ‘Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing’”, *The Journal of Urology* 196, No. 6 (2016), 1822-23, <https://doi.org/10.1016/j.juro.2016.05.127>; Morten Frisch, “Re: ‘Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing’”, *The Journal of Urology* 196, No. 6 (2016), 1821-22, <https://doi.org/10.1016/j.juro.2016.05.127>; Robert S. Van

the foreskin as having value in and of itself, and this is the common view outside of circumcising societies, including the United States. Because non-therapeutic circumcision (NTC) removes this structure without a strict medical indication,<sup>16</sup> it therefore necessarily involves harm, whether one sees this harm as outweighed by other considerations or not. Circumcision is an irreversible surgery that also risks serious physical injury, psychological sequelae and death.<sup>17</sup> A recent study suggests that for every 50,000 newborn inpatient circumcisions performed, one otherwise preventable neonatal death may be expected to occur.<sup>18</sup>

As we argued, NTC also violates boys' rights to equal protection, bodily integrity, the preservation of their future autonomy to make highly personal self-affecting decisions, and, where it is imposed as a permanent mark of religious affiliation, their freedom to choose their own religion.<sup>19</sup> A physician has a legal duty to protect children from unnecessary medical interventions. Men rarely volunteer for circumcision, and an increasing number of circumcised men ex-

---

Howe et al., "Re: 'Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing'", *The Journal of Urology* 196, No. 6 (2016), 1824-1824, <https://doi.org/10.1016/j.juro.2016.05.127>; Morris L. Sorrells et al., "Fine-Touch Pressure Thresholds in the Adult Penis", *BJU International* 99, No. 4 (April 2007), 864-69, <https://doi.org/10.1111/j.1464-410X.2006.06685.x>; Brian D. Earp, "Infant Circumcision and Adult Penile Sensitivity: Implications for Sexual Experience", *Trends in Urology & Men's Health* 7, No. 4 (1 July 2016), 17-21, <https://doi.org/10.1002/tre.531>; Christopher J. Cold & John R. Taylor, "The Prepuce", *BJU International* 83, No. S1 (1999), 34-44; John R. Taylor, Anthony P. Lockwood & A. J. Taylor, "The Prepuce: Specialized Mucosa of the Penis and Its Loss to Circumcision", *British Journal of Urology* 77, No. 2 (1996), 291295.

- <sup>16</sup> In its first circumcision policy statement in 1971, the AAP stated simply, "There are no valid medical indications for circumcision in the neonatal period". American Academy of Pediatrics, Committee on Fetus and Newborn, Standards and Recommendation for Hospital Care of Newborn Infants, 5th ed. Evanston, IL: American Academy of Pediatrics, 1971:10.
- <sup>17</sup> Aaron J. Krill, Lane S. Palmer & Jeffrey S. Palmer, "Complications of Circumcision", *The Scientific World Journal* 11 (2011), 2458-68, <https://doi.org/10.1100/2011/373829>; Gregory J. Boyle et al., "Male Circumcision: Pain, Trauma and Psychosexual Sequelae", *Journal of Health Psychology* 7, No. 3 (1 May 2002), 329-43, <https://doi.org/10.1177/135910530200700310>.
- <sup>18</sup> B.D. Earp, "Factors associated with early deaths following neonatal male circumcision in the United States, 2001-2010", *Clinical Pediatrics* (2019). In press.
- <sup>19</sup> See Kai Möller, "Ritual Male Circumcision and Parental Authority", *Jurisprudence* 8, No. 3 (2017), 461-79. The author argues (10-11): "precisely by virtue of being irreversible [such bodily] changes make it impossible for the child to ever distance himself from them and to live his life free from a religiously or culturally imposed physical mark. To this, it could be objected that while the child cannot later distance himself from his circumcision, he remains free to distance himself from the parents' religious belief and become an atheist, agnostic, or take on another religion and that, therefore, the freedom constraint is not violated. This distinction [is] unconvincing; this becomes clear when placing oneself in the position of a man who has distanced himself from Judaism or Islam but finds himself unable to distance himself from the circumcision that was imposed on him in the name of his former religion. This man may understandably perceive a permanent physical mark imposed on him in the name of a religion as overstepping a boundary and therefore as an act of abuse ... Similarly, imagine Christian parents tattooing a Christian cross on their child's body; the fact that the child can later distance himself from Christianity does not make the tattoo legitimate, and we could understand his upset about having to carry this religiously imposed, permanent mark, which he, too, might understandably perceive as overstepping a boundary (and therefore as abuse)".

press their resentment about having been circumcised in infancy.<sup>20</sup> Our support for these propositions included a large body of scholarship produced by academic experts, medical society position statements, legal decisions, and human rights documents.

Against this view, Morris et al. claim that an ethical requirement exists to offer to circumcise newborn boys, based on asserted medical benefits, and claim that NTC is easier to perform on and is less harmful to newborns. We will address claims of medical benefit in due course. With respect to the latter contention, however, as Earp and Darby argue:

“[T]he argument ... is not straightforward. In the first place, it may be the case that any number of non-therapeutic bodily interventions are less risky in infancy compared to later in life ... The initial question, however, is whether such interventions are permissible at all, given the prevailing moral and legal norms of the wider society in which the child is being raised. If they are not, the question of preferred timing on the basis of relative risk profiles does not arise. Second, it is not clear that infant circumcision, compared to adult circumcision, does in fact carry less surgical risk.... Even proponents of circumcision contend that the absolute likelihood of clinically important, difficult-to-resolve surgical complications associated with circumcision is ‘low’, irrespective of the age at which the procedure is performed. Given such a low baseline risk according to the proponents’ view, the existence of a relative risk reduction in the incidence of adverse events in infancy compared to adulthood is unlikely to be morally decisive: a small risk divided by any amount is still a small risk”.<sup>21</sup>

A similar perspective has been advanced by the US Centers for Disease Control (CDC). Even assuming, with Morris et al., that the risks of NTC are lower in infancy, the CDC nevertheless concludes that: “Delaying male circumcision until adolescence or adulthood obviates concerns about violation of autonomy”, and therefore any medical “disadvantages associated with [such a deferral] would be ethically compensated to some extent by the respect for the [bodily] integrity and autonomy of the individual”.<sup>22</sup>

---

<sup>20</sup> 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”, *The International Journal of Human Rights* 21, No. 2 (12 February 2017), 189-218, <https://doi.org/10.1080/13642987.2016.1260007>.

