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## SECULARIZATION, ANTI-MINORITY SENTIMENT, AND CULTURAL NORMS IN THE GERMAN CIRCUMCISION CONTROVERSY

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*After an appellate court made circumcision of minors effectively illegal in the absence of a medical justification, the German Parliament passed a statute that restored, with some limitations, the right of parents to seek ritual circumcisions for their sons. Between these events, a fierce controversy broke out in Germany involving Jews, Muslims, and other Germans. Whereas circumcision without medical indication is rare among most Germans, it is a common religious practice in Jewish and Muslim communities in Germany. The debate tapped into ongoing discussions of German cultural norms, German secularization, and a long history of anti-Semitism and a much shorter history of anti-Muslim sentiment in Germany. It also tapped into the religious and traditional practices – sometimes converging, sometimes diverging – of Jews and Muslims.*

*This Article discusses the range of opinions on religious circumcision among Germans and other Europeans. It disentangles the social factors at work in the debate and analyzes the court decision and the new statute. It also examines some recent decisions under the new statute and explores problems with the statute's application. Given that roughly 700 million*

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*boys worldwide have undergone ritual circumcision, the German controversy has global implications.*

*This Article shows that at day's end, the debate turns on issues of toleration and multiculturalism. It is scarcely possible to resolve this debate without asking, "What is a child?" If a child is a proto-member of his parents' religious community and has only a weak right to bodily integrity, or if the risk-benefit ratio favors circumcision and the parents have a broad scope of consent, then circumcision without medical indication might be legally and morally permissible. Parents might then have discretion to place on his body a permanent physical symbol of his expected or hoped for religious affiliation as an adult. Yet if a child has a strong right to bodily integrity, and circumcision is not medically indicated, then the permanent physical modification of his body with a symbol of Jewish or Muslim identity might be problematic, and circumcising him for aesthetic or other nonreligious reasons might likewise be problematic.*

## TABLE OF CONTENTS

1.	INTRODUCTION .....	506
2.	THE SPARK OF CONTROVERSY .....	511
	2.1. <i>Factual Background</i> .....	511
	2.2. <i>The Trial Court</i> .....	513
	2.3. <i>The Appellate Court</i> .....	514
3.	IMMEDIATE AFTERMATH OF THE COLOGNE DECISION..	520
	3.1. <i>Initial Reactions</i> .....	520
	3.2. <i>Official Responses by Jewish and Muslim Groups</i> .....	523
	3.3. <i>Two German Professors Weigh In</i> .....	529
	3.4. <i>Accusations of Anti-Semitism</i> .....	536
	3.5. <i>A Muslim Perspective</i> .....	543
	3.6. <i>The New Statute</i> .....	545
4.	DEVELOPMENTS SINCE JANUARY 2013 .....	548
	4.1. <i>Interpretation, Application and Enforcement of the New Statute</i> .....	549
	4.1.1. <i>Motivations and Parental Disagreement</i> .....	549
	4.1.2. <i>Undesirable and Perverse Motivations</i> .....	551
	4.1.3. <i>Enforcement of Anesthesia Requirements</i> .....	552
	4.1.4. <i>Two Constitutional Complaints</i> .....	553
	4.1.5. <i>Was It, or Was It Not, a Circumcision Metzitzah B'Peh?</i> .....	555
	4.1.6. <i>Female Genital Mutilation and the Issue of Sex Discrimination</i> .....	559
	4.2. <i>Two Specimens of German Recalcitrance</i> .....	561
	4.3. <i>Developments Affecting Jews in Germany</i> .....	564
	4.4. <i>A German Muslim Comment</i> .....	568
	4.5. <i>European Developments beyond Germany</i> .....	570
5.	RETROSPECT AND PROSPECT .....	573
	5.1. <i>Sources of the Controversy</i> .....	573
	5.2. <i>Going Forward</i> .....	577
	5.2.1. <i>Legal Issues</i> .....	577
	5.2.2. <i>Broader Problems</i> .....	578

## 1. INTRODUCTION

On May 7, 2012, the regional appellate court in Cologne issued a ruling that effectively made the performance of a non-medically-indicated circumcision on male minors a criminal offense within its territorial jurisdiction.<sup>1</sup> Once the decision became public on June 25, 2012,<sup>2</sup> Germany entered a period of nationwide debate on banning circumcision. Many German doctors and citizens rallied in support of the decision, while politicians, Jewish and Muslim communities, and other voices protested the criminalization of what some considered a religious obligation to circumcise. Most Jews saw the Cologne decision as anti-Semitic. Most Muslims saw it as discriminatory.

The circumcision controversy emerged as a political issue in the wake of Germany's ongoing efforts to come to terms with its Nazi past (*Vergangenheitsbewältigung*). It occurred during a period of discussion about the integration of Muslim immigrants into German society. It came when German society was far more secular than it was after 1945 or even after the mid-1960s.<sup>3</sup> The controversy of 2012, then, combined issues of dealing with the Holocaust, increasing multiculturalism, and continuing secularization.

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<sup>1</sup> See Landesgericht Köln [LGK] [Cologne Regional Court] May 7, 2012, 151 Ns 169/11 (Ger.) (holding that non-medically-indicated circumcisions of male minors are a criminal offense). In the United States, a decision by an appellate court would create a precedent, and the territorial scope of that precedent would remain until reversed by a higher court or legislatively overruled. Germany has no formal doctrine of *stare decisis* for district or regional courts. Thus, the Cologne appellate decision had no binding force on other courts, even if in practice German courts try to take earlier decisions into account. See Hendrik Pekárek, *Circumcision Indecision in Germany*, 4 J.L., REL. & STATE 1, 7-8 (2015) (explaining relevant differences between the U.S. and German court systems) (page proofs dated Nov. 20, 2015) (on file with the author). However, the court's decision "created considerable legal uncertainty for the rest of the country." *Id.* at 8.

<sup>2</sup> On that date the German edition of the *Financial Times* published an article on the ruling. See Peter Widmann, *Ein Gerichtsurteil und seine mediale Inszenierung* [A Court Judgment and its Medial Production], in *BESCHNEIDUNG: DAS ZEICHEN DES BUNDES IN DER KRITIK* [Circumcision: The Sign of the Covenant in Critique] 219, 220-21 (Johannes Heil & Stephan J. Kramer eds., Metropol Verlag, 2012) (stating that it was not the court but Holm Putzke, a law professor, who informed the press of the decision).

<sup>3</sup> Olaf Blaschke, *Germany in the Age of Culture Wars*, in *IMPERIAL GERMANY REVISITED: CONTINUING DEBATES AND NEW PERSPECTIVES* 125, 132, 134-35, 138 (Sven Oliver Müller & Cornelius Torp eds., 2011) (suggesting that secularization increased and Christian confessionality decreased in the 1960s).

In any complicated situation it is often difficult to isolate the different though overlapping factors that led to a particular denouement. With caution, I suggest that three main factors are at work in the unfolding controversy. One is cultural norms: The great majority of Germans – like the Chinese, the Japanese, and most Latin Americans – have never been a circumcising people, while Jews and Muslims generally view circumcision as a duty or at least as highly desirable. It is common for regularities in behavior and attitude to take on normative weight.<sup>4</sup> Among now-normative German regularities are a respect for human rights, a practice of raising children without corporal punishment, and a growing consensus that children have certain rights and parents have certain responsibilities. These social norms can limit justifications for circumcising minors. So can the attitudes and professional behavior of German physicians, including an understanding of the Hippocratic oath (not to do harm) in which pain and the loss of nonrenewable functional tissue count as harm. Sometimes the law plays a role in enforcing cultural norms against minority populations whose customs and practices are different.

A second factor is that increasing secularization in Germany after World War II, and especially after 1970, created an atmosphere in which ignorance of and disdain for many religious practices tended to become socially normative. For clarity, here the adjective *secular* means nonreligious, and *secularization* is a social process in which a society or a person becomes increasingly nonreligious. Typical markers of secularization include “the retreat of religion from public life,” “the decline in [religious] belief and practice,” and the rise “of a humanist alternative.”<sup>5</sup> The mechanisms by which secularization operates are unclear. One possibility is that as nonreligious persons become increasingly secularized they are less

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<sup>4</sup> Exactly how norms arise remains in dispute. See, e.g., EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977) (proposing that social norms emerge as solutions to prisoners’ dilemma-type situations, coordination situations, and partiality situations).

<sup>5</sup> See CHARLES TAYLOR, *A SECULAR AGE* 423 (2007) (noting that these markers pertain both to what he calls “secularization theory” and “secularity”). I do not use the term *secularity* but will later introduce the term *secularism*, which I employ differently from Taylor. See *infra* text accompanying notes 52–62, 170–72, 178–80, 374–75. Sociologically, secularization also involves making religion a private matter and seeing religion, law and politics as different cultural fields. See generally JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); NIKLAS LUHMANN, *DIE RELIGION DER GESELLSCHAFT [Religion in Society]* (2002).

sympathetic to religious practices unfamiliar to them. The secularization of German society helped many Germans to see themselves as protectors of human rights without considering the religious significance of ritual circumcision to Muslims and Jews.

In this context, however, secularization by itself is not a deep explanatory phenomenon. Going along with it are toleration and multiculturalism. Toleration, as understood here, is declining to interfere with what one sees as objectionable behavior or practices of other persons or groups. One can be secular without being tolerant and be religious without being intolerant. But sometimes being secular makes it easier to be tolerant. Multiculturalism, again as understood here, is a governmental and social policy that asks all persons to respect those whose cultural and religious practices differ from one's own. Multiculturalism seeks respect rather than mere toleration. Later it will become clear that some Germans, whether Christian or secular, were blind to ways in which their forms of state secularism are adapted to the dominant Christian tradition.<sup>6</sup>

A third factor is anti-Semitism and anti-minority sentiment generally. Although the views held by many Germans about minority religious populations are sometimes hard to identify and articulate, these views require attention. The Cologne case involved a child of Muslim parents. After the Second World War, Germany saw a good deal of immigration. There was substantial migration from Turkey to Germany during the post-war years under the guest worker (*Gastarbeiter*) program, and immigration became a vexed issue. Negative attitudes toward immigrants persist to this day.<sup>7</sup> Moreover, discussions of German identity were also informed by the Holocaust and the need to deal with the Nazi past. The situation

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<sup>6</sup> See *infra* text accompanying notes 53, 57-58, 171-172, 374-375, 377, 381.

<sup>7</sup> See The Editorial Board, Editorial, *The Marches in Dresden*, N.Y. TIMES, Jan. 7, 2015, at A22 (reporting on an anti-immigration rally in Dresden, Germany). Anti-immigrant views are associated especially with the organization Patriotic Europeans Against the Islamicization of the West, known by the German-based acronym PEGIDA. See *Pegida*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Pegida> (last visited Aug. 26, 2015) (defining the group). Nevertheless, as this Article went to press, Germany more than any other European country welcomed thousands of migrants from Syria. See Katrin Bennhold et al., *Germany Welcomes Thousands of Weary Migrants*, N.Y. TIMES, Sept. 6, 2015, at 1 (noting that Germany welcomed about 8,000 migrants in September 2015); see also Melissa Eddy, *As Germany Welcomes Migrants, Some Wonder How to Make Acceptance Last*, N.Y. TIMES, Sept. 6, 2015, at 8 (stating that Germany would be potentially "accepting an expected 800,000 new residents this year" - or "1 percent of the overall population" - despite worries about a "backlash" against migrants).

of Jews in Germany raises concerns about anti-Semitism, by which I mean a constellation of negative beliefs, attitudes, sentiments, biases, prejudices, dispositions, actions, and practices toward Jewish people held or engaged in by non-Jews.<sup>8</sup> Anti-Semitism played a role in German opinions and attitudes expressed in the media during the circumcision debate. Perceptions of anti-Semitism or anti-Muslim bias hindered Jews and Muslims from engaging fruitfully with arguments by supporters of the court's decision. In the immediate aftermath of the Cologne decision, the participants in the debate often seemed to be talking past each other. Now that the dust has settled, it is important to provide a more even-handed account.

In identifying these factors, I stress that they overlap. Secularization, anti-Semitism, and anti-Islamic sentiment also involve cultural norms. Secularization in Germany is rooted in a particular background that includes a history of religious wars. Though Protestants have been numerically dominant since 1870, Catholics are a sizable and influential minority. Secularization in Germany thus differs from secularization in France, in which Protestants have always been a very small minority, and the French Revolution and later developments stressed *laïcité* (a thoroughgoing separation of church and state). By contrast, anti-Semitism and to a lesser extent anti-Islamic sentiment, along with cultural norms involving human rights, child-rearing, and the practice of medicine, are shared across many European countries. Further, these factors may intersect, reinforce, or at times counteract one another. They played a role in the media and intellectual discussion of the Cologne appellate court's decision. But that does not show that the decision itself was the result of all three factors, or that these forces motivated the decision. The factors were not equally important in all aspects of the controversy.

The United States is not Germany, and secularization is not the same in the two countries. But similar issues regarding circumcision have arisen in the United States, which makes this Article more than a discussion of German law and its social context. As an illustration, in 2011 there were notable efforts to ban circumcision via ballot measures in San Francisco and Santa Monica.<sup>9</sup> A judge removed the

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<sup>8</sup> This provisional definition is elaborated more carefully at *infra* text accompanying notes 157-158.

<sup>9</sup> See Robert Hindery, *San Francisco Circumcision Ban to Appear on Ballot*, HUFFINGTON POST, May 18, 2011, <http://www.huffingtonpost.com/2011/05/18/>

San Francisco measure from the ballot on the ground that regulating circumcision was up to the state rather than individual cities.<sup>10</sup> The Santa Monica effort fell apart when it “became associated with anti-Semitic propaganda,” and later a California statute made “it illegal for local authorities to restrict the medical or religious practice.”<sup>11</sup> These issues could arise again. If they do, the free exercise and establishment clauses of the First Amendment might come into play.

This Article proceeds as follows. Part 2 explains the case from the beginning in November 2010 to the appellate court’s decision to criminalize ritual circumcision in May 2012. Part 3 discusses the immediate aftermath from the initial reactions of the Muslim and Jewish communities in Germany through the passage, in late December 2012, of a German statute that permits, with some limitations, religiously-based as well as cultural and prophylactic circumcision. Part 4 turns to developments after January 1, 2013, especially disputes over the interpretation, application, and enforcement of the new law. Also important are developments affecting Jewish and Muslim communities in Germany, and implications for other predominantly secular nations in Europe. Part 5 concludes.

It is useful to separate an analytical distinction from a strategy of organization. The three-factor analytical distinction helps us to understand the German circumcision controversy, which is the chief aim of this Article. The three factors do not suffice to resolve the controversy; for that we also need, at least, to see the importance of toleration and multiculturalism, and to gain some clarity on the nature of children. The strategy of exposition hinges on two questions: why did the controversy break out in Germany after the

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san-francisco-circumcision-ban\_n\_863945.html (reporting on the proposal to ban circumcision in San Francisco); see also Martha Groves, *Male Circumcision Opponents Propose Ballot Measure in Santa Monica*, L.A. TIMES, May 25, 2011, <http://articles.latimes.com/2011/may/25/local/la-me-circumcision-ban-20110525> (noting San Diego’s similar ballot proposal to ban circumcision). For the text of the San Francisco measure, see *San Francisco MGM Bill*, MGMBILL, <http://www.mgmbill.org/san-francisco-mgm-bill.html> (last visited Oct. 22, 2015) (containing the text of the San Francisco bill).

<sup>10</sup> See Mikaela Conley, *Proposed Circumcision Ban Struck from San Francisco Ballot*, ABC NEWS, July 28, 2011, <http://abcnews.go.com/Health/san-francisco-circumcision-ban-stricken/story?id=14179024> (stating that the San Francisco Superior Court held that the ballot would not contain the proposed circumcision ban).

<sup>11</sup> Nicole Neroulias, *New California Law Prohibits Circumcision Bans*, USA TODAY, Oct. 3, 2011, <http://usatoday30.usatoday.com/news/religion/story/2011-10-03/circumcision-ban-california/50647014/1>.



Cologne decision, and which developments and open issues remain after that decision and the new statute? Parts 2, 3 and 5.1 address the first question. Parts 4 and 5.2 address the second. The organization of the Article is roughly chronological in nature.

## 2. THE SPARK OF CONTROVERSY

### 2.1. Factual Background

On November 4, 2010, Dr. Omar Kezze circumcised a four-year-old boy in his medical practice in Cologne.<sup>12</sup> Dr. Kezze is a physician from Aleppo, Syria, who has practiced medicine in Germany since 1991.<sup>13</sup> The child's parents,<sup>14</sup> who are Muslim, requested the

<sup>12</sup> See Bijan Fateh-Moghadam, *Criminalizing Male Circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11*, 13 GERMAN L.J. 1131, 1132 (2012) (providing the basic facts of the case) [hereinafter Fateh-Moghadam, *Criminalizing*].

<sup>13</sup> See Georg Bönisch et al., *Das Stückchen Fleisch* [The Little Piece of Flesh], DER SPIEGEL, July 23, 2012, at 16, 18, <http://magazin.spiegel.de/EpubDelivery/spiegel/pdf/87482679> (stating that Dr. Kezze, although originally from Aleppo, Syria, has worked in Germany as a doctor since 1991). For an English translation, see Georg Bönisch et al., *Where Human Rights Collide: Circumcision Debate Has Berlin Searching for Answers*, SPIEGEL ONLINE, Jul. 25, 2012, <http://www.spiegel.de/international/germany/circumcision-debate-has-german-government-scrambling-for-a-law-a-846144.html>.

<sup>14</sup> See Amtsgericht Köln [AMK][Cologne Trial Court] Sept. 21, 2011, 528 Ds 30/11 (Ger.), translated in *District Court of Cologne -- Judgment of 7 May 2012 on Male Circumcision for Religious Reasons*, DURHAM UNIVERSITY ISLAM, LAW, AND MODERNITY (Jul. 10, 2012) [hereinafter Durham Website], [www.dur.ac.uk/ilm/newsarchive/?itemno=14984](http://www.dur.ac.uk/ilm/newsarchive/?itemno=14984) (containing a translation of the order of the case in Cologne). Professor Michael Bohlander translated the trial court's use of the word *Personensorgeberechtigten* as "parents" although the literal meaning is closer to "legal guardians." Bohlander's translation suggests that both of the boy's parents consented to the procedure. But it is doubtful the father was present to give consent. The *Der Spiegel* article of July 25, 2012, at 18 cited in *supra* note 13, identifies only the mother as having contacted Dr. Kezze, and indicates that the boy and his mother, but not the father, were staying in the mother's friend's apartment. This Article assumes that both parents were Muslim.

The trial court gives, by U.S. standards, a very spare statement of the "facts" of the case. My exposition of the case as decided by the trial and appellate courts is supplemented by information that has become available from press reports and

circumcision. Dr. Kezze performed the surgery *lege artis* (correctly, with no malpractice) and under local anesthesia.<sup>15</sup> Dr. Kezze used a scalpel, sutured the wound with four stitches, and visited the child for aftercare that evening.<sup>16</sup> Two days later, the boy's mother brought him to the University Hospital of Cologne because of secondary bleeding, which was treated successfully.<sup>17</sup> According to a friend of the family, the mother removed her son's dressing prematurely, which prevented the wound from healing completely and resulted in the hospital visit two days after the procedure.<sup>18</sup>

At the hospital, the mother, who was from Tunisia and spoke very little German, had difficulty explaining to the medical staff what had happened.<sup>19</sup> It also appears that she was in considerable mental distress.<sup>20</sup> Hospital personnel apparently believed that the boy's father, but not the mother, consented to the circumcision.<sup>21</sup> They doubted whether Dr. Kezze performed the circumcision according to medical standards.<sup>22</sup> Reportedly, the medical staff noted in the boy's intake form that he was circumcised in an apartment with scissors and without anesthesia.<sup>23</sup> The hospital reported the incident to the police, who interviewed the mother with

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other sources, because doing so leads to a much better understanding of the circumstances of the prosecution of Dr. Kezze. The trial and appellate courts' opinions refer to the circumcised boy simply as "Kind 1" ("child 1"). This reference is akin to the American practice of not making public the names of minor children in many situations. Although various sources have identified the boy by name, I will not do so here.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* See also Bönisch et al., *supra* note 13, at 18 (detailing that the friend of the mother reported that mother and son were taken to the hospital in an ambulance after a passerby called an ambulance because the mother walked into the street and was yelling).

<sup>18</sup> See Bönisch et al., *supra* note 13, at 18 (reporting on the reason for the child's hospital visit).

<sup>19</sup> See Pekárek, *supra* note 1, at 4 (describing the scene at the hospital).

<sup>20</sup> See Bönisch et al., *supra* note 13, at 18 (stating that shortly after the boy was admitted to the University Hospital of Cologne, his mother jumped from the second floor of the hospital and later, according to a friend of hers, spent "a few days in the madhouse") (Irrenanstalt).

<sup>21</sup> See Pekárek, *supra* note 1, at 4 ("... leaving the impression that this was her husband's decision rather than hers").

<sup>22</sup> *Id.*

<sup>23</sup> Yassin Musharbash, *Die Operation war einwandfrei* [The Operation Was Flawless], ZEIT ONLINE, July 12, 2012, <http://pdf.zeit.de/2012/29/Beschneidung.pdf>.

the help of an interpreter.<sup>24</sup> Although the investigation revealed that the mother gave consent to her son's circumcision and that the surgery was performed at Dr. Kezze's medical practice, doubts about the soundness of Dr. Kezze's procedure remained.<sup>25</sup> He was charged with aggravated criminal battery.<sup>26</sup>

## 2.2. The Trial Court

After trial, Dr. Kezze was acquitted of criminal battery as defined in § 223<sup>27</sup> of the Strafgesetzbuch ("StGB"), or German Criminal Code.<sup>28</sup> A urologist, whom the trial court refers to as "Dr. L.," testified in Dr. Kezze's defense that the circumcision was performed in a "medically unimpeachable manner."<sup>29</sup> Dr. L. also testified that circumcision possesses high value from a medical point of view as a prophylactic measure.<sup>30</sup> The trial court held that while the violation of the boy's bodily integrity objectively met the definition of criminal battery under § 223 StGB, it could be justified by the consent of the boy's legal guardian if the consent was given

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (stating that a doctor questioned whether the number of stitches and the anesthesia were adequate).

<sup>26</sup> *Id.* The prosecution classified Dr. Kezze's scalpel as a dangerous instrumentality and charged him with causing bodily harm by dangerous means (*gefährliche Körperverletzung*), which is an aggravated form of criminal battery. *Id.* A spokesman for the prosecutor's office explained that a more serious charge gives the prosecutor less leeway to drop the case. *Id.* Thus, the seriousness of the charge might have been a factor in the lead prosecutor's decision to move forward with the case. The appellate court later found that Dr. Kezze's scalpel was not a dangerous instrumentality. See LGK 151 Ns 169/11 (Ger.), *supra* note 1 (charging the doctor with criminal battery).

<sup>27</sup> Dr. Kezze was charged with § 224 StGB (bodily harm by dangerous means), an aggravated form of criminal battery. *Id.* Because the actus reus of criminal battery is defined in § 223 StGB, and because the trial court refers to criminal battery in general terms, Dr. Kezze was acquitted of criminal battery as defined under § 223 StGB. Given that the more serious charge includes the lesser, this acquittal would also be an acquittal of aggravated criminal battery under § 224 StGB.

<sup>28</sup> See Fateh-Moghadam, *supra* note 12, at 1133 (describing the accusations made against the doctor).

<sup>29</sup> AMK 528 Ds 30/11 (Ger.), *supra* note 14. The trial court used the words "in medizinisch nicht zu beanstandender Weise ausgeführt worden ist" to describe Dr. L.'s appraisal of Dr. Kezze's surgical performance.

<sup>30</sup> *Id.*

in accordance with the best interest of the child under § 1627 of the Bürgerliches Gesetzbuch ("BGB"),<sup>31</sup> or German Civil Code.<sup>32</sup>

To determine whether the consent was in the child's best interest, the trial court opinion balanced competing rights specified in the Grundgesetz ("GG"), or German Basic Law.<sup>33</sup> On one side was the right of parents to the care and upbringing of their children under Art. 6(2) GG and the parents' right of religious freedom under Art. 4(1), (2) GG. On the other side was the right of the child to bodily integrity under Art. 2 GG.<sup>34</sup> The trial court identified circumcision, under Islam, as a ritual that documents a child's religious and cultural belonging to the Muslim community and reasoned that circumcision not only conveys religious and cultural belonging but also avoids the threat of stigmatization of the child.<sup>35</sup> Further, the court noted Dr. L.'s testimony on the health benefits of circumcision to the child as a counterweight to the violation of bodily integrity.<sup>36</sup> Because the court concluded that the parents' decision to circumcise aimed at the interest of the child, it acquitted Dr. Kezze.<sup>37</sup>

### 2.3. The Appellate Court

The prosecution appealed to the Cologne regional appellate court (*Landesgericht*).<sup>38</sup> On the court's bench sat one professional

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<sup>31</sup> For a translation of § 1627 BGB, see *BGB German Civil Code*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html) (last visited Oct. 22, 2015) ("The parents must exercise the parental custody on their own responsibility and in mutual agreement for the best interests of the child. In the case of differences of opinion, they must attempt to agree.").

<sup>32</sup> See Fateh-Moghadam, *supra* note 12, at 1133 (noting the court's decision).

<sup>33</sup> *Id.*

<sup>34</sup> For a translation of these provisions, see *Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (last visited Oct. 22, 2015) (containing a translation of Germany's basic law).

<sup>35</sup> See AMK 528 Ds 30/11 (Ger.), *supra* note 14 (identifying religious and cultural reasons for circumcision).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Wolfgang Hegener, *Blutbeschuldigungen oder die Gleichzeitigkeit von Ungleichzeitigem* [Blood Libel or the Simultaneity of the Nonsimultaneous], in *DIE*

judge, Thomas Beenken,<sup>39</sup> and two lay judges (*Schöffen*).<sup>40</sup> Just like the trial court, the appellate court's opinion considered whether the consent of the child's parents could justify the operation. To determine whether consent does justify circumcision, the consent has to be given in accordance with the best interest of the child under § 1627 of the BGB. The appellate court used a balancing test similar to that of the trial court to weigh the fundamental rights of the parents in Articles 4(1) and 6(2) GG against the fundamental rights of the child to bodily integrity and self-determination in Article 2(1) and (2) GG, but came to a different conclusion.<sup>41</sup>

Before the appellate court employed the balancing test, it made three findings. First, it noted that, in Europe, it is not medically necessary to circumcise as a prophylactic measure.<sup>42</sup> Second, it dismissed the view of the trial court that the "social adequacy" (*Sozialadäquanz*) of a procedure – a procedure's historical and social acceptance – can remove it from the scope of the criminal law.<sup>43</sup> Third, the court disputed the trial court's analysis of circumcision as

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"UNHEIMLICHE" BESCHNEIDUNG [The "Strange" Circumcision] 51, 53 (Yigal Blumenberg & Wolfgang Hegener eds., Brandes & Apsel Verlag, Frankfurt, 2013) (stating that the lead prosecutor supported her appeal with the reasoning of Putzke and Rolf Dietrich Herzberg) [hereinafter cited as Hegener].

<sup>39</sup> See LGK 151 Ns 169/11, *supra* note 1. Little information on Judge Beenken exists in the media. Several months after the case on circumcision was decided, Beenken's name briefly appeared in the Cologne press when he became the presiding judge of the construction division and, "of all judges," heard a case concerning the central mosque in Cologne. Hendrik Pusch, *Beschneidungs-Richter urteilt über Gerichts-Streit* [Circumcision Judge Decides a Lawsuit], EXPRESS.DE (Oct. 3, 2012), <http://www.express.de/koeln/baumaengel-an-moschee-beschneidungs-richter-urteilt-ueber-gerichts-streit,2856,20132346.html>. A spokesman for the court said that Judge Beenken's transfer from the criminal to the construction division was in the works before the circumcision case drew attention. *Id.*

<sup>40</sup> See LGK 151 Ns 169/11, *supra* note 1 (Ger.). In criminal appeals to the regional court, a tribunal of one professional judge and two lay judges hears the case. See § 76 Gerichtsverfassungsgesetz ("GVG"). Lay judges are considered equal to the professional judge and have independent votes. *Das Schöffenamts*, JUSTIZ-ONLINE, [http://www.justiz.nrw.de/Gerichte\\_Behoerden/ordentliche\\_gerichte/Strafgericht/verfahren/Verfahrensbeteiligte/schoeffe/index.php](http://www.justiz.nrw.de/Gerichte_Behoerden/ordentliche_gerichte/Strafgericht/verfahren/Verfahrensbeteiligte/schoeffe/index.php) (Ger.) (last visited July 3, 2014). The court selects lay judges from a proposal list generated by local authorities. Once selected, a lay judge must serve for a term of five years on approximately twelve days per year. For more information, see *Lay Judges in Germany*, DEUTSCHE VEREINIGUNG DER SCHÖFFINNEN UND SCHÖFFEN, <http://www.schoeffen.de/lay-judges-in-germany.html> (last visited Sept. 17, 2015).