<sup>21</sup> Brian D. Earp & Robert Darby, “Circumcision, Sexual Experience, and Harm”, *University of Pennsylvania Journal of International Law* 37, No. 2-online (2017), 1-57, at 48-49.

<sup>22</sup> CDC, “Background, Methods, and Synthesis of Scientific Information Used to Inform the Draft Recommendations for Providers Counseling Male Patients and Parents Regarding Elective Male Circumcision and the Prevention of HIV Infection and Other Adverse Health Outcomes”, *U.S. Centers for Disease Control* (2014), 1-61, at 39-40.

What else is at the source of our disagreement?<sup>23</sup> One important issue concerns the underlying motivations of those who argue in favor of protecting children's rights. We address this matter next.

### 1. Speculating About the Motives of Others

Another rhetorical strategy that appears in the Critique, and of which readers should be mindful in evaluating the main arguments we pursue later, involves speculating in an uncharitable and unsupported fashion about the motives of those who hold a critical view of circumcision. According to the Critique, the objective of people who oppose NTC and other medically unnecessary surgeries performed on non-consenting minors is to spread propaganda and “undermine public health and individual wellbeing”.<sup>24</sup> Widespread European opposition to NTC in turn “may reflect lack of familiarity, anti-Semitism, anti-Islamic sentiment or anti-American attitudes”.<sup>25</sup> No support is provided for such ad hominem speculations, and in our view, they are beneath the dignity of this debate. Moreover, Morris et al. claim that the *raison d'être* for the charitable organization Attorneys for the Rights of the Child is the compensation to be earned from litigation, but the organization does not litigate. In contrast to this, the Circumcision Academy of Australia, of which Morris is the co-founder and chief spokesperson, primarily consists of individuals whose main incomes appear to be derived from circumcising boys without a medical indication, as has been documented elsewhere.<sup>26</sup> The stated mission of that group is to increase health insurance compensation for such elective surgeries,

---

<sup>23</sup> A consistent difficulty in answering this question pertains to Morris et al.'s use of rhetoric as we highlighted in the previous section. In many places, the Critique finds fault with our article in ways that make it difficult to track the asserted bases for the criticisms. For example, quotations are provided without indicating the source and counter-arguments are given without establishing the gist of the position being denounced. It is impossible for readers who do not happen to have our article simultaneously at hand to know to what the authors' statements refer. In several instances, comments made under a topic heading are unrelated to the stated topic. Critique, at 649 (section I.D.3.a) “Physical harm”; Critique, at 653 (section I.E.4) “Out of Africa”; Critique, at 653 (section II.A.1) “Autonomy”; Critique, at 653 (section II.A.2) “Non-maleficence (‘do no harm’)”; Critique, at 653-54 (section II.A.3) “Beneficence (‘do good’)”; Critique, at 654 (section II.B.1) “No unnecessary surgery”; Critique, at 654 (section II.B.3) “A physician’s duty is to the patient”; Critique, at 654 (section II.B.4) “Ethical Preventive Medicine”; Critique, at 655 (section III.B.1) “Equal protection”; Critique, at 653 (section III.B.2) “Personal security”; Critique, at 656 (section III.B.4) “Freedom of religion”; Critique, at 656-57 (section III.C.2) “Parental ‘consent’ to unnecessary circumcision is invalid”; Critique, at 657 (section III.D.1) “Physicians cannot take orders from parents”; and Critique, at 653 (section III.D.2) “Physicians cannot operate on healthy children”.

<sup>24</sup> Critique, at 654.

<sup>25</sup> Critique, at 654.

<sup>26</sup> M. Frisch & B.D. Earp, “Circumcision of male infants and children as a public health measure in developed countries: a critical assessment of recent evidence”, *Global Public Health* 13(2018), 626-641.

which would directly benefit those same individuals. Moreover, Morris has written several articles with a co-author who benefits financially from performing circumcisions and has a patent pending for a circumcision device.<sup>27</sup> Finally, as the AAP 2012 committee revealed only after receiving international criticism, one of its 8 members, Dr. Waldemar Carlo, also stands to benefit financially from NTC as a director of Mednax, the medical services corporation.<sup>28</sup>

For a comparison, Attorneys for the Rights of the Child is a non-profit children's rights organization whose members volunteer their time and thus lose money by arguing against NTC. Insofar, as awareness of potential conflicts of interest may be epistemologically valuable in assessing the strength of an individual or group's argument, it seems obvious that the likelihood and/or magnitude of such potential conflicts would be greater in the case of those who stand to benefit, financially or otherwise, from the acceptance of their argument than in the case of those who are willing to accept financial and other losses in order to advance a moral position.