<sup>41</sup> See LGK 151 Ns 169/11, *supra* note 1 (Ger.).

<sup>42</sup> *Id.* I render "Mitteleuropa" in the opinion as "Europe" because the literal translation as "Central Europe" seems too restrictive.

<sup>43</sup> *Id.*

“traditional ritual behavior.”<sup>44</sup> The possibility of the child’s exclusion from the religious community was not, for the appellate court, a decisive factor in the context of circumcision.<sup>45</sup> As a result, unlike the trial court, the appellate court did not consider in its final analysis the asserted health benefits of circumcision or the putative value of cultural and religious belonging imparted by circumcision.<sup>46</sup>

In applying the balancing test under a proportionality standard, the appellate court stressed that the parents’ fundamental rights are restricted by two fundamental rights or interests of the child. First, a four-year-old male minor’s right to bodily integrity is disproportionately infringed upon by circumcision given the value judgment in § 1631(2) of the German Civil Code that children have a right to a non-violent upbringing.<sup>47</sup> Second, the irreversibility of circumcision “also runs contrary to the interests of the child in deciding his religious affiliation independently later in life.”<sup>48</sup> This second point might initially seem nonsensical, because circumcision does not prevent a change in religious affiliation. A male child born to Muslim (or Jewish) parents could always decide to become a Christian or a Buddhist despite having been circumcised as a child. Perhaps the court thought that if the parents cannot control the child’s religious affiliation forever, it is difficult to see why they should be able to engrave his body with a permanent symbol of Muslim affiliation.<sup>49</sup>

Having narrowed the scope of the parents’ right to educate in religious matters, the court said that the parental right to the upbringing of their children is “not unacceptably diminished by requiring [the parents] to wait until their son is able to make the decision himself whether to have a circumcision as a visible sign of his affiliation to Islam.”<sup>50</sup> Because the child’s rights to bodily

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<sup>44</sup> See AMK 528 Ds 30/11, *supra* note 14 (Ger.).

<sup>45</sup> See LGK 151 Ns 169/11, *supra* note 1 (Ger.).

<sup>46</sup> *Id.*

<sup>47</sup> See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], July 11, 2012, § 1631(2), sentence 1 (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (“Children have a right to a non-violent upbringing.”).

<sup>48</sup> See LGK 151 Ns 169/11, *supra* note 1 (Ger.).

<sup>49</sup> This last point was later made explicitly by Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault*, 39 J. MED. ETHICS 444, 447 (2013) [hereinafter Merkel & Putzke].

<sup>50</sup> *Id.*

integrity and self-determination outweigh parental rights to raise their children and freely practice their religion, the court concluded that circumcision is not in the best interest of the child. Instead, the circumcision of a male minor is illegal in the absence of a medical indication. The appellate court nevertheless acquitted Dr. Kezze based on an unavoidable-mistake-of-law defense because he was convinced that his actions were lawful and the state of the law was unclear at the time he operated on the boy.<sup>51</sup>

The Cologne appellate decision and opinion cannot be understood without grasping German secularism and some differences between German and Anglo-American law. As used here, *secularism* is a governmental and social policy that holds the state and its political and legal institutions may not directly favor any particular religion. Secularism in this sense seems to have played a role in the decision. Judge Beenken regarded circumcision without medical indication to be legally impermissible. He declined to favor Islam (or Judaism) over Christianity just because circumcision is required for Muslims and Jews but optional for Christians. *German secularism*, as used here, is a governmental and social policy that holds the state and its political and legal institutions may not directly favor any particular religion,<sup>52</sup> but the state and its institutions may reflect the foundational norms of society. It is likely that Judge Beenken implicitly assumed something like German secularism to be correct. If he did, that could reflect German foundational norms that include some Christian content, such as the idea that circumcision is unnecessary.<sup>53</sup>

It might be objected that to call this policy *German* secularism creates trouble in explaining why the Federal Government later

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<sup>51</sup> *Id.*; sec. 17 StGB (unavoidable mistake of law (Verbotsirrtum)). See also Angelika Günzel, *Nationalization of Religious Parental Education? The German Circumcision Case*, 12 OXFORD J.L. & RELIGION 206, 207 (2013) (pointing out that the appellate court did not examine earlier decisions on circumcision by German courts). For a summary of German criminal law on circumcision shortly before the appellate court decision, see EDWARD SCHRAMM, EHE UND FAMILIE IM STRAFRECHT: EINE STRAFRECHTSDOGMATISCHE UNTERSUCHUNG [Marriage and Family in the Criminal Law: An Investigation in Criminal Law Doctrine] 221, 224–31 (Tübingen, Mohr Siebeck, 2011).

<sup>52</sup> Relatedly, the religious and ideological neutrality of the state (*die religiös-weltanschauliche Neutralität des Staates*) is a well-established concept in German constitutional law.

<sup>53</sup> Suppose that the default religion is not Christianity but Judaism. One might imagine that an Israeli judge, using an analog of German secularism, might include some Jewish content, such as the idea that circumcision is required or desirable.

opposed the Cologne appellate decision. This objection misses the mark. The Federal Government as well as German business interests saw that decision as a public relations disaster and reacted pragmatically to undo the decision.<sup>54</sup>

It is nevertheless astonishing that Judge Beenken apparently did not perceive the vulnerability of German secularism, or any highly similar policy, to criticism. Relatedly, he seems unaware that some German foundational social norms bear a tincture of Christian content that can disfavor foreigners and religious minorities. In France as well as Germany, disputes have broken out over nominally secular decisions by state actors applied entirely, or almost entirely, to one or two religious minorities. French secularism, generally called *laïcité*, excludes religion from governmental matters and excludes the government from religious matters. The headscarf debate turned on a 2004 statute that prohibited the wearing of “conspicuous” religious signs and clothing in the public schools.<sup>55</sup> The statute, which was drafted in general terms, is applicable to Christians wearing large crosses, Jews wearing skullcaps, and Sikhs wearing turbans as well as Muslim girls wearing headscarves; but the point of the statute was to stop Muslim girls from wearing the headscarf (*hijab, foulard, voile*) in public schools.<sup>56</sup>

The German counterpart to the French controversy was whether the Constitutional Court acted appropriately in “striking down a law mandating a crucifix in every Bavarian classroom.”<sup>57</sup> At first, writes Leora Auslander, these controversies

appear to be almost mirror images of each other. The French debate is about *allowing* a sign of religious identification *into* the schools; the German debate is about *removing* a sign of religious identification *from* the schools. The headscarf

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<sup>54</sup> See *infra* text accompanying notes 71–74, 169, 195–220.

<sup>55</sup> See JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL 1* (2007) (citing the French law that banned the wearing of conspicuous signs of religious affiliation). According to Scott, “The other groups were included to undercut the charge of discrimination against Muslims and to comply with a requirement that such laws apply universally.” *Id.* at 1-2.

<sup>56</sup> *Id.* at 1. She argues that though the language of secularism is pertinent to the controversy, it is also misleading, for it incorrectly supposes that only one conception of *laïcité* exists in French history and culture. *Id.* at 90–123.

<sup>57</sup> Leora Auslander, *Bavarian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State*, 12 *CULTURAL DYNAMICS* 283, 283 (2000) (emphasis in original).



debate in France has focused on the place of Islam, and of immigrants, in a highly centralized state committed to secularism . . . . The crucifix debate, by contrast, has been expressed as an intra-Christian, intra-German discussion, in a federal state, pitting Bavarian Catholics against the Protestant majority and politicians against the Constitutional Court.<sup>58</sup>

Auslander is quick to notice convergences. Both “originated in the public schools.”<sup>59</sup> Both are “national controversies set off by debate over religious emblems in societies in which”<sup>60</sup> many people are secular. And both have “been articulated as crises of national identity and as exemplary of current dangers facing ‘the West’.”<sup>61</sup> In the second and third points of convergence we hear an echo of a motif sounded earlier: that underneath issues of secularization and secularism are deeper questions about toleration and multiculturalism.<sup>62</sup>

A partial explanation of Judge Beenken’s legal reasoning, despite the salience of prior disputes over religion and the state in German society, may lie in the training and selection of German judges. As in most Continental countries, the study of law in Germany begins at the undergraduate level. One has to pass two rigorous state examinations to become a lawyer. Lawyers seeking to become academics must earn graduate degrees in law. Lawyers who wish to become judges must have high marks on the state examinations and spend time clerking for sitting judges.<sup>63</sup> In Germany judges are not appointed or elected. They start their careers as proto-judges and work their way up. German appellate judges are intelligent, well-educated, respected civil servants. Career advancement is meritocratic and almost entirely apolitical.<sup>64</sup>

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<sup>58</sup> *Id.* at 284 (emphasis in original). I leave to one side additional divergences between the two controversies.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 285. I omit other convergences.

<sup>62</sup> See *supra* text accompanying note 6 *supra* and *infra* text accompanying notes 117-122, 284-288, 300-301, 350-353, 377, 392-395.

<sup>63</sup> See generally JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 108-73 (2006); Annette Keilmann, *The Einheitsjurist: A German Phenomenon*, 7 GERMAN L.J. 293 (2006); Stefan Koriath, *Legal Education in Germany Today*, 24 WIS. INT’L L.J. 85 (2006).

<sup>64</sup> See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L.

The reasoning in German legal opinions often strikes those brought up in the common law tradition as abstract, top-down, and less neatly tied to the facts of the case than the reasoning in judicial opinions in, for example, the United States. We see as much in the appellate court opinion in the Cologne case. It is more than surprising that Judge Beenken's opinion did not consider its implication for Jewish life in Germany.

Suppose that the circumcision case had been before a state appellate judge in the United States and that the judge was inclined to reach the same result as Judge Beenken did. The opinion would have looked different in some respects. For instance, the American judge would have devoted more attention to the empirical evidence on the risks and benefits of prophylactic circumcision. She would also have expressly limited the scope of the decision to the facts before her – namely, the circumcision of a four-year-old boy who was the son of Muslim parents. The opinion would not encompass the circumcision of an eight-day-old boy who was the son of a Jewish mother.

### 3. IMMEDIATE AFTERMATH OF THE COLOGNE DECISION

Once the Cologne ruling became public, all hell broke loose. This part describes the aftermath from its initial reception through a new law passed by the Bundestag that allows circumcisions for religious, cultural and prophylactic reasons.

#### 3.1. *Initial Reactions*

The case provoked intense debate in Germany. The Central Council of Jews in Germany (*Zentralrat der Juden in Deutschland*) (“ZdJ”) issued a press release on June 27, 2012, calling the decision an “unprecedented and dramatic intervention in the right of religious communities to self-determination.”<sup>65</sup> Rabbis and

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REV. 823, 848-53, 855 (1985) (explaining the German judiciary).

<sup>65</sup> Press Release, Central Council of Jews in Germany, *On the Decision of the District Court of Cologne Concerning Circumcision of Boys*, June 27, 2012, <http://www.zentralratdjuden.de/en/article/3706.html?path=en/article/3706.html>.

mohelim felt under threat of prosecution for performing circumcisions,<sup>66</sup> and hospitals throughout Germany suspended circumcision procedures.<sup>67</sup> On July 10, 2012, the Conference of European Rabbis called for an emergency meeting in Berlin to discuss the controversy, and the Central Council of Muslims in Germany joined in condemning the ruling as a “massive intrusion on religious freedom and on parents’ rights.”<sup>68</sup> Some hospitals in Austria and Switzerland halted circumcisions.<sup>69</sup> By late July, *Der Spiegel* characterized the previous four weeks of national debate in this way: “Germany has been talking about penises for weeks now. It’s become customary to discuss the pros and cons of life without a foreskin over lunch . . . .”<sup>70</sup>

German politicians took quick notice of the emerging controversy and international pressure from Jewish and Muslim groups.<sup>71</sup> Chancellor Angela Merkel warned that Germany would become a laughingstock if it permitted the circumcision decision to

<sup>66</sup> Four German citizens filed criminal complaints against Rabbi David Goldberg for performing a circumcision in Hof, Germany. See Jack Ewing, *Some Religious Leaders See a Threat as Europe Grows More Secular*, N.Y. TIMES (Sept. 9, 2012), at A5, available at [http://www.nytimes.com/2012/09/20/world/europe/circumcision-debate-in-europe-reflects-deeper-tensions.html?\\_r=0](http://www.nytimes.com/2012/09/20/world/europe/circumcision-debate-in-europe-reflects-deeper-tensions.html?_r=0) (explaining the case against Rabbi Goldberg).

<sup>67</sup> *Id.*

<sup>68</sup> *Criticism of German Court's Circumcision Decision: Jews Denounce Ruling, Seek Ways to Proceed*, SPIEGEL ONLINE (July 9, 2012), <http://www.spiegel.de/international/germany/international-criticism-of-german-court-s-circumcision-ruling-mounts-a-843453.html>. For a meditative reflection on the relationship between German society and Jews by a professor of religious history and Jewish literature at the University of Basel, see ALFRED BODENHEIMER, HAUT AB! DIE JUDEN IN DER BESCHNEIDUNGSDEBATTE [Skin Lost! Jews in the Circumcision Controversy] (Göttingen, Wallstein Verlag, 2012).

<sup>69</sup> See *Austria: Governor Orders Hospitals to Halt Circumcisions*, N.Y. TIMES, July 25, 2012, at A10 (documenting the decision of one Austrian province to halt all circumcisions); see also Rachel Hirshfeld, *Wiesenthal Center Urges Swiss Government to Protect Circumcision*, ISRAEL NATIONAL NEWS, Jul. 27, 2012, available at <http://www.israelnationalnews.com/News/News.aspx/158296#.VjEYTberSM8> (reporting on two Swiss hospitals that banned circumcisions).

<sup>70</sup> *Circumcision Debate Has Berlin Searching for Answers*, SPIEGEL ONLINE (July 25, 2012), <http://www.spiegel.de/international/germany/circumcision-debate-has-german-government-scrambling-for-a-law-a-846144.html>.

<sup>71</sup> *Support for Religious Traditions: Politicians Welcome German Circumcision Motion*, SPIEGEL ONLINE (July 20, 2012), <http://www.spiegel.de/international/germany/politicians-greet-german-parliament-resolution-supporting-circumcision-a-845535.html> (reporting on Angela Merkel’s response) [hereinafter cited as *Politicians Welcome German Circumcision Motion*].

stand.<sup>72</sup> Her Christian Democratic Union (“CDU”) party, the business-friendly Free Democratic Party (“FDP”), and the opposition Green Party all spoke out against the ban.<sup>73</sup> During a special session on July 20, 2012, the Bundestag passed a resolution endorsing the right of Muslim and Jewish parents to have their boys circumcised and calling for a new law clarifying the legality of circumcision in the coming fall 2012 session.<sup>74</sup>

German public opinion was split. The German news agency DPA found in a survey during the week of July 20 that 45 percent of Germans supported the decision on circumcision while 42 percent were opposed and 13 percent were undecided.<sup>75</sup> A survey conducted for *FOCUS Magazin* at about the same time reported that 48 percent disapproved of a Bundestag proposal to permit circumcision while 40 percent approved, with 12 percent undecided.<sup>76</sup>

Supporters of the decision did not remain silent. After the Bundestag signaled an intention to legalize circumcision, several hundred medical professionals, academics, and lawyers signed a letter authored by Dr. Matthias Franz of the University of Düsseldorf urging Chancellor Merkel and the Bundestag to uphold the ruling on circumcision until a child can give consent himself.<sup>77</sup> German Children's Aid and the Federation of German Criminal Police led a petition drive calling for a two-year moratorium on circumcision.<sup>78</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Michael Jach et al., *Ein Schnitt – aber kein Frieden* [A Snip – but no Peace], *FOCUS MAGAZIN* (July 23, 2012), available at [http://www.focus.de/magazin/archiv/politik-ein-schnitt-aber-kein-friede\\_aid\\_785300.html](http://www.focus.de/magazin/archiv/politik-ein-schnitt-aber-kein-friede_aid_785300.html) (last visited Aug. 13, 2014) (detailing the results of the survey). By political party, a majority of respondents who identified with the Union party (the CDU and, in Bavaria, the CSU), which is roughly conservative or center-right, or the Green Party, which is left on many issues, approved of the planned legislation. *Id.* A majority of respondents who identified with the FDP (classic liberal), the SPD (socialist or center-left), or Linke (democratic socialist and considered left-wing) disapproved of the planned legislation. In the area formerly known as East Germany, 55 percent disapproved of the planned legislation and 38 percent approved of it. *Id.*

<sup>77</sup> *Religionsfreiheit kann kein Freibrief für Gewalt sein* [Freedom of Religion Cannot be a License for Violence], *FRANKFURTER ALLGEMEINE* (July 21, 2012), <http://www.faz.net/aktuell/politik/inland/offener-brief-zur-beschneidung-religionsfreiheit-kann-kein-freibrief-fuer-gewalt-sein-11827590.html>.

<sup>78</sup> *Politicians Welcome German Circumcision Motion*, *supra* note 71 (detailing the

In what follows, I describe the official responses of the Jewish and Muslim councils, some reactions of the legal professoriat, charges of anti-Semitism, a Muslim reaction, and the content of the new statute. Space precludes more than a sampling of various opinions and developments.

### 3.2. Official Responses by Jewish and Muslim Groups

After the court's decision, the main Jewish and Muslim groups in Germany spoke out against the ruling. They emphasized that circumcision was a religious obligation in their communities. In addition, the European Jewish Association, the Rabbinical Centre of Europe, the European Jewish Parliament, Germany's Turkish-Islamic Union for Religious Affairs, and the Islamic Center Brussels issued a joint statement condemning the ban as an "affront [to] our basic religious and human rights."<sup>79</sup> Here, pride of place goes to the fuller statements by the principal Jewish and Muslim organizations in Germany.

The Central Council of Jews in Germany ("ZdJ") issued a dossier to elucidate the significance and legitimacy of male circumcision in Judaism.<sup>80</sup> It emphasizes that male circumcision is a fundamental part of Judaism<sup>81</sup> and is not subject to change.<sup>82</sup> The Jewish practice of circumcision comes from the Bible and is the sign of the covenant between God and the Jewish people.<sup>83</sup> Because circumcision is a

delay called for by the groups).

<sup>79</sup> *Muslim and Jewish Groups Denounce Circumcision Ruling*, BBC NEWS EUROPE, July 12, 2012, <http://bbc.com/news/world-europe-18807040> (last visited Sept. 24, 2014).

<sup>80</sup> *Warum beschneiden Juden Ihre Kinder?*, ZENTRALRAT DER JUDEN IN DEUTSCHLAND (Aug. 14, 2012), <http://www.zentralratdjuden.de/de/article/3731.warum-beschneiden-juden-ihre-kinder.html?sstr=warum|beschneiden>. I cite the English version posted on the website: *Why Do Jews Circumcise their Children?*, ZENTRALRAT DER JUDEN IN DEUTSCHLAND (Aug. 14, 2012), <http://www.zentralratdjuden.de/en/article/3734.why-do-jews-circumcise-their-children.html> [hereinafter *English Dossier*].

<sup>81</sup> *English Dossier*, *supra* note 80, at 1 (explaining that the practice of circumcision is more important than observing Shabbat or Yom Kippur and was done even during the Nazi era despite an imminent risk of death).

<sup>82</sup> *Id.* at 5 ("Circumcision . . . is an unalterable command in Judaism . . .").

<sup>83</sup> *Id.* at 1 (citing Genesis 17: 10) ("This is my covenant, which ye shall keep, between me and you and thy seed after thee; every man child among you shall be

nearly universal practice among religious and secular Jews belonging to different movements, it functions as a unifying principle of the Jewish people.<sup>84</sup> The ZdJ asks that German society tolerate the practice of circumcision because a ban would threaten the very foundations of Judaism.<sup>85</sup>

The ZdJ dossier contends that circumcision does not adversely affect the health of the child or, later in life, impair a man's sexual functioning.<sup>86</sup> The dossier touches briefly on the circumcision procedure<sup>87</sup> as well as the use of anesthesia.<sup>88</sup> The ZdJ differentiates sharply between male circumcision and so-called female circumcision, and dismisses any connotations of "mutilation" in the context of male circumcision.<sup>89</sup> The dossier points to putative health benefits of circumcision. These are said to include reducing the accumulation of bacteria under the foreskin and lowering the risk of sexually transmitted infections.<sup>90</sup> The ZdJ argues that because circumcision benefits the child, Article 24 of the U.N. Convention on Rights of the Child, which proscribes harmful traditional customs, does not apply to male circumcision.<sup>91</sup>

In examining the legal context of circumcision, the ZdJ argues that freedom of religious association and the right to practice one's religion, as granted by Article 4 (1) and (2) GG, is imputed into the parents' exercise of their right of custody as defined in § 1626(1) of the BGB.<sup>92</sup> Moreover, the ZdJ argues, these parental and religious rights outweigh the child's right to bodily integrity guaranteed by

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circumcised").

<sup>84</sup> *Id.* ("[Circumcision] is not only a tradition but a central part of the Jewish identity.").

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *English Dossier, supra* note 80, at 1-2 .

<sup>87</sup> *Id.* at 1 ("Circumcision is one of the most common surgical operations carried out worldwide. Here the foreskin is removed from the penis with a scalpel.").

<sup>88</sup> *Id.* ("There is nothing against the child being given a local anaesthetic.").

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.*, citing WORLD HEALTH ORGANIZATION, MANUAL FOR EARLY INFANT MALE CIRCUMCISION UNDER LOCAL ANAESTHESIA 6 (2010), available at [http://www.who.int/hiv/pub/malecircumcision/manual\\_infant/en/](http://www.who.int/hiv/pub/malecircumcision/manual_infant/en/). There is a more searching examination of the medical and surgical aspects of circumcision in AM. JEWISH COMM., AJC BERLIN BRIEFING: FACTS AND MYTHS IN THE CIRCUMCISION DEBATE (Am. Jewish Comm. Berlin Office ed., Hanna Baumann & Deidre Berger trans., Dec. 2012).

<sup>91</sup> *English Dossier, supra* note 80, at 2.

<sup>92</sup> *Id.* at 3.

Article 2(2) GG.<sup>93</sup> The ZdJ also explains that one may not defer circumcision until a boy reaches the age of fourteen when he can, under German law, choose his own religion (*Religionsmündigkeit*),<sup>94</sup> because in Judaism a boy must be circumcised on the eighth day after birth.<sup>95</sup> Furthermore, according to the World Health Organization, pain and the risk of complications are much lower when circumcising during the child's first two months of life.<sup>96</sup> The ZdJ rejects arguments invoking the child's "right to self-determination" because the parents often properly limit this right in other areas.<sup>97</sup> It underscores that circumcision does not preclude a man from later changing his religion.<sup>98</sup>

The ZdJ's account is accurate so far as it goes, but it does not mention variations in Jewish practices of circumcision throughout history or today. For instance, the Hebrew Bible says that the Israelites left off circumcising during the 40 years of wandering in the desert, and that Joshua reinstated the practice with a mass circumcision.<sup>99</sup> The distinction between *bris milah* and *peri'ah* indicates that over time different amounts of foreskin and adjacent tissue were removed:

After the Bar Kokhba revolt [early second century C.E.] the rabbis apparently instituted *peri'ah* (laying bare of the glans), probably in reaction to attempts to "obliterate the Seal of the Covenant" by epispasm [a sort of "uncircumcision" in which remaining foreskin tissue is stretched forward and tied off with a string or a pin]. According to Tractate Shabbat 19:2, circumcision [*milah*] and *peri'ah* became part of a unified process in which the *mohel* disposed of all or most of the foreskin and then split the thin layer of mucosal membrane that is under the foreskin and rolled it downwards to uncover the head of the penis. The importance of *peri'ah* is

<sup>93</sup> *Id.*

<sup>94</sup> *Religionsmündigkeit* is defined in the Gesetz über die religiöse Kindererziehung [Law on the Religious Education of Children] (KERzG) § 5. This section also stipulates that once children turn twelve they may not be forced to change a religious affiliation they previously held.

<sup>95</sup> *English Dossier, supra* note 80, at 3. One may delay circumcision for medical reasons. *Id.* Genesis 17: 12 announces the 8-day default rule.

<sup>96</sup> *Id.* at 3-4.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.*

<sup>99</sup> Joshua 5: 2-9.

emphasized in the early rabbinic period and supportive midrashic readings were constructed in order to base it in Torah (e.g., *hatan damim* (Ex. 4:25) is said to imply two acts: the blood of *milah*, the actual circumcision, and the blood of the *peri'ah* incision (TJ, Shab. 19:2 17(a)).<sup>100</sup>

The social pressure to hide one's badge of Jewishness in Greco-Roman baths and gymnasia seems to have led to rabbinic action to make epispasm largely ineffective.<sup>101</sup> Today *metzitzah b'peh*, in which the mohel uses his mouth to remove blood from the newly circumcised penis, is another variant practice. This ritual seems to have originated in the second century C.E. It came under fire for sanitary reasons in the nineteenth century from both secular physicians and some Jews, and nowadays survives only among ultra-Orthodox Jews.<sup>102</sup>

Nadeem Elyas, a medical doctor and former president of the Central Council of Muslims in Germany (*Zentralrat der Muslime in Deutschland*) ("ZMD"),<sup>103</sup> responded to the circumcision controversy by providing an Islamic context for the practice of male circumcision.<sup>104</sup> The article's main purpose is to refute statements made in the media portraying the circumcision of Muslim boys as an optional practice (*Kann-Regelung*).<sup>105</sup> Elyas stresses that circumcision is a duty (*Pflicht*) among the Sunni and Shiites<sup>106</sup> and is documented in the Sunna which, together with the Qur'an, forms

<sup>100</sup> JONATHAN SEIDEL, JUDITH R. BASKIN & LEONARD V. SNOWMAN, *Circumcision*, in 4 ENCYCLOPAEDIA JUDAICA 730, 731 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference, 2d ed. 2007) (referring to Exodus and the Jerusalem Talmud) (emphasis in original) [hereinafter *Circumcision*, ENCYCLOPAEDIA JUDAICA].

<sup>101</sup> LEONARD B. GLICK, MARKED IN YOUR FLESH: CIRCUMCISION FROM ANCIENT JUDEA TO MODERN AMERICA 6, 31-32 (2005); 1 Maccabees 1: 14-15.

<sup>102</sup> *Id.* at 6, 127-32, 137-38, 167, 171, 224, 292, 300-01. See also *infra* text accompanying notes 162-163, 268-288, 387.

<sup>103</sup> Curriculum Vitae, *Lebenslauf*, ZENTRALRAT DER MUSLIME IN DEUTSCHLAND, <http://zentralrat.de/3873.php>.

<sup>104</sup> Nadeem Elyas, *Ist die Knaben-Beschneidung überhaupt Pflicht im Islam?* [Is Male Circumcision even a Duty in Islam?], available at <http://www.wegzumislam.com/fiqh/nicht-muslime/631-ist-die-knaben-beschneidung-ueberhaupt-pflicht-im-islam>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Circumcision is considered obligatory (*wajib*) in the Shiite legal school of thought and in two Sunni legal schools of thought, the Shafi'i and Hanbali. In two other Sunni legal schools of thought, the Hanafi and Maliki, circumcision is considered highly recommended (*sunna*); both think it a duty to follow the recommendation. *Id.*



the basis of the Islamic legal schools of thought.<sup>107</sup> Muslims practice circumcision as a continuation of the prophetic tradition of Abraham as well as of later Jewish communities and some of the earliest Christians.<sup>108</sup>

Elyas also provides brief factual details surrounding the Islamic practice of circumcision. Any adequately trained person, irrespective of religion or gender, may circumcise.<sup>109</sup> Furthermore, in Islam, circumcision is performed before the boy reaches sexual maturity.<sup>110</sup> A majority of Muslim groups circumcise when the boy is seven days old in connection with the naming of the child.<sup>111</sup> Among Turkish Muslims and some other Muslims, a boy is circumcised shortly before he reaches sexual maturity, and the family celebrates his circumcision.<sup>112</sup>

Elyas's response is brief and competent but neglects the wide range of opinion and practice in Islam. An undetermined percentage of Muslim thinkers not only regard male circumcision (*khitan*) as a duty or as recommended but also see "female circumcision" (*khafd*) as a duty, a recommendation, or as an honorable act.<sup>113</sup> If Judaism has a fairly tight set of rules and traditions relating to circumcision at a given time, Islam does not. Part of the diversity of opinion and practice in Islam stems from the fact that circumcision is practiced in some societies with, and others without, a pre-Islamic tradition of circumcision.<sup>114</sup>

These responses will convey little that is new to those familiar with Jewish and Muslim circumcision practices. In part, these responses seem designed to educate those Germans who

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* "The Messenger of Allah . . . said: 'Five acts are part of the original human nature: circumcision, the shaving of the pubic hair, the trimming of the mustache, the cutting of the nails (hands and feet) and the plucking of the hair of the armpits.'" *Id.*

<sup>109</sup> *Id.* He does not say what makes a person adequately trained.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> ABU BAKR ABDU'R-RAZZAQ, CIRCUMCISION IN ISLAM (Abdalhaqq Bewley & Muhammad 'Isa Waley eds., 1998); MUHAMMAD LUFTI AL-SABBAGH, ISLAMIC RULING ON MALE AND FEMALE CIRCUMCISION (1996).