## 2. Dismissal of Men Harmed by Circumcision

Increasing numbers of men report having been physically harmed by and resenting having had the foreskin of their penis removed without their consent.<sup>29</sup> The authors dismiss all such claims by speculating – again without support – that such men have a psychopathologic sexual obsession that may warrant a psychological diagnosis.<sup>30</sup> Equally unsupported, they add that any resentment about having been circumcised “is likely to stem from gullible acceptance of ‘intactivist’ propaganda”.<sup>31</sup> For an in-depth analysis of the rational basis for feeling harmed by a non-consensual surgery on one's genitals, see Hammond and Carmack's survey of long-term adverse outcomes from neonatal circumcision, published in the *International Journal of Human Rights* in 2017.<sup>32</sup>

---

<sup>27</sup> B.J. Morris, J.N. Krieger & J.D. Klausner, “CDC's Male Circumcision Recommendations Represent a Key Public Health Measure”, *Global Health: Science and Practice* 5(2017), 15-27.

<sup>28</sup> AAP, “Cultural Bias and Circumcision: The AAP Task Force on Circumcision Responds”, *Pediatrics* 131, No. 4 (2013), 801-4, <https://doi.org/10.1542/peds.2013-0081>.

<sup>29</sup> T. Hammond & A. Carmack, “Long-term adverse outcomes from neonatal circumcision reported in a survey of 1,008 men: an overview of health and human rights implications”, *International Journal of Human Rights* 21 (2017), 189-218; L. Watson, *Unspeakable mutilations: circumcised men speak out* (Seattle: Amazon Digital Services, 2014).

<sup>30</sup> Critique, at 651.

<sup>31</sup> Critique, at 654.

<sup>32</sup> T. Hammond & A. Carmack, “Long-term adverse outcomes from neonatal circumcision reported in a survey of 1,008 men: an overview of health and human rights implications”, *International Journal of Human Rights* 21 (2017).



## B. Misrepresentations

### 1. Omissions

Demonstrable misrepresentation is another rhetorical strategy found in the Critique that calls into question the seriousness with which it should be taken. The Critique implies that Svoboda et al. concealed the ad-hoc German law that overturned a 2012 Cologne court judgment which had concluded that NTC was unlawful under the German basic law.<sup>33</sup> It is unclear whether the Critique’s authors intended to misrepresent our article, or whether they simply did not read it carefully: we mentioned the passage of the overriding German law on three separate occasions.<sup>34</sup> It is wrong to characterize a claim as “unsupported” when the claim is fully cited with valid sources.<sup>35</sup> Similarly, the authors criticize us for citing an Internet posting of a talk that has not yet been published, apart from its presentation at a conference open to the public. If citing Internet sources is prohibited, then the Critique needs to retract its references 23, 54, 84, 88, 111, 139, 140, 143, 146, 147, 152, 157, 158, 162, 163, 164 and 174.

### 2. Reliance on Self-citation for Extreme Claims

One of the key issues at stake in the NTC debate is the question of how the various medical benefits that have been attributed to newborn circumcision relate to the risks and costs of the procedure. We will address this important question in detail in a subsequent section. Although it is difficult to reach a definitive answer due to various weaknesses in the available data, as well as substantive disagreements about how to weigh individual benefits and risks in light of differing individual values,<sup>36</sup> more or less plausible ways exist of approaching the question. The Critique by Morris et al. assert that circum-

---

<sup>33</sup> Critique, at 656.

<sup>34</sup> First, we noted in Original Article, at 271 (section III.A.): “With the exception of a recent law passed in Germany to protect circumcision considered specifically as a religious rite ...” [citing the German Civil Code (Bürgerliches Gesetzbuch), para. 1631d]. Later in the original article, at 271 (section III.A.1), we stated: “In 2012, the BVKJ [Berufsverband der Kinder- und Jugendärzte, the official German pediatric association] opposed the bill that later became law in Germany...” Still later in the original article, at 272 (section III.A.2), we added: “Although European medical associations argued that circumcision should be banned, the German legislature passed a law that same year, allowing circumcision by physicians and mohels [citing the German law].”

<sup>35</sup> Critique, at 651 (section I.D.3.d., last paragraph): “Unsubstantiated claims that MC may impair sexual function or pleasure can produce adverse psychological outcomes and physical harm in believers”. These claims were substantiated with references 86 through 90 in our original article.

<sup>36</sup> Earp, “Gender, genital alteration, and beliefs about bodily harm”, *Journal of Sexual Medicine* 14 (2017), e225.

cision carries a 100-to-1 benefit-to-risk ratio, citing Morris. No other scientist or medical body has independently found support for this claim; rather, those who have evaluated it have stated that it reflects a “complete lack of any attempt to accurately document the risk of the complications of circumcision”.<sup>37</sup> As was the case for the 2012 AAP policy on NTC, no recognized procedure for objectively assigning weights to individual benefit or risks is used by Morris in his calculations; the ratio should not be taken seriously. For example, with no sound justification for how the higher number was obtained, in 2017 Morris et al. increased the ratio to 200 to 1, suggesting that the ratio is not scientifically meaningful.<sup>38</sup>

### C. What is Good for the Goose is Good for the Gander

#### 1. Methodology

The scientific data bearing on benefits and harms of circumcision are highly contested, and the available studies are of varying quality. In past work, Morris et al. have consistently criticized the methodology, often without adequate basis, of studies that do not appear to support the practice of infant circumcision, without acknowledging that the same criticisms could be leveled against studies that they often cite that do appear to support the practice of circumcision. For example, they criticize Frisch, Lindhol, and Grønbaek for expressing their results as odds ratios rather than as prevalence risk ratios.<sup>39</sup> Nevertheless, database-based studies published by frequent Morris co-author Wiswell<sup>40</sup> also reported odds ratios instead of prevalence risk ratios. A recent “meta-analysis” authored by Morris and Wiswell that included Wiswell’s studies failed to allude to Wiswell’s use of odds ratios.<sup>41</sup>

---

<sup>37</sup> *Ibid.*

<sup>38</sup> B.J. Morris, S.E. Kennedy, A.D. Wodak, A. Mindel, D. Golovsky, L. Schrieber, E.R. Lumbers, D.J. Handelsman & J.B. Ziegler, “Early infant male circumcision: Systematic review, risk-benefit analysis, and progress in policy”, *World Journal of Clinical Pediatrics* 6 (2017), 89-102.

<sup>39</sup> Morris et al. gave the wrong citation for their statement. This criticism was addressed by Frisch in 2011. Despite this, they continue to make this claim.

<sup>40</sup> T.E. Wiswell, R.W. Enzenauer, M.E. Holton, J.D. Cornish & C.T. Hankins, “Declining frequency of circumcision: implications for changes in the absolute incidence and male to female sex ratio of urinary tract infections in early infancy”, *Pediatrics* 79 (1987), 338-42; T.E. Wiswell & J.D. Roscelli, “Corroborative evidence for the decreased incidence of urinary tract infections in circumcised male infants”, *Pediatrics* 78 (1986), 96-9; T.E. Wiswell, F.R. Smith & J.W. Bass, “Decreased incidence of urinary tract infections in circumcised male infants”, *Pediatrics* 75 (1985), 901-3.

<sup>41</sup> B.J. Morris & T.E. Wiswell, “Circumcision and lifetime risk of urinary tract infection: a systematic review and meta-analysis”, *Journal of Urology* 189 (2013), 2118-24.

## 2. Lack of Control Groups

Morris et al. criticize studies for a lack of control groups in which men compared their experience after circumcision to their experience before circumcision. Following the Critique's logic, Kigozi's study of female sexual partners of African men<sup>42</sup> is not credible because it lacked a control group. Thus, by the Critique's own logic, the Critique should not have cited Kigozi. Morris and colleagues appear unaware that their review article, arguing that male circumcision does not affect sexual function,<sup>43</sup> included 11 before-after studies in their analysis that lacked "control groups." Morris and colleagues are evidently unaware that controls are not needed in before/after evaluations as each participant acts as his own control and matches himself in all demographic categories.

## 3. The Small Number Fallacy

Morris et al. criticize several studies with findings that they deem insufficiently supportive of male circumcision as not scientifically reliable, due either to a small percentage of participants having one circumcision status or to a small percentage having the outcome of interest. Such claims demonstrate the authors' lack of awareness that determinants of statistical significance permit small percentages when they are compensated by a larger number of participants. While a study with equal numbers of intact and circumcised participants would be more efficient (fewer participants would be needed for the study to achieve the desired power), studies with unequal numbers in each group (such as having two to three controls for each case) are commonly published, are scientifically valid, and are often ethically mandated.

We are surprised that Morris et al. did not voice the same invalid objections to the three randomized clinical trials in Africa,<sup>44</sup> given that the combined absolute risk reduction of HIV for the three trials was only 1.3%.<sup>45</sup> The Critique's authors also should have raised the same objections to a study they cite of genital human papillomavirus (HPV) as in four of the five countries studied

---

<sup>42</sup> G. Kigozi, I. Lukabwe, J. Kagaayi, M.J. Wawer, B. Nantume, G. Kigozi, F. Nalugoda, N. Kiwanuka, F. Wabwire-Mangen, D. Serwadda, R. Ridzon, D. Buwembo, D. Nabukenya, S. Watya, T. Lutalo, J. Nkale & R.H. Gray, "Sexual satisfaction of women partners of circumcised men in a randomized trial of male circumcision in Rakai, Uganda", *BJU International* 104 (2009), 1698-701.

<sup>43</sup> B.J. Morris & J.N. Krieger, "Does male circumcision affect sexual function, sensitivity, or satisfaction? – a systematic review", *Journal of Sexual Medicine* 10 (2013), 2644-2657.

<sup>44</sup> These trials are cited in the Critique as references 35-37.

<sup>45</sup> G.J. Boyle & G. Hill, "Sub-Saharan African randomised clinical trials into male circumcision and HIV transmission: methodological, ethical and legal concerns", *Journal of Law and Medicine* 19 (2011), 316-334.

the numbers of circumcised men found to be positive for HPV were 0, 1, 1, and 2, and in the fifth country the number of intact men found to be positive for HPV was 2.<sup>46</sup>

#### 4. Expendable Anatomy

The Critique also suggests that the foreskin, because its size can vary, is a vestigial organ. Noses, female breasts, and the male penis also vary in size. Morris et al. presumably do not believe that they, too, are vestigial organs.

## II. Problematic Ethical Claims

Turning to the debate about the ethics of circumcision or the lack thereof, Morris et al. claim that circumcision is ethical because it confers many health benefits that exceed the risks, going so far as to suggest that an ethical *mandate* may exist to circumcise. Unfortunately, they have exaggerated the medical benefits and minimized the harms and risks, as demonstrated above, and assigned no inherent value to the foreskin.

### A. Unfounded Appeals to Authority

While much of the Critique relies on appealing to the authority of the American Academy of Pediatrics and of the US Centers for Disease Control and Prevention (CDC), neither organization has ever recommended circumcision. According to the AAP in its 2012 circumcision policy statement, “[The] health benefits are not great enough to recommend routine circumcision for all male newborns”, and “[parents] will need to weigh medical information in the context of their own religious, ethical, and cultural beliefs and practices”.<sup>47</sup> Similarly, in the 2012 technical report accompanying the policy statement, the AAP hedged its bets by stating:

Parents should weigh the health benefits and risks in light of their own religious, cultural, and personal preferences, as the medical benefits alone may

---

<sup>46</sup> X. Castellsagué, F.X. Bosch, N. Muñoz, C.J.L.M. Meijer, Shah KV, S. de Sanjosé, J. Eluf-Neto, C.A. Ngelangel, S. Shichareon, J.S. Smith, R. Herrero, V. Moreno & S. Franceschi, “Male circumcision, penile human papillomavirus infection, and cervical cancer in female partners”, *New England Journal of Medicine* 346 (2002), 1105-12. Cited in Critique as reference 124. In this case, the small numbers criticism is legitimate because the analysis failed to stratify by country but rather pooled the five populations.