<sup>114</sup> LENA EILE, JANDO: THE RITE OF CIRCUMCISION AND INITIATION IN EAST AFRICAN ISLAM I (1990) ("circumcision is not an integral part of Bantu culture but many tribes practice it, either as an original institution or as an adoption from Nilo-Hamites or from Arabs").

misconceived or were ignorant of religious circumcision. The responses emphasize that for Jews and Muslims, circumcision is a religious duty, not an optional religious practice. Perhaps it is a clearer duty in Judaism than it is Islam. Moreover, the Jewish response is careful to point out that a local anesthetic is permissible, perhaps in order to quell concerns that the procedure is painful.<sup>115</sup> This response does not say, though, how often mohelim actually use a local anesthetic, or address some Jewish views that pain is at least part of the purpose of circumcision.<sup>116</sup>

One can explain the relevance of toleration and multiculturalism to Jewish and Muslim reactions to the Cologne decision in this way. Recall that secularization, secularism, and German secularism all play a role in the legal and social treatment of minorities.<sup>117</sup> As one drills down more deeply, it becomes apparent that Jews and Muslims reasonably expected a measure of acceptance in Germany. To illustrate, on October 3, 2010, German Unity Day, the Federal President of Germany, Christian Wulff, stressed the need to heal divisions in German society.<sup>118</sup> He declared "Christianity belongs undoubtedly to Germany. Judaism belongs to Germany. That is our Christian-Jewish history. But Islam too now belongs to Germany."<sup>119</sup>

Wulff's declaration elicited resistance from various quarters.<sup>120</sup> Yet his welcoming attitude toward Jews and especially Muslims revealed a spirit of tolerance and multiculturalism. Germany had long tolerated Jewish circumcision and more recently it had tolerated Islamic circumcision. So the Cologne decision *withdrew* toleration that had been reasonably expected. Wulff's multicultural attitude toward Muslim immigrants was at least a "denunciation of prejudice."<sup>121</sup> The Cologne decision, in contrast, was effectively a *rejection* of multiculturalism for Muslim circumcision practices. The

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<sup>115</sup> *Why Do Jews Circumcise their Children?*, *supra* note 80.

<sup>116</sup> 2 MOSES MAIMONIDES, *THE GUIDE OF THE PERPLEXED* 609 (Shlomo Pines trans., 2d ed., 1963), writes: "The bodily pain caused to that member [the penis] is the real purpose of circumcision."

<sup>117</sup> Taylor, *supra* note 5, at 52-62.

<sup>118</sup> Russell A. Berman, *Multiculturalism Uber [sic] Alles*, *DEFINING IDEAS: A HOOVER INSTITUTION JOURNAL* (Dec. 13, 2010), <http://www.hoover.org/research/multiculturalism-uber-alles>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

reactions of Jews and Muslims to the decision were, then, responses to the revocation of a measure of German acceptance that they might reasonably have expected to be secure.<sup>122</sup>

### 3.3. Two German Law Professors Weigh In

Two German academic lawyers played prominent roles in the early legal commentary on the case.<sup>123</sup> One is Dr. Bijan Fateh-Moghadam, a law professor at the University of Münster, who criticized the decision. The other is Dr. Holm Putzke, a law professor at the University of Passau, who supported the decision.<sup>124</sup>

Analytically, one can distinguish among at least three different positions: (1) Medically non-indicated circumcision of male minors is legally justifiable under certain conditions, by parental consent independent of religious motivations; though religious freedom may support justification, it is not necessary for justification. (2) Medically non-indicated circumcision of male minors is legally justifiable if the consent of the parents lies in a serious religious motivation; here religious freedom is a necessary underpinning of justification. (3) Medically non-indicated circumcision of male minors is legally unjustifiable and amounts to criminal battery whether or not parental consent exists. Position (2) is an intermediate position and is perhaps the most common opinion among German academic lawyers. Dr. Brian Valerius of the University of Würzburg takes this position.<sup>125</sup> Fateh-Moghadam

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<sup>122</sup> "Secularization" as used in this Article is both a word that applies to a process in which a society or a person becomes increasingly nonreligious and an umbrella word for the explanatory factor that also includes toleration, multiculturalism, and various forms of secularism.

<sup>123</sup> In civil law countries, academic theory has a stronger influence on the law and is more often cited in court opinions than in common law countries.

<sup>124</sup> Space limits discussion to two figures. Other notable German legal contributions just before or just after the Cologne decision include BRIAN VALERIUS, *KULTUR UND STRAFRECHT: DIE BERÜCKSICHTIGUNG KULTURELLER WERTVORSTELLUNGEN IN DER DEUTSCHEN STRAFRECHTSDOGMATIK* [Culture and Criminal Law: The Consideration of Cultural Propositions of Value in German Criminal Law Doctrine] 149-58 (Berlin, Duncker & Humboldt, 2011); see also Tatjana Hörnle & Stefan Huster, *Wie weit reicht das Erziehungsrecht der Eltern? Am Beispiel der Beschneidung von Jungen* [How Far does the Parents' Right to Bring up their Children Extend? The Example of Male Circumcision], 68 *JURISTENZEITUNG* 328 (2013).

<sup>125</sup> See VALERIUS, *supra* note 124, at 157 (stating that parents have some discretion to interfere with the bodily integrity of their children for religious reasons in

subscribes to position (1) and Putzke holds position (3). I confine sustained attention to the divergent radical positions of Fateh-Moghadam and Putzke.<sup>126</sup>

Fateh-Moghadam argues that the Cologne appellate court erred by narrowly characterizing a child's best interest as its *medical* best interest.<sup>127</sup> The court's reasoning was misguided, in his estimation, because it replaced the parents' right to the care and custody (*Personensorge*) of the child with the State's "objective" determination on whether circumcision is in the best interest of all male children.<sup>128</sup> After finding that circumcision was not in the best medical interest of the boy, the court compounded its error, he thinks, by saying that circumcision of a minor would be a crime unless justified by parental consent.<sup>129</sup> Neither the state nor physicians, he contends, should make the primary determination on the best interest of a minor child. The parents, he argues, should make that determination.<sup>130</sup> Thus, the court made a colossal mistake, in his judgment, by relegating parental consent to an *ex post* justification for an assumed violation of the criminal law.<sup>131</sup> Indeed, to consider parental rights as only a potential justification for the four-year-old boy's circumcision "turns out to be merely rhetorical as it is not apparent how parental rights in education could ever justify a violation of the well-being of a child."<sup>132</sup>

In Fateh-Moghadam's opinion, the case ought to have been decided under Art. 6(2) GG.<sup>133</sup> He interprets this article as relegating

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order to support the welfare of their children).

<sup>126</sup> Bijan Fateh-Moghadam enabled me to see the landscape of German legal opinion in this way.

<sup>127</sup> See Fateh-Moghadam, *Criminalizing*, *supra* note 12, at 1135 (describing the doctrine of the best medical interest-test which the court develops). For his earlier argument seeking to justify ritual circumcision under German law, see Bijan Fateh-Moghadam, *Religiöse Rechtfertigung? Die Beschneidung von Knaben zwischen Strafrecht, Religionsfreiheit und elterlichem Sorgerecht* [Religious Justification? The Circumcision of Boys between Criminal Law, Freedom of Religion, and Parental Custody], 1 RECHTSWISSENSCHAFT ZEITSCHRIFT 115 (no. 2, 2010).

<sup>128</sup> Fateh-Moghadam, *Criminalizing*, *supra* note 12, at 1136. For more on the meaning of *Personensorge*, see *infra* note 198.

<sup>129</sup> *Id.* at 1137.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1136-1137.

<sup>132</sup> *Id.* at 1136.

<sup>133</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY] [CONSTITUTION] May 8, 1949, art. 6(2), available at

the state to the role of guardian. “[T]he parental discretionary authority,” he writes, “is exceeded only if the decision amounts to an abuse of the right to care and custody of the child.”<sup>134</sup> If I understand him correctly, parental consent to circumcision violates a boy’s best interest only if the operation is not performed in accordance with medical standards.<sup>135</sup> To determine whether a parent’s decision to consent to a particular medical procedure constitutes abuse, Fateh-Moghadam would examine the nature of the procedure and its medical risks, the procedure’s medical benefits (if any) and other non-medical benefits of the procedure (including benefits flowing from the free exercise of religion), and finally whether the procedure implicates a child’s right to be free from “mental punishment, debasement, humiliation, or cruel and excessive treatment.”<sup>136</sup> For instance, parents may not choose a circumciser whom they know, or have reason to believe, is incompetent. Yet they can consider nonmedical benefits such as a deeper introduction into Islam and the life of the Muslim community in Germany.

A salient feature of Fateh-Moghadam’s position is that the legal justifiability of circumcising male minors does not derive from a parental right to freedom of religion. Rather, it derives from the scope of parental consent. Because Fateh-Moghadam believes that the risk-benefit ratio of circumcision is acceptable, he maintains that parental consent to circumcision lies within the scope of the parents’ discretion. This result depends partly on his understanding of the allocation of the burden of argument under Art. 6(2) GG. Under that allocation, the state has to justify any interference with the primacy of parental care and custody of the child.

For Fateh-Moghadam, Art. 6(2) GG is an exceptional basic right. That article grants parents the legal power to exercise the basic rights of their child so long as the parents’ decisions do not violate their child’s well-being. The Cologne appellate court made use, in part, of a balancing test. The court sought to balance parental rights under Art. 6(2) GG against a violation of the child’s rights to bodily integrity and religious self-determination. Fateh-Moghadam thinks

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[http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (“The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.”).

<sup>134</sup> Fateh-Moghadam, *Criminalizing*, *supra* note 12, at 1137.

<sup>135</sup> *Id.* at 1140.

<sup>136</sup> *Id.* at 1138.

that the court was quite wrong to consider the child's rights to be violated by circumcision. Yet his more important thought is that a balancing test is not appropriate here. If a child's rights are violated, then there is no countervailing consideration that can outweigh that violation. If, as Fateh-Moghadam believes, a child's rights are not violated, no need exists to do any balancing so long as the child's welfare is protected. In his view, the parents exercise rights of bodily integrity and religious determination *on behalf of* their child.<sup>137</sup>

One central question to be raised about Fateh-Moghadam's analysis is whether the risk-benefit ratio of medically non-indicated circumcision of male minors is acceptable. Be the test acceptability or some other standard, Fateh-Moghadam's argument could be vulnerable to an empirical refutation. It lies outside the scope of this Article to investigate, even from a medical perspective, the risks and benefits of circumcising male minors.<sup>138</sup> Once one takes into account nonmedical risks and benefits, the question posed becomes even harder to answer. Fateh-Moghadam is well aware that his argument is in principle empirically vulnerable. That is one reason why, as both of us agree, new medical evidence on the risks and benefits of circumcision should be scrutinized. He would emphasize, though, that under Art. 6(2) GG the burden would be on the state to show that the risk-benefit ratio is acceptable.

If I understand Fateh-Moghadam correctly, he is concerned with legal justifiability – that is, justifiability under German law and specifically under Art 6(2) GG – rather than moral justifiability. As to the latter, it is important to consider Joel Feinberg's view that each child has a "right-in-trust," as he calls it, to an open future and that parents must exercise this right solely for the benefit of the child.<sup>139</sup> This right belongs to a class of "anticipatory autonomy rights."<sup>140</sup> While the child is a minor, his rights-in-trust "are to be saved for the child until he is an adult, but which can be violated 'in advance', so to speak, before the child is in a position to exercise them."<sup>141</sup> Despite the high regard in which Feinberg's work is rightly held, it

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<sup>137</sup> I thank Fateh-Moghadam for helping me to grasp his position more accurately.

<sup>138</sup> See *infra* text accompanying notes 202-204.

<sup>139</sup> Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125-26 (William Aiken & Hugh LaFollette eds., 1980).

<sup>140</sup> *Id.* at 126.

<sup>141</sup> *Id.* at 125-26.

is hard to make sense of the idea of a right to an open future. As Claudia Mills persuasively argues, it is neither necessary nor possible to supply children with a future that is as “open” as Feinberg seeks.<sup>142</sup> But the idea of a right-in-trust makes sense. Here a question arises as to whether a decision to circumcise is one that can reasonably be deferred until an age when the child himself would be competent to make that decision. Further argument is needed to say whether deferring the decision would be reasonable. The answer might turn partly on whether the circumcision to be considered is secular or religious and, if religious, whether it is Jewish or Islamic.

A related question is whether it is possible to say, when a male child is one week or one month or one year old, what is in his best interest in the long run. That question can become increasingly difficult, or easier, to answer when the child attains the age of two, five, or ten. One possibility is that no fact of the matter exists when one tries to analyze this situation from the date of circumcision. If there is no fact of the matter at that time, it might be impossible to say that the risk-benefit ratio is acceptable. Obviously, proponents of religious circumcision could reply that if there is no fact of the matter as of the planned date of circumcision, it might be impossible to say that the risk-benefit ratio is unacceptable. Another possibility is that there is now no fact of the matter concerning the future time at which a circumcised child attains majority in regard to his welcoming or regretting his circumcision. This possibility turns on the thorny philosophical problem of whether propositions about future contingents have a truth-value.