<sup>47</sup> 2012 AAP Statement, *supra* note 5, at 585-586.

not outweigh these other considerations for individual families.<sup>48</sup> ... In cases such as the decision to perform a circumcision in the newborn period (where there is reasonable disagreement about the balance between medical benefits and harms, where there are nonmedical benefits and harms that can result from a decision on whether to perform the procedure, and where the procedure is not essential to the child's immediate well-being), the parents should determine what is in the best interest of the child.<sup>49</sup>

Subsequently, the 2012 AAP Task Force backpedaled further, noting that the “benefits were *felt* to outweigh the risks of the procedure” (emphasis added).<sup>50</sup> Similarly, in its 2014 draft circumcision recommendations, which have never been published nor revised following peer review, the CDC did not recommend the procedure.<sup>51</sup>

By comparison, Morris et al. appear to take a quite unprecedented position that attempts to claim an ethical *requirement* to recommend circumcision.<sup>52</sup> But in the body of the text they too equivocate as follows:

“Given the immediate and lifelong protections and very low risk of adverse events, failure to recommend infant MC [male circumcision] or to suggest that MC should be delayed would *seem* unethical as it would expose the boy to substantial harms. Since MC [male circumcision] later in life is no longer a simple surgical procedure ... failure to circumcise *might* be considered unethical. (emphasis added).”<sup>53</sup>

#### B. Morris et al. Cannot Support the Claim that Benefits Exceed Risks

While the authors claim that the medical benefits outweigh the risks – the centerpiece of the AAP's 2012 circumcision policy statement,

---

<sup>48</sup> American Academy of Pediatrics Task Force on Circumcision, “Technical Report, Male Circumcision”, *Pediatrics* 130 (2012), e756-e785, at e757.

<sup>49</sup> *Ibid.*, e759.

<sup>50</sup> AAP Task Force on Circumcision 2012, “The AAP Task Force on Neonatal Circumcision: a call for respectful dialogue”, *Journal of Medical Ethics* 39 (2013), 442-443, at 442.

<sup>51</sup> Centers for Disease Control and Prevention, Background, Methods, and Synthesis of Scientific Information used to Inform the “Recommendations for Providers Counseling Male Patients and Parents Regarding Male Circumcision and Prevention of HIV infection, STIs and other Health Outcomes” [draft] (Atlanta: Centers for Disease Control and Prevention, 2014).

<sup>52</sup> The title of the Critique is an interesting choice of words: “The Ethical Course Is To Recommend Infant Male Circumcision.” Using “the” indicates that there is no alternative to a physician recommending circumcision. If the authors wanted to argue that it is ethically permissible for physicians to recommend circumcision, they should have worded the title differently.

<sup>53</sup> Critique, at 653.

according to one of its authors<sup>54</sup> – the claim is unsustainable because, as the AAP conceded in 1999<sup>55</sup> and again in 2012,<sup>56</sup> it does not know the risks. Moreover, as Darby has written, in its weighing of the pros and cons, the AAP *assigned no value to the foreskin itself*, whereas the male genitalia – the most intimate and so-called “private parts” of the male anatomy– are of obvious psychosexual importance to males.<sup>57</sup>

Even if one accepts the set of facts proposed in the Critique, physicians must comply with the ethical rule of proportionality, and must demonstrate that there is no simpler, safer, or more effective way to achieve the desired medical benefits. This cannot be done with circumcision, because, as the American Academy of Pediatrics wrote in its initial position statement on circumcision in 1975, the same benefits can be obtained more easily and effectively without surgically removing healthy tissue and without the attendant risks of surgery, including the risks of meatal stenosis, septicemia, significant, hemorrhage, and mutilation.<sup>58</sup>

The effectiveness of circumcision is sufficiently uncertain, the purported medical benefits sufficiently unlikely, the risks sufficiently great (when both likelihood and magnitude of harm are taken into account) that physicians are ethically prohibited from the customary US practice of soliciting the procedure, as well as from performing it. As the Royal Dutch Medical Association wrote in 2010, “The rule is: do not operate on healthy children”.<sup>59</sup>

### III. Is It Lawful For Physicians To Take Orders From Parents To Operate On Healthy Boys?

Thus, unnecessary circumcision surgery is ethically proscribed, and for over thirty years, the prevailing view among legal scholars who have addressed the issue has been that circumcision is unlawful as well – not that it should be banned; that it is *already* unlawful. In 1985, William Brigman wrote that circumcision violates the child abuse statutes;<sup>60</sup> and in 1999, Christopher

---

<sup>54</sup> A.L. Freedman, “The circumcision debate: beyond benefits and risks”, *Pediatrics*, 137 (2016): pii: e20160594.

<sup>55</sup> American Academy of Pediatrics Task Force on Circumcision, “Circumcision policy statement”, *Pediatrics* 103 (1999), 686-93, at 688.

<sup>56</sup> American Academy of Pediatrics Task Force on Circumcision, “Male circumcision”, *Pediatrics* 130 (2012), e756-e785. Available at [www.pediatrics.org/cgi/content/full/130/3/e756](http://www.pediatrics.org/cgi/content/full/130/3/e756).

<sup>57</sup> R. Darby, “Risks, benefits, complications and harms: Neglected factors in the current debate on non-therapeutic circumcision”, *Kennedy Institute of Ethics Journal* 25, No. 1 (2015), 1-34.