In sum, Fateh-Moghadam’s analysis has strengths and weaknesses. Among its strengths are its careful argument and thorough documentation, the separation of a child’s best interest from his medical best interest, and the construction of a case for robust parental discretion under Art. 6(2) GG. His analysis is weaker in neglecting to recognize that the test he proposes need not always generate the conclusion that circumcision is legally justifiable. A different weakness lies in a failure to get to the bottom

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<sup>142</sup> See generally Claudia Mills, *The Child’s Right to an Open Future?* 34 J. Soc. PHIL. 499 (2003) (arguing that it is neither desirable nor possible for parents to give a child an open future because human life is too short, providing some options forecloses others, and exposing the child to the full gamut of choices regarding religious education etc. results in no coherent form of religious upbringing etc. at all).

of why parents should have such a broad scope of consent on behalf of a male child as to circumcise him without medical indication.

I shift now to an opposing point of view. Holm Putzke was a prominent critic of circumcising male minors before Dr. Kezze operated on the four-year-old boy.<sup>143</sup> Putzke approved of the decision of the Cologne appellate court soon after the judgment, which is not surprising given that the court adopted many of his views.<sup>144</sup> The core points on which Putzke's position turns are these. First, he takes it as settled that circumcision without medical indication has no medical benefits, or at least no risk-adjusted medical benefits for boys and men living in Germany. This stance is controversial, and he does not explore in depth the medical evidence on the risks and benefits of circumcision.

Second, Putzke argues that every male should be able to decide for himself whether to allow permanent anatomical changes to his body. This decision should be made when he has sufficient maturity to understand and process the information relevant to the decision, which Putzke puts at age 16.

Third, he gives only modest weight to the significance of Jewish and Muslim attachment to circumcision. Putzke participated in online opinion fora with those who do not agree with him, so he should be aware of the importance of circumcision to Jews and Muslims.<sup>145</sup> Yet his position does not seem to take seriously that importance or the reasons given for it.<sup>146</sup> According to Matthias

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<sup>143</sup> Holm Putzke, *Die strafrechtliche Relevanz der Beschneidung von Knaben: Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personensorge* [The Relevance of the Criminal Law to the Circumcision of Boys: Together with a Contribution on the Boundaries of Consent in Cases Concerning the Right to the Care and Custody of the Child], in STRAFRECHT ZWISCHEN SYSTEM UND TELOS: FESTSCHRIFT FÜR ROLF DIETRICH HERZBERG ZUM 70. GEBURTSTAG AM 14 FEBRUAR 2008 669 (Holm Putzke et al. eds., 2008).

<sup>144</sup> Holm Putzke, *Recht und Ritual – Ein grosses Urteil einer kleinen Strafkammer* [Law and Ritual: A Great Judgment by a Small Criminal Court]: Besprechung zu LG Koeln, Urt. V. 7.5.2012 – 151 Ns 169/11, 30 MEDIZIN UND RECHT 621 (2012).

<sup>145</sup> E.g., Holm Putzke, Abraham Foxman, Emmanuel Njeuhmeli, Sally Steenland & John Geisheker, *An Age of Consent for Circumcision?*, N.Y. TIMES ROOM FOR DEBATE (Jul. 11, 2012, 10:32 AM), <http://www.nytimes.com/roomfordebate/2012/07/10/an-age-of-consent--for-circumcision/let-boys-decide-at-16-whether-to-be-circumcised> (participating in a dialogue with those such as Abraham Foxman, who argues that delayed circumcision would have a detrimental impact on religious identity for those that practice Judaism and Islam).

<sup>146</sup> See generally Jon D. Levenson, *The New Enemies of Circumcision*, COMMENTARY (Mar. 1 1980), <https://www.commentarymagazine.com/articles/the-new-enemies-of-circumcision/> (connecting circumcision with "God's eternal



Drobinski, when Putzke was asked whether circumcision has value by making a child part of his religious community, he replied, “Why can’t Jews and Muslims postpone circumcision to a later point in time . . . and just leave it as a symbolic rite, a small jab for example?”<sup>147</sup> Putzke might have shored up this third point in his reply by mentioning that in the nineteenth century there was some discussion among Jews of the necessity of circumcision, but he did not do so.<sup>148</sup>

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and indefectible covenant” and the survival of Jews in a ritually complete sense); see also Marianne Heimbach-Steins, *Religious Freedom and the German Circumcision Debate*, 18 EUR. U. INST. ROBERT SCHUMAN CENTRE FOR ADVANCED STUD. 1, 9-14 (2014) (EUI Working Paper RSCAS 2014/18) (identifying as a Christian social ethicist at the University of Münster who recognizes the significance of circumcision in Judaism and Islam and calls for toleration of the practice in a multicultural society).

<sup>147</sup> Matthias Drobinski, *When Judges Become Religious Referees*, SÜDDEUTSCHE ZEITUNG, in Qantara.de (Jennifer Taylor trans., June 28, 2012), <http://en.qantara.de/content/ruling-on-circumcision-in-germany-when-judges-become-religious-referees> (last visited Feb. 17, 2015). See also *Circumcision*, ENCYCLOPAEDIA JUDAICA, *supra* note 100, at 734 (referring to the Shulhan Arukh, a code by Joseph b. Ephraim in the Yoreh De’ah, to show that Jewish law allows postponement or omission of circumcision under certain conditions):

Hemophilia was apparently recognized in talmudic times, since there is a law that a mother who has lost two sons from the unquestionable effects of circumcision must not have her next sons operated on until they are older and better able to undergo the operation. Moreover, should two sisters each have lost a son from the effects of circumcision, the other sisters must not have their sons circumcised (Sh. Ar., YD, 263:2-3).

<sup>148</sup> E.g., *Circumcision*, ENCYCLOPAEDIA JUDAICA, *supra* note 100, at 733 (addressing whether circumcision was essential to Judaism or perhaps “a vestigial post-biblical practice and unnecessary accretion to true Judaism which was unhygienic and barbaric”). Though most of such discussion occurred in Western Europe, and was always a minority position within Judaism, it is also visible in the work of Dr. Veniamin Portugalov (1835-1896), a Russian Jewish physician, who called for the abolition of circumcision in the late nineteenth century. See also *Circumcision*, in 1 THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE 336, 337 (Gershon David Hundert ed., 2008) (“Portugalov not only denied all medical claims regarding the advantages of circumcision, but disparaged the practice as barbaric, likening it to pagan ritual mutilation. Ritual circumcision, he claimed, stood as a self-imposed obstacle to the Jews’ attainment of true equality with the other peoples of Europe”).

### 3.4. Accusations of Anti-Semitism

The Cologne decision drew immediate charges of anti-Semitism.<sup>149</sup> Professor Alan Dershowitz wrote a blistering piece:

So let no one praise a nation that murdered a million Jewish babies and children for shedding crocodile tears over the plight of the poor little baby boy who, following a many thousand year old tradition, is circumcised a week after birth. Every good person should condemn Germany for what really lies at the heart of efforts to ban circumcision – old-fashioned anti-Semitism, a term coined by Germans for Germans and against Jews.<sup>150</sup>

For Dershowitz, Norwegians should join Germans in the dock for trying to tamp down the allegedly “barbaric” practice of circumcision.<sup>151</sup> He is not impressed by medical and scientific arguments against a ban on circumcision, and brings up “Nazi racial

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<sup>149</sup> See, e.g., Ben Cohen, *Europe's Assault on Jewish Ritual*, 144 COMMENTARY 4, 16, 16-20 (Nov. 2012), available at <https://www.commentarymagazine.com/articles/europes-assault-on-jewish-ritual/> (attempting to disentangle the roles of anti-Semitism, anti-Zionism, anti-ritualism, and religious antagonism in Europe); see also Scott Krane, *Let's Do the Time Warp*, JERUSALEM POST (Israel), Aug. 30, 2012, available at <http://www.jpost.com/landedpages/printarticle.aspx?id=283114> (contending that Jews outside of a Jewish homeland will always face anti-Semitism, persecution, and limitations on religious freedom); see also Donald Snyder, *Teach the Holocaust Separately, Germans Told*, FORWARD, Nov. 2, 2012, at 1, available at <http://forward.com/news/world/164912/teach-the-holocaust-separately-germans-told/> (discussing a report commissioned by the German government which found that one-fifth of German citizens harbor anti-Semitic attitudes).

<sup>150</sup> Alan Dershowitz, *J'Acuse [sic]: Shame on Germany for the Circumcision Ban*, THE ALLGEMEINER EPAPER (Sept. 6, 2012) (article first appeared in German in the *Jüdische-Allgemeine*), available at <http://www.algemeiner.com/2012/09/06/j%E2%80%99acuse-shame-on-germany-for-circumcision-ban/#> [hereinafter Dershowitz, *J'Acuse*]. *Contra*, ALEX BEIN, THE JEWISH QUESTION: BIOGRAPHY OF A WORLD PROBLEM 230, 594 (transl. Harry Zohn, 1990) (stating that the Austrian Jewish scholar Moritz Steinschneider was, in 1860, the first person to use the term in German in print). See also Richard S. Levy, *Marr, Wilhelm (1819-1904)*, in 2 ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION 445-46 (Richard S. Levy ed., 2005) (noting that later, in 1879, Wilhelm Marr coopted the term when he founded the *Antisemiten-Lige* (Anti-Semitic League). See EDWARD H. FLANNERY, THE ANGUISH OF THE JEWS: TWENTY-THREE CENTURIES OF ANTI-SEMITISM (1965) (suggesting that there was a rudimentary form of anti-Semitism perhaps going back to the Egyptians in the third century B.C.E.).

<sup>151</sup> Dershowitz, *J'Acuse*, *supra* note 150.

studies.”<sup>152</sup> He concludes: “The dirty hands and filthy past of Germany forever disqualifies [sic] that country from leading the effort to ban Jewish rituals. For shame!”<sup>153</sup>

In the wake of the Cologne decision, many voices, not only Jewish and Muslim voices, expressed concern and sorrow over what that decision seemed to say about the place of Jews in Germany.<sup>154</sup> Most informed Jewish reaction to the decision and anti-Semitism was a great deal more balanced.<sup>155</sup> Yet even if Dershowitz wrote in a moment of anger and outrage, his statement is worth examination.<sup>156</sup>

The Introduction provisionally defined the term “anti-Semitism” as a constellation of negative beliefs, attitudes, sentiments, biases, prejudices, dispositions, actions and practices toward Jewish people held or engaged in by non-Jews.<sup>157</sup> Because not all of these elements are present in each case, and because each element can vary in intensity, anti-Semitism is a matter of degree. Anti-Semitism has many dimensions: religious, theological, political, ideological, economic, social, and cultural. As understood here, to be anti-Semitic is not identical with – though it sometimes overlaps with – being anti-Zionist or disagreeing with the actions and policies of the government of Israel. Neither is anti-Semitism, as understood here, a form of racism, because Jews can and do

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<sup>152</sup> *Id.*

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

<sup>154</sup> *E.g.*, *Jewish Leader Lays into Germany: ‘Do You Still Want Us Jews?’*, SPIEGEL ONLINE (Sept. 5, 2012), <http://www.spiegel.de/international/germany/german-jewish-leader-lays-attacks-germany-over-circumcision-debate-a-854070.html>; *see also*, Spiegel Staff, *Great Anxiety: Jews Question their Future in Germany*, SPIEGEL ONLINE (Jan Liebelt trans., Sept. 10, 2012), <http://www.spiegel.de/international/germany/amid-circumcision-debate-jews-question-their-future-in-germany-a-854863.htm>; *see also*, *German Jewish Leader: ‘Jews Don’t Need any Tutoring in Democracy’*, SPIEGEL ONLINE (Oct. 22, 2012), <http://www.spiegel.de/international/germany/interview-with-jewish-german-jewish-leader-charlotte-knobloch-a-862650.html>.

<sup>155</sup> *E.g.*, AJC BERLIN BRIEFING, *supra* note 90, at 7-10; Juliane Wetzel, *Judenfeindliche Stereotypisierungen. Das Beschneidungsurteil im öffentlichen Diskurs* [Anti-Jewish Stereotyping. The Circumcision Judgment in Public Discourse], in Heil & Kramer, *BESCHNEIDUNG*, *supra* note 2, at 264.

<sup>156</sup> Hegener, *supra* note 38, at 51, 57–85, offers a subtler diagnosis that traces anti-Semitism to early Christianity and argues that subsequent generations have passed it on and placed it in a modern, more secular context.

<sup>157</sup> *See* text accompanying note 8 *supra*.

belong to different races.<sup>158</sup> However, some of the negative elements in anti-Semitism have counterparts in racism. Some persons who are anti-Semitic may also have negative beliefs, attitudes, etc., about Muslims or about Semitic peoples generally, but those beliefs, attitudes, etc., are not part of what it is to be anti-Semitic.

With this elaboration in hand, notice that on the surface at least the Cologne decision had more to do with anti-Muslim and/or anti-Arab beliefs, attitudes and actions than with anti-Jewish beliefs, attitudes and actions. Dershowitz's essay seems tendentious in assuming that the court's ruling is centrally about Jews rather than both Muslims and Jews.

Granted, some might contend that the court took advantage of the prosecution of a Muslim physician to write an opinion that applies to both Jewish and Muslim practices. In support of this contention, some might urge that the court does not make much of the fact that pain and complications are, all else equal, more likely to result if it is a four-year-old rather than a newborn who is circumcised. Some might also point out that Judge Beenken could have crafted the opinion to deal with the facts of the case at bar (a four-year-old boy with Muslim parents) and refrain from expressing any view on the facts of a hypothetical case not before the court (an eight-day-old boy with a Jewish mother). The support for this contention is hardly nil, yet it is a stretch.

It is surprising that Dershowitz takes the Norwegians to task almost as much as the Germans.<sup>159</sup> It was a German rather than a Norwegian prosecutor who put Dr. Kezze on trial. Germany invaded Norway in World War II. Germans, not Norwegians, ran an archipelago of concentration and extermination camps under Hitler. However, Norway has some history of anti-Semitism and

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<sup>158</sup> This part of my account of anti-Semitism is mildly stipulative. Some writers, among them most notoriously ADOLF HITLER, *MEIN KAMPF* 423, 429-30, 447-49 (John Chamberlain et al. eds., Reynal & Hitchcock publ., 1940), consider Jews to be a race.

<sup>159</sup> "History is not irrelevant in assessing current policies. The history of Germany (and Norway) in prohibiting Jews from their traditional rituals goes back to a time when anti-Semitism was not only acceptable, it was de rigeur." Dershowitz, *supra* note 150. "Indeed, there is an ugly whiff of 'racial superiority' in the implicit assumption underlying these bigoted laws: Namely, that Germans and Norwegians are somehow morally (if not racially) superior to other countries that permit such 'barbaric' practices." *Id.* These practices relate not only to circumcision but also to the "Kosher slaughter of animals." *Id.* My subject is circumcision. I voice no opinion on Kosher slaughter.

many Norwegians are unsympathetic to ritual circumcision.<sup>160</sup> History is indeed pertinent to understanding the background of this case and contemporary attitudes in both Germany and Norway. But a balanced presentation of the history would be desirable.