<sup>58</sup> H.C. Thompson, L.R. King, E. Knox et al., “Report of the ad hoc task force on circumcision”, *Pediatrics* 56 (1975), 610-1.

<sup>59</sup> KNMG, Non-therapeutic Circumcision of Male Minors (Utrecht, Netherlands: KNMP, 2010).

<sup>60</sup> W.E. Brigman, “Circumcision as Child Abuse: The Legal and Constitutional Issues”, *Journal of Family Law* 23 (1985), 337-357.

Price wrote that non-therapeutic circumcision violates criminal and constitutional law and constitutes criminal assault.<sup>61</sup> In our article, we cited numerous legal authorities for the proposition that circumcision is unlawful, including US constitutional law, statutory law, and case law; international treaties and customary international law; and recent decisions by courts in Germany, Austria, and the United Kingdom.

In contrast, in 2010 the AAP suggested that physicians could perform a ritual nick of girls' genitals, even though this would have constituted a federal crime under the 1997 female genital mutilation statute.<sup>62</sup> The AAP quickly re-tired the policy.<sup>63</sup> The burden falls to the AAP and now Morris et al. to refute the claims that circumcision is unlawful, but as discussed below, the arguments that they make, usually citing no law, are untenable, and are based on a form of extreme cultural relativism that requires ignoring the rights of the child.

## A. Implausible Defenses

### 1. The "Circumcision is Common" Defense

We argued that parents do not have the right to choose to have their sons circumcised for religious reasons, based on the principles established in a famous case (*Prince v. Massachusetts*). In 2013, the AAP Committee on Bioethics cited the *Prince* case to advance the same principle: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death".<sup>64</sup> Puzzlingly, Morris et al. argue that this case is irrelevant because "infant MC continues to be one of the most common surgical procedures in the US".<sup>65</sup> Such an argument is a non sequitur. A criminal would not succeed in a defense by asserting that his crime is commonplace.

---

<sup>61</sup> C.P. Price, "Male Non-therapeutic Circumcision: The Legal and Ethical Issues" in G.C. Denniston, F.M. Hodges & M.F. Milos (eds.), *Male and Female Circumcision: Medical, Legal and Ethical Considerations in Pediatric Practice* (New York: Kluwer Academic, 1999), 425-454, at 437.

<sup>62</sup> American Academy of Pediatrics Committee on Bioethics, "Ritual genital cutting of female minors", *Pediatrics* 125, No. 5 (2010), 1088-1093. Available at <http://pediatrics.aappublications.org/content/125/5/1088.abstract>.

<sup>63</sup> American Academy of Pediatrics, *American Academy of Pediatrics withdraws policy statement on female genital cutting* [press release], [www2.aap.org/advocacy/releases/fgc-may27-2010.htm](http://www2.aap.org/advocacy/releases/fgc-may27-2010.htm) (last visited: 18 April 2018).

<sup>64</sup> [American Academy of Pediatrics] Committee on Bioethics, "Conflicts between religious or spiritual beliefs and pediatric care: informed refusal, exemptions, and public funding", *Pediatrics* 132 (2013), 962-5.

<sup>65</sup> Critique, at 656.

## 2. The “That’s Absurd” Defense

In their Critique, Morris et al. assert, “It is patently absurd that physicians, ‘risk being held liable for every non-therapeutic circumcision,’”<sup>66</sup> but they do not prove the absurdity. Involuntary male circumcision violates black letter law in most US states prohibiting child abuse.<sup>67</sup> Therefore, physicians do indeed risk being held liable for each NTC, and as the most plausible interpretation of existing law becomes more widely understood, this risk will only increase.

### B. The “There Is No Law or Case Against It” Defense

#### 1. No Statute

During the debate about the ethics and legality of circumcision, Dr. Brady of the AAP 2012 committee offered only one slide about the law, a slide that incorrectly asserted, “No jurisdiction in the United States has any law prohibiting male newborn circumcision ...” Brady’s argument regarding the absence of an explicit statute demonstrates his lack of awareness that an act can be illegal without a statute explicitly prohibiting it. For example, there was no federal US statute prohibiting female genital cutting until Congress made it a crime in 1997, but in doing so, Congress made findings that “such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional”.<sup>68</sup> Thus, Congress expressly recognized that female genital cutting (except when medically necessary) was *already unlawful* and violated the rights of girls, including forms of such cutting that are less physically invasive than NTC. The bill therefore merely codified existing law into a federal statute. Similarly, although there is no statute in the United Kingdom prohibiting NTC, in 2016, the UK’s High Court of Justice (Family Division) prohibited a father from circumcising two boys for religious reasons on the grounds that it conflicted with more basic legal requirements despite these not having been specifically enumerated with respect to NTC.<sup>69</sup>

---

<sup>66</sup> Critique, at 657.

<sup>67</sup> W.E. Brigman, “Circumcision as Child Abuse: The Legal and Constitutional Issues”, *Journal of Family Law* 23 (1985), 337-357.

<sup>68</sup> 18 US Code, para. 116 – Female genital mutilation.

<sup>69</sup> [UK] Royal Courts of Justice, In the matter of B and G (Children) (No 2), Neutral Citation Number [2015] EWFC 3, Case Number LJ13C00295, 14 January 2015, [https://www.judiciary.gov.uk/wp-content/uploads/2015/01/BandG\\_2\\_.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2015/01/BandG_2_.pdf) (“B and G”).



## 2. No Case

As discussed in our paper, there have been several decisions by courts in Europe in recent years holding that there is no parental right to have one's son circumcised for religious reasons; that children's rights to bodily integrity and self-determination supersede their parents' rights; and that circumcision is harmful.<sup>70</sup> In the US as well, at least one circumcision case has been settled even though the circumcision was "properly performed".<sup>71</sup> Even ignoring that case, it does not follow from the absence of adverse judgments or settlements – which are often kept confidential – that circumcision is lawful.

## C. The "Female Genital Cutting is Different" Defense

Morris et al. argue that the federal law making female genital cutting a crime applies only to females, whereas, "infant MC is highly beneficial, but FGM [female genital mutilation] is not."<sup>72</sup> Cutting off any body part can be misleadingly characterized as being medically "beneficial" insofar as the body part removed cannot become diseased. The questions, then, are whether there are net benefits; whether this is a consensus among experts or a matter of debate; whether the claimed benefits, even if they do outweigh risks and harms, do so to a sufficiently impressive degree that this would justify overriding a child's moral and legal rights to bodily integrity; and whether those same alleged benefits could be achieved in less invasive ways. With respect to removing the foreskin in newborns, the prevailing conclusion among national-level medical societies to have released formal policy statements on the question is that any benefits that may follow from this practice do not outweigh the risks.<sup>73</sup> The view that the benefits do outweigh the risks is maintained only by the AAP, whose 2012 policy served as the basis for the subsequent 2014 draft policy from the CDC, which has never been published; both of these organizations are based in the sole developed country where non-religious newborn NTC remains a

<sup>70</sup> Landgericht Köln; 7 May 2012, Urteil Ns 169/11 ("Cologne case"); Court of Zutphen [Austria], Family Division, Case Number 83927 JE RK 07-110, July 31 2007 ("Austrian case"); OLG Frankfurt A.M., Beschluss vom 21 August 2007, Az. 4 W 12/07 ("Frankfurt case"); OLG Hamm, Beschluss vom 30 August 2013, Az. 3 UF 133/13 ("Hamm case"); B and G; [UK] High Court of Justice, Family Division, Re L and B (Children), Neutral Citation Number [2016] EWHC 849 (Fam), 5 April 2016, [www.bailii.org/ew/cases/EWHC/Fam/2016/849.html](http://www.bailii.org/ew/cases/EWHC/Fam/2016/849.html) ("L and B").

<sup>71</sup> "NOCIRC-ARC Press Release Re Stowell Case", [www.arclaw.org/resources/press-releases/nocirc-arc-press-release-re-stowell-case](http://www.arclaw.org/resources/press-releases/nocirc-arc-press-release-re-stowell-case) (last visited 12 April 2018).

<sup>72</sup> Critique, at 655.

<sup>73</sup> CPS, "Newborn Male Circumcision", *Paediatrics & Child Health* 20, No. 6 (2015), 311-320; KNMG, "Nontherapeutic Circumcision of Male Minors", *The Royal Dutch Medical Association (KNMG)* (2010), 1-17; RACP, "Circumcision of Infant Males", *Royal Australasian College of Physicians* (2010), 1-28; CUA, "CUA Guideline on the Care of the Normal Foreskin and Neonatal Circumcision in Canadian Infants", *Canadian Urological Association Journal* 12, No. 2 (2018), E76-99.

prevailing cultural custom.<sup>74</sup> But even if the medical benefits did outweigh the medical risks *and* this was a matter of consensus among experts, this would not settle the moral issue of whether a child should be allowed to keep his genitals intact, given alternative ways of achieving the same purported health benefits that would respect his ethical and legal right to bodily integrity. Moreover, the male and female genitalia are identical in early gestation and become homologous parts – in males, the prepuce is the foreskin of the penis, while in females, it is the clitoral hood – so one would expect male and female prepuces to be treated the same way from ethical and legal perspectives. Indeed, differential treatment of males and females is prohibited by the US Constitution’s Fifth and Fourteenth Amendments<sup>75</sup> and by human rights treaties that the US has ratified such as the International Covenant on Civil and Political Rights.<sup>76</sup> Since genital cutting removes healthy genital tissue from both boys and girls, the law should, and we contend that it must, treat them equally.

#### D. Not Understanding Legal Precedent

Morris et al. are dismissive of the legal cases we cited that do not involve circumcision.<sup>77</sup> What they fail to appreciate is that in common law jurisdictions such as the US, legal precedent necessarily evolves one case at a time. Adjudication of an individual case is informed by the United States Constitution, human rights treaties, legislative actions, legal principles that have been established in previous cases, and of course fairness. The question is not whether the facts of the cases are identical, but rather whether the *legal analysis* in a past case is applicable to the facts in a present case. If it were required in deciding a case that the facts be identical, slavery would likely still be legal, and civil rights law might never have developed. Whether a case specifically addresses male circumcision or not, the case may be cited if the principles developed in the case can be applied to a case involving male circumcision.

---

<sup>74</sup> See, e.g., D. Sumit, K. Afshar, L. Braga & P. Anderson, “Canadian Urological Association guideline on the care of the normal foreskin and neonatal circumcision in Canadian infants (full version)”, *Canadian Urological Association Journal* 12 (2017), E76-99; KNMG, *Non-therapeutic Circumcision of Male Minors* (Utrecht, Netherlands: KNMP, 2010); M. Frisch, Y. Aigrain, Y. Barauskas et al., “Cultural bias in the AAP’s technical report and policy statement on male circumcision”, *Pediatrics* 131 (2013), 796-800.

<sup>75</sup> See Shea Lita Bond, *Female Circumcision Laws and the Equal Protection Clause*, 32 *J. Marshall L. Rev.* 353 (1999).

<sup>76</sup> International Covenant on Civil and Political Rights, Article I, Part I, Section 1 (right to self-determination) and Part II, Article 2, Section 1 (prohibiting discrimination), available at [www.ohchr.org/en/professionalinterest/pages/CCPR.aspx](http://www.ohchr.org/en/professionalinterest/pages/CCPR.aspx).