Equally surprising is Dershowitz's observation that Germany's past "forever disqualifies" that country from "leading the effort to ban Jewish rituals."<sup>161</sup> A cooler observation is that Germany's position, and the position of Germans collectively, on which religiously-based practices, if any, should be banned or regulated are only as sound as the evidence and arguments for those positions. Otherwise, one has *ad patriam* and *ad hominem* exclusions, respectively, of Germany and Germans from speaking out on important matters affecting children.

Suppose that the Bundestag sought to regulate or forbid *metzitzah b'peh* on the ground that the practice could transmit a bacterial or viral infection to the baby.<sup>162</sup> It is not obvious that the Bundestag should be powerless to regulate or make a law relating to this practice just because it is a Jewish ritual.<sup>163</sup> Moreover, it would require an impressive argument to show that Germany is *forever* disqualified from making law in this area. It is quite another

<sup>160</sup> E.g., CENTER FOR STUDIES OF THE HOLOCAUST AND RELIGIOUS MINORITIES, ANTISEMITISM IN NORWAY? THE ATTITUDES OF THE NORWEGIAN POPULATION TOWARDS JEWS AND OTHER MINORITIES (May 2012) (offering a thorough quantitative study of Norwegian attitudes and perceptions); see also Lyndsey Smith, *Norway Anti-Semitism Results Published*, THE FOREIGNER (May 30, 2012), available at <http://theforeigner.no/pages/news/norway-anti-semitism-results-published/> (reporting a Oslo Holocaust Centre study which found that "12.5 percent of Norwegians have a distinct prejudice against Jews").

<sup>161</sup> Dershowitz, *supra* note 150.

<sup>162</sup> See, e.g., CTNS. FOR DISEASE CONTROL & PREVENTION, *Neonatal Herpes Simplex Virus Infection Following Jewish Ritual Circumcisions that Included Direct Orogenital Suction – New York City, 2001–2011*, MORBIDITY & MORTALITY WKLY. REP. 61(22) (Atlanta, Ga.), June 8, 2012, at 405 (estimating that Jewish ritual circumcision involving direct orogenital suction – *metzitzah b'peh* – more than triples the risk of a newborn's contracting HSV-1 and untyped HSV and recommending that direct oral suction be avoided).

<sup>163</sup> Such a case almost arose a year later, but the facts were murky and the prosecutor declined to file charges. Claudia Keller & Jost Mueller-Neuhoff, *Berliner Staatsanwälte pruefen neuen Fall* [Berlin Public Prosecutor Examines New Case], DER TAGESSPIEGEL (Apr. 4, 2014), <http://www.tagesspiegel.de/politik/strafanzeige-nach-beschneidung-berliner-staatsanwaelte-pruefen-neuen-fall/8047730.html>; Jost Mueller-Neuhof, *Knabenbeschneidung als Grenzfall* [Male Circumcision as a Borderline Case], DER TAGESSPIEGEL (Nov. 27, 2014), <http://www.tagesspiegel.de/politik/knabenbeschneidung-als-grenzfall/9141960.html>. For discussion of the case, see Part 4.1.5 *infra*.

matter to say that it would be *prudent* for Germany to lead a multi-nation charge in banning what it sees as a harmful religious practice.

Dershowitz's point that the first European country with a court decision against circumcision was also the same country in which virulent anti-Semitism resulted in the Holocaust is worth considering, but it fails to account for major changes in Germany. If the Cologne court betrayed a tin ear in deciding the case as it did, Dershowitz slights some profound changes in German society in the years since World War II.<sup>164</sup>

First is the discussion in Germany of its Nazi past (*Vergangenheitsbewältigung*). Denazification programs were introduced after World War II.<sup>165</sup> The victorious Allies initially imposed such programs.<sup>166</sup> Memory of the Nazi past informed post-war German politics.<sup>167</sup> Holocaust denial and speech supporting the Nazi regime are now considered incitement of popular hatred (*Volkverhetzung*) and are crimes under section 130 of the German Criminal Code.<sup>168</sup> Given the continuing need to deal with the Nazi past, it is no surprise that Chancellor Merkel, mainstream politicians, business people, and the Bundestag moved quickly to enact a statute that would neutralize the Cologne decision.<sup>169</sup>

Second, at least since the 1970s, Germany has become an increasingly secular society.<sup>170</sup> But it remains culturally Christian in

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<sup>164</sup> For an earlier period, see, e.g., ROBIN JUDD, *CONTESTED RITUALS: CIRCUMCISION, KOSHER BUTCHERING, AND JEWISH POLITICAL LIFE IN GERMANY, 1843-1933* (2007).

<sup>165</sup> TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 52-62, 88, 105, 261, 697, 809 (2005); see also JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANYs*, 72-74, 204, 206, 265-66, 274-80 (1997) (examining denazification in East and West Germany and concessions to some West Germans as part of the postwar anti-communist policy of the United States).

<sup>166</sup> E.g., RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 699-704 (1961) (explaining that many former Nazis received amnesty or other favorable treatment); INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 201-07 (transl. Deborah Lucas Schneider, 1991) (discussing Allied efforts at denazification of the judiciary and giving examples of German leniency to former Nazi officials).

<sup>167</sup> JEFFREY HERF, *DIVIDED MEMORY*, *supra* note 165.

<sup>168</sup> See Klaus Dahmann, *No Room for Holocaust Denial in Germany*, *DEUTSCHE WELLE* (Dec. 23, 2005), <http://www.dw.de/no-room-for-holocaust-denial-in-germany/a-1833619-1> (explaining that the legislation, first enacted in 1985 and tightened up in 1994, sentences "anyone who publicly endorses, denies or plays down the genocide against the Jews" to "a maximum penalty of five years in jail and no less than the imposition of a fine").

<sup>169</sup> See *Politicians Welcome German Circumcision Motion*, *supra* note 71.

<sup>170</sup> See Blaschke, *supra* note 3.

significant respects,<sup>171</sup> which intertwines with various forms of secularism.<sup>172</sup> Religious affiliation is declining sharply, and among those with no religious affiliation it can be difficult to find sympathy for some religious beliefs and practices. Science and medicine are ever more respected and prominent,<sup>173</sup> though it bears notice that more than one side in the circumcision debate invokes science and medicine.<sup>174</sup> These secular trends may make nonreligious persons suspicious of what they view as the cultural trappings of religious beliefs. Granted, more people in Germany view religion to be important than do people in Britain and France.<sup>175</sup> Though Germany has lower rates of atheism than Britain, France and Sweden, support for Catholic and Protestant churches is declining and church membership and attendance are diminishing in Germany.<sup>176</sup> Religion is even less conspicuous in the former East Germany, which, if it were considered a separate country, would rank the lowest out of thirty European countries for percentage of

<sup>171</sup> See Dieter Grimm, *Conflicts between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369, 2369-71 (2009).

<sup>172</sup> In a growing literature, see TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003) (contending that secularism belongs to public space, moves Christian ritual to private spaces, and makes room for Islam only as a restricted minority religion); see also POWERS OF THE SECULAR: TALAL ASAD AND HIS INTERLOCUTORS (David Scott & Charles Hirschkind eds., Stanford University Press 2006) (exploring different responses to Asad's influential book); see also TODD H. WEIR, *SECULARISM AND RELIGION IN NINETEENTH-CENTURY GERMANY* (Cambridge University Press 2014) (examining early secularism in Germany, its effort to dismantle Christian religious confessionalism, and its relation to anti-Semitism) [hereinafter WEIR, *SECULARISM*].

<sup>173</sup> Dershowitz, *supra* note 150, criticizes "the pseudo scientific bigots who claim to be interested in the sensitivities of children." It is debatable whether every German scientist or medical doctor who takes into account the sensitivities of children and the risks to them of complications from circumcision is a pseudo-scientific bigot. See Maximilian Stehr, *Undue Suffering: Circumcision for Non-Medical Reasons is Wrong*, SPIEGEL ONLINE (Jan Liebelt trans., Jul. 26, 2012), available at <http://www.spiegel.de/international/germany/commentary-circumcision-without-medical-justification-is-wrong-a-846395.html> (suggesting that risks exist and that the benefits are uncertain).

<sup>174</sup> See *infra* text accompanying notes 308-309, 311-314.

<sup>175</sup> *The American-Western European Values Gap* (Pew Research Ctr./ Global Attitudes Project, D.C.), Nov. 17, 2011, available at <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/> (updated Feb. 29, 2012).

<sup>176</sup> See generally GERT PICKEL, *RELIGION MONITOR: UNDERSTANDING COMMON GOOD – AN INTERNATIONAL COMPARISON OF RELIGIOUS BELIEF* (Bertelsmann Foundation, 2013) (presenting information on the manifestations of religious conviction and beliefs in various countries).

people who believe in God.<sup>177</sup> Especially when religious beliefs are acted upon, as in the case of ritual circumcision, a segment of a predominantly secular-minded populace might view the practice as disturbing or backward.

To deepen this second point it is useful to expand the treatment of secularism. Earlier I defined the terms *secularism* and *German secularism*.<sup>178</sup> As used here, *plural German secularism* is a governmental and social policy which holds that although for many purposes the state and its political and legal institutions do not favor any particular religion, competing religious groups struggle at the periphery for influence in society and in political and legal institutions.<sup>179</sup> The adjective "plural" reflects the fact that the history of the German world since the Reformation has been marked by the presence of two or more religious organizations vying for support and resources from the state. Technically, of course, Catholicism and Protestantism are not different religions but different confessions. It is within this complicated setting that plural German secularism and the increasingly secular character of German society must be understood.<sup>180</sup> For instance, Jews in Germany have obtained a beneficial position within this field of competition, and Muslims would like to gain some of the same advantages as Jews.<sup>181</sup>

Third, in Germany as in most Western European countries, increased attention has focused on the interests and rights of children. Much of this focus comes from the expanding force of human rights generally.<sup>182</sup> The basic idea is that human rights first

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<sup>177</sup> *Chief among Non-Believers: Only the Old Embrace God in Former East Germany*, SPIEGEL ONLINE (Apr. 19, 2012), <http://www.spiegel.de/international/zeitgeist/report-shows-highest-percentage-of-atheists-in-former-east-germany-a-828526.html> (tracing trends in religious belief throughout East Germany, especially due to the dissolution of the communist regime).

<sup>178</sup> See *supra* text accompanying note 52.

<sup>179</sup> According to WEIR, *SECULARISM*, *supra* note 172, at 1, this form of secularism operated as a "dynamic force" "within and between Germany's religious communities, as much as *against* them" (emphasis in original).

<sup>180</sup> *Secularism* is a chameleon among words. It is important not to elide the differences between establishing no state religion, embracing all religions, and excluding all religions from public life. In a rather different classification, secularism can be a personal political philosophy rather than a governmental and social policy.

<sup>181</sup> See *infra* text accompanying notes 338–353.

<sup>182</sup> Historians disagree on the development of human rights. Compare LYNN HUNT, *INVENTING HUMAN RIGHTS* (2007) (tracing human rights to the Enlightenment), with SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010) (emphasizing the increased importance of human rights after 1968), and JENNY S.



embraced free men, then women, and finally children. The widespread adoption of the U.N. Convention of the Rights of the Child of 1989 testifies to a concern for children as individuals, not merely as offspring of their parents, nor as actual or potential members of their parents' religious communities. As of 2012, the U.N. Convention and similar regional agreements and domestic laws had not led to many prohibitions on the circumcision of male minors, though there was some push in this direction in the Nordic countries.<sup>183</sup> Some work in this area considers genital autonomy from a human rights perspective.<sup>184</sup> Thus, when Dershowitz dismisses Germans' care for "the so-called rights of young children not to be circumcised" as a smokescreen for "old-fashioned anti-Semitism,"<sup>185</sup> he ignores the wider story. According to a survey in the same time period, forty-seven percent of Europeans ranked human rights as their most important value, whereas only six percent gave that rank to religion.<sup>186</sup>

Dershowitz's essay is ultimately unsatisfying because it fails to come to grips with the substance of the Cologne decision. The substance turns on whether it is justifiable to circumcise an infant or young boy for religious reasons if there is no medical basis for the procedure. Recitals of past practices and anti-Semitic beliefs and motivations do not address this issue. Although Dershowitz and Putzke are poles apart, they have at least one characteristic in common: neither manages to get fully inside the opposing position.

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MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (Oxford University Press, 2012) (contending that international human rights law derives from British efforts to end the slave trade).

<sup>183</sup> See generally Johanna Schiratzki, *Banning God's Law in the Name of the Holy Body - The Nordic Position on Ritual Male Circumcision*, 5 *THE FAMILY IN LAW* 35 (2011), available at <http://din-online.info/pdf/fam5-3.pdf> (finding that in the wake of immigration to Nordic states with a long history of Protestant homogeneity, various sectors of society are beginning to debate about conflicts between religious traditions).

<sup>184</sup> See generally Debra DeLaet, *Genital Autonomy, Children's Rights and Competing Rights Claims in International Human Rights Law*, 20 *INT'L J. CHILD. RTS.* 554 (2012) (discussing how despite a narrow conception of a right to genital autonomy, international organizations have been seeking to expand this right by condemning genital cutting and surgical alteration).

<sup>185</sup> Dershowitz, *supra* note 150.

<sup>186</sup> DIRECTORATE-GENERAL FOR COMMUNICATION OF THE EUROPEAN COMMISSION, *EUROBAROMETER 74 - AUTUMN 2010: PUBLIC OPINION IN THE EUROPEAN UNION* 32 (TNS Opinion & Social, Brussels, Feb. 2011).