<sup>77</sup> A case dismissed by the Critique at 656 (section III.C.1) is *Reynolds v. United States*, 98 US 145 (1878), at 166-167, available at <https://supreme.justia.com/cases/federal/us/98/145/case.html>; A case dismissed by the Critique at 657 (section III.D.2) is *Tortorella v. Castro*, 140 Cal.App.4th 1, 43 Cal.Rptr.3d 853, Cal.App. 2 Dist (2006), available at [www.lawlink.com/research/Case-Level3/83392](http://www.lawlink.com/research/Case-Level3/83392).

## E. Human Rights Violations

Contrary to the Critique's assertion, human rights treaties are the law of the land according to the Supremacy Clause of Article VI of the US Constitution and some of the most well-established legal precedents in US legal history [e.g., *Missouri v. Holland*, 252 US 416 (1920)]. Typically, human rights declarations provide principles to be followed, rather than exclusive laundry lists of specific human rights violations.<sup>78</sup> For example, the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child* do not specifically mention involuntary female genital cutting as a forbidden activity, yet many have used these documents to support efforts to combat the practice.<sup>79</sup> The principles that apply to involuntary female genital cutting also apply to involuntary male genital cutting (NTC). Applying human rights principles, the United Nations (UN) has shown growing concern about male circumcision as a human rights violation, dating from the 2001 presentation by Attorneys for the Rights of the Child<sup>80</sup> that became part of the official UN record.

Further support has developed in recent years for the view that circumcision constitutes a human rights violation. The UN's Torture Rapporteur found the medically unnecessary genital cutting of intersex children to be torture.<sup>81</sup> A UN-affiliated children's rights report from the International NGO Council on Violence Against Children, cited by Morris et al., suggested that applying human rights principles consistently yields a conclusion that male circumcision is a human rights violation.<sup>82</sup> Lastly, in 2013, the UN officially "expressed concern

---

<sup>78</sup> United Nations, "The Universal Declaration of Human Rights", available at [www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/). Convention on the Rights of the Child. United Nations General Assembly Resolution 44/25. Adopted 20 Nov 1989, [www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx) (accessed: 12 February 2018).

<sup>79</sup> See, e.g., the World Health Organization, "Eliminating Female genital mutilation", (2008), at 8 ("Strong support for the protection of the rights of women and girls to abandon female genital mutilation is found in international and regional human rights treaties and consensus documents"). Available at [www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf).

<sup>80</sup> "Written statement submitted by the National Organization of Circumcision Information Resource Centers (NOCIRC), a non-governmental organization on the Roster, 14 June 2002", United Nations document number E/CN.4/Sub.2/2002/NGO/1 (23 March 2002), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/140/10/PDF/G0214010.pdf?OpenElement>.

<sup>81</sup> "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013", UN document number A/HRC/22/53, available at: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53-English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53-English.pdf).

<sup>82</sup> International NGO Council on Violence Against Children, *Violating children's rights: harmful practices based on tradition, culture, religion or superstition* (New York City: International NGO Council on Violence Against Children, 2012), at 22, available at [www.crin.org/en/home/what-we-do/working-partnership/working-others/international-ngo-council-violence-against](http://www.crin.org/en/home/what-we-do/working-partnership/working-others/international-ngo-council-violence-against).

about reported short and long-term complications arising from some traditional male circumcision practices” and requested that Israel investigate complications of circumcision.<sup>83</sup>

#### IV. Conclusion: Despite Morris Et Al.’s Contentions, Circumcision Remains Unethical And Unlawful

Ultimately, the proponents of circumcision have two main arguments: 1. Circumcision has purported medical benefits and few medical risks, and this makes it ethical and lawful to perform; 2. Parents have the “right” to elect it for their sons, based on the parents’ religious, cultural and personal beliefs, and physicians have the right to take orders from parents to perform the procedure.

As the British physician Gairdner wrote, however, in a landmark article in 1949, of all the many and varied medical reasons that physicians had advanced for circumcision during the previous 100 years, none were convincing;<sup>84</sup> and the same remains true today, nearly 70 years later. Most of the potential medical benefits or reduced risks that the AAP claims for the procedure occur in adulthood and can be achieved by non-surgical means; boys who are too young to consent to NTC are also too young to consent to sexual activity that might expose them to the various diseases whose incidence is claimed to be reduced by NTC. Given that there is disagreement about the likelihood, magnitude, and even relevance of the various benefits that have been attributed to NTC, the ethical course is to leave the decision to the individual who will be personally affected by the procedure for him to make when he is able to assess the competing claims and decide about any relevant trade-offs in light of his own values.

From the ethical and legal perspective, medical procedures on children that can be deferred to the age of consent must be deferred, and unnecessary surgery violates numerous legal rights of children as well as their human rights. As several courts in Europe (at least three in Germany, at least one in Austria, and at least two in the UK) have held in recent years, parents’ constitutional and statutory rights do not extend to surgically modifying their healthy children’s bodies,<sup>85</sup> and as argued above, the result would be the same under US and international law.

---

<sup>83</sup> United Nations Committee on the Rights of the Child, “Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May - 14 June 2013)”, CRC/C/ISR/CO/2-4, available at [www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf), at paras 41-42.

<sup>84</sup> D. Gairdner, “The fate of the foreskin: a study of circumcision”, *Br Med J* 1949;2:1433-7.

<sup>85</sup> Cologne case; Austrian case; Frankfurt case; Hamm case; B and G; and L and B.

Hence, we conclude that the outlying view expressed in the Critique that there is an ethical duty to recommend circumcision is not convincing and that the opposite is true: physicians are ethically and legally proscribed from operating on healthy children.