### 3.5. A Muslim Perspective

Aside from the response of the ZMD, Muslim reactions have been less intense and less visible than Jewish reactions. Hidayet Metin, a young politician, observes that though Muslim organizations issued press releases, German newspapers paid little attention to them.<sup>187</sup> He ascribes part of this phenomenon to the lack of a widely accepted Muslim organization or Muslim figure who could speak on behalf of all Muslims in Germany.<sup>188</sup> He says that Muslim silence – not silence among Muslims, but relative Muslim silence in the media – results from feeling destabilized<sup>189</sup> and misunderstood.<sup>190</sup>

If German media attention to anti-Semitism was a way of dealing with Germany's past, it was also a way of not dealing with its present. Today there are roughly four million Muslims in Germany, which is much larger than the German Jewish population. In the 1970s Muslim guest workers were expected to return to their home countries, and Germans and Muslims had little interest in interacting with each other.<sup>191</sup> By the 1990s, when integration became a contentious issue, writes Metin, Muslim associations had few qualified spokespersons to make Islam understood, and many Germans considered Islam to be a problem.<sup>192</sup> How might the circumcision debate have developed had it been strictly an Islamic issue?<sup>193</sup> Metin wonders whether the move to allow religious

<sup>187</sup> Hidayet Metin, *Ihr Wortabschneider!* [You Who Cut Off Words!], 32 CHRIST UND WELT (2012), available at <http://www.christundwelt.de/detail/artikel/ihr-wortabschneider/> (last visited Aug. 7, 2014).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (“eine Folge einer mentalen Destabilisierung von außen”). He refers to the success of Thilo Sarrazin's polemical book *Deutschland schafft sich ab* [Germany Is Doing Away with Itself], which was published in 2010 and is critical of Muslims in Germany. *Id.*

<sup>190</sup> “The Cologne decision signaled to the Muslim community: ‘The Germans still don't understand us.’” (“Von dem Kölner Gerichtsurteil ging für die muslimische Gemeinschaft das Signal aus: ‘Die Deutschen verstehen uns schon wieder nicht.’”) *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* For general discussion, see ISLAMOPHOBIE UND ANTISEMITISMUS – EIN UMSTRITTENER VERGLEICH [Islamophobia and Anti-Semitism – A Contested Comparison] (Gideon Botsch et al. eds., de Gruyter, 2012).

<sup>193</sup> Metin, *supra* note 187. “This question occupies the Muslim community more than ‘For’ or ‘Against’ circumcision.” (“Diese Frage beschäftigt die muslimische Community mehr als ein Pro und Contra Beschneidung.”) He adds a second

circumcisions would have been nearly as strong had only Muslim circumcisions been at stake.<sup>194</sup> His point of view is a useful corrective to Dershowitz's perspective that the Cologne decision was almost entirely a matter of anti-Semitism.

### 3.6. *The New Statute*

Whatever cloud of anti-Muslim sentiment or anti-Semitism hovered over the land, the Bundestag quickly asked the federal government to come up with a new law ensuring the legality of ritual male circumcision in Germany.<sup>195</sup> The Ministry of Justice took the lead role in drafting the proposal for the law.<sup>196</sup> The Bundestag passed it on December 12, 2012, and it went into force on December 28, 2012.<sup>197</sup> The legislature thus struck a blow in favor of toleration and multiculturalism. The law added a new subsection to the German Civil Code ("BGB") concerning parental care and custody of the child (*Personensorge*).<sup>198</sup> Subsection 1631d BGB reads as follows:

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question: without Jewish intervention, "Would there have been such a strong lobby for circumcision?" ("Gäbe es dann auch eine so starke Lobby pro Beschneidung?")  
*Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Antrag [Motion], Jul. 19, 2012, DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/10331 (Ger.), available at <http://dip21.bundestag.de/dip21/btd/17/103/1710331.pdf> (specifying that new law should ensure that circumcision be performed according to accepted medical standards without causing unnecessary pain and should take into consideration the constitutional guarantees of the best interest of the child, bodily integrity, freedom of religion, and the parents' right to raise their child).

<sup>196</sup> Gesetzentwurf der Bundesregierung [Draft Bill of the Federal Government], Nov. 5, 2012, BT 17/11295 (Ger.), available at <http://dipbt.bundestag.de/dip21/btd/17/112/1711295.pdf>. I refer to the drafters of the law as "the legislature." I have found no official or unofficial English translation of BT 17/11295, which runs to 20 printed pages.

<sup>197</sup> Legislative History of Section 1631d BGB, *Basisinformationen über den Vorgang*, DEUTSCHER BUNDESTAG, <http://dipbt.bundestag.de/extrakt/ba/WP17/479/47943.html> (Ger.).

<sup>198</sup> Beschneidung des männlichen Kindes [Circumcision of the Male Child], BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Aug. 18, 1896, BGBL. I at 2749, § 1631d (Ger.), available at <http://dejure.org/gesetze/BGB/1631d.html>. *Personensorge* is literally "care for the person" but in many contexts it means "child custody." Under § 1626(1) BGB, the rights and duties of parental care (*elterliche Sorge*) include care for the person of the child (*Personensorge*) and care for the child's finances (*Vermögenssorge*). BGB, Aug. 18, 1896, § 1626 para. 1 (Ger.). Under § 1631(1) BGB, "[t]he

(1) Parental care and custody of the child [*Personensorge*] also encompasses the right to consent to a medically non-indicated circumcision of a male child [who is] incompetent of understanding or assessing the meaning of the procedure, if it is performed according to medical standards.<sup>199</sup> This [provision] does not apply if the circumcision, with regard to its particular purpose, endangers the welfare of the child [*Kindeswohl*].<sup>200</sup>

(2) In the six months after the child's birth, circumcisions as described in paragraph (1) may also be performed by persons designated by a religious community, if they are specifically trained and, without being physicians, comparably qualified in performing the circumcision.<sup>201</sup>

The legislature commented on the intended application of the new law. Under the first sentence of § 1631d(1), the parents' consent to circumcision makes lawful an intrusion into the child's bodily

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care for the person of the child encompasses, in particular, the duty and the right to care for, to raise, and to supervise the child and to determine the child's place of residence." ["Die Personensorge umfasst insbesondere die Pflicht und das Recht, das Kind zu pflegen, zu erziehen, zu beaufsichtigen und seinen Aufenthalt zu bestimmen."]. BGB, Aug. 18, 1896, BGBL. I at 1479, § 1631, para. 1 (Ger.). In legal contexts, the best translation of *Personensorge* is probably "care and custody of the child." Even this translation does not, however, capture all of the parents' duties and rights.

<sup>199</sup> Literally "according to the rules of the medical art."

<sup>200</sup> In a context of possible endangerment, *Kindeswohl* is more nearly the "welfare of the child" rather than the "best interest of the child." Section 1666 BGB defines the legal standard for *Kindeswohl*.

<sup>201</sup> Section 1631d reads in German as follows:

(1) Die Personensorge umfasst auch das Recht, in eine medizinisch nicht erforderliche Beschneidung des nicht einsichts- und urteilsfähigen männlichen Kindes einzuwilligen, wenn diese nach den Regeln der ärztlichen Kunst durchgeführt werden soll. Dies gilt nicht, wenn durch die Beschneidung auch unter Berücksichtigung ihres Zwecks das Kindeswohl gefährdet wird.

(2) In den ersten sechs Monaten nach der Geburt des Kindes dürfen auch von einer Religionsgesellschaft dazu vorgesehene Personen Beschneidungen gemäß Absatz 1 durchführen, wenn sie dafür besonders ausgebildet und, ohne Arzt zu sein, für die Durchführung der Beschneidung vergleichbar befähigt sind

The translation in the text benefited from but is a bit more accurate than the translation in Merkel & Putzke, *supra* note 49, at 447.

integrity.<sup>202</sup> The parents need not justify the purpose of the circumcision so long as the child's welfare is not endangered.<sup>203</sup> They may circumcise their child for religious, cultural, or prophylactic reasons.<sup>204</sup> However, for the state to fulfill its duty to protect the child's right to bodily integrity guaranteed by Art. 2(2) GG and its duty to watch over the parents' exercise of their right to the care and upbringing of their children under Art. 6(2) GG, the legislature ties four requirements to the parents' right to consent to the procedure.<sup>205</sup> First, it is "indispensable" that the procedure be done in accordance with accepted medical standards.<sup>206</sup> Second, these medical standards implicitly call for "adequate and effective pain management under the circumstances."<sup>207</sup> Third, parents have to receive accurate and comprehensive information on the procedure.<sup>208</sup> Fourth, while the new law applies only to children who are incompetent to consent to the procedure, the legislature states that the child's wishes are "not irrelevant."<sup>209</sup> If the child does not want to be circumcised, the parents have to take his wishes into consideration.<sup>210</sup> In religious circumcisions, the child's religious beliefs must also be considered.<sup>211</sup>

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<sup>202</sup> Gesetzentwurf der Bundesregierung [Draft Bill of the Federal Government], Nov. 5, 2012, BT 17/11295, at 16 (Ger.).

<sup>203</sup> *See id.* The legislature clarifies that although religious practices will motivate the majority of circumcisions, the law does not give religious groups a "special right" (*Sonderrecht*). *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 17, 18. Some of these four requirements come partly from existing legal norms and principles, which is why they are not expressly mentioned in the law. *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> ("eine im Einzelfall angemessene und wirkungsvolle Betäubung"). *Id.* The legislature also says that the circumcision should be performed as gently as possible. *Id.*

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

<sup>209</sup> *Id.* at 18.

<sup>210</sup> *Id.* The legislature uses the verb *sich auseinandersetzen*, which roughly means "to confront." Here it connotes some inquiry into the child's possible opposition. *Id.* But the legislature gives no further instructions on how to weigh the child's wishes in reaching a final decision. *Id.*

<sup>211</sup> *Id.* In such a case, the Gesetz über die religiöse Kindererziehung applies. *Id.* *See generally* GESETZ ÜBER DIE RELIGIÖSE KINDERERZIEHUNG [KErzG] [Law on the Religious Upbringing of Children], July 15, 1921, BGBL. III at §§ 1-3, 5 (Ger.), <http://www.gesetze-im-internet.de/kerzg/BJNR009390921.html>.

The second sentence of § 1631d(1) indicates that the law does not apply if the welfare of the child is endangered.<sup>212</sup> The legislature points out that in most instances the intervention of the state will be inappropriate because the state has to respect parental rights to the care and upbringing of their child.<sup>213</sup> However, if an analysis of the welfare of the child is necessary, the parents' purpose in circumcising the child and possibly the child's wishes become relevant.<sup>214</sup>

Section 1631d(2) authorizes persons selected by religious communities to circumcise boys up to the age of six months.<sup>215</sup> The legislature explains that this provision satisfies the state's duty to protect the freedom of religion.<sup>216</sup> The provision also protects, under Art. 4 GG, the right of religious communities to autonomous administration under Art. 140 GG.<sup>217</sup> The six-month restriction reflects a legislative effort to balance these religious rights against the child's right to bodily integrity. Moreover, the law requires that religious circumcisers possess skills for this operation comparable to those of medical doctors.<sup>218</sup> The legislature concludes that, in order to meet this medical standard, those who circumcise have to receive special training.<sup>219</sup> Nevertheless, religious communities may

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<sup>212</sup> Gesetzentwurf der Bundesregierung [Draft Bill of the Federal Government], Nov. 5, 2012, BT 17/11295, at 18 (Ger.). Section 1666 BGB defines endangerment of the welfare of the child. *Id.* For an English translation of this section, see [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5747](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5747). The website's translation renders *Kindeswohl* as the "best interests [plural] of the child" rather than the "welfare of the child." See *supra* note 190.

<sup>213</sup> Gesetzentwurf der Bundesregierung [Draft Bill of the Federal Government], Nov. 5, 2012, BT 17/11295, at 18 (Ger.).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* I refer to such persons as "religious circumcisers."

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 19. The statute specifies that if the circumcision is performed by a religious circumciser, the medical risk may not be greater than if is performed by a medical doctor ("so dass von dem Eingriff im Vergleich zur Vornahme durch eine Ärztin oder einen Arzt keine erhöhten gesundheitlichen Risiken ausgehen"). *Id.*

<sup>219</sup> *Id.* The legislature requires that religious circumcisers have the knowledge and skills specific to the procedure, as well as knowledge and skills concerning hygiene, disinfection, sterile conditions, and first aid. *Id.* The religious circumciser must also be able to provide the parents with comprehensive information on the procedure. However, special medical privileges given only to medical doctors and (with qualifications) to dentists, such as the authority to prescribe pharmaceutical drugs, remain unchanged. *Id.*

autonomously select and train religious circumcisers without prior approval by a government agency.<sup>220</sup>

#### 4. DEVELOPMENTS SINCE JANUARY 2013

The turmoil leading up to the new German law that went into force in the waning days of 2012 sheds little light on what was to come next. That is the subject of Part 4. I take up in turn the interpretation, application, and enforcement of the new law; German public opinion; the evolving situation of Jews and Muslims living in Germany; and European developments beyond Germany.

##### *4.1. Interpretation, Application, and Enforcement of the New Statute*

###### *4.1.1. Motivations and Parental Disagreement*

In August 2013, the higher regional appellate court (*Oberlandesgericht*) in Hamm applied § 1631d BGB in a custody dispute.<sup>221</sup> The case involved a Kenyan mother who had sole custody of her six-year-old son and wanted to have him circumcised according to Kenyan cultural practices.<sup>222</sup> The non-Kenyan father objected to circumcision.<sup>223</sup> The court held that the mother's consent did not meet legal requirements and that circumcision endangered the child's welfare.<sup>224</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> *Oberlandesgericht Hamm [OLG]* [Higher Regional Appellate Court Hamm], Aug. 30, 2013, 3 UF 133/13, [http://www.justiz.nrw.de/nrwe/olgs/hamm/j2013/3\\_UF\\_133\\_13\\_Beschluss\\_20130830.html](http://www.justiz.nrw.de/nrwe/olgs/hamm/j2013/3_UF_133_13_Beschluss_20130830.html). The pin cites *infra* notes 222-236 refer to the numbered paragraphs in the section headed "Gründe" (reasons) at this link.

<sup>222</sup> *Id.* para. 8.

<sup>223</sup> *Id.* para. 5. The court's opinion notes that since 2009, the father and the mother had many disputes in court concerning their child. *Id.* para. 4. When the father learned of the mother's plan to circumcise their child, he filed for a temporary injunction in family court. *Id.* para. 5. The court temporarily transferred the right to make health care decisions on behalf of the boy to social services, which objected to the circumcision. *Id.* The mother appealed based on § 1631d BGB. *Id.* paras. 6-8.

<sup>224</sup> *Id.* paras. 32-33.

Because § 1631d applies only to a child who lacks competence to understand or assess the meaning of the circumcision procedure, the court stated that in each individual case the parents and a medical doctor have to consider whether the child meets that criterion.<sup>225</sup> Even if the child is incompetent, the parents and a medical doctor have to educate the child about the procedure in a way appropriate for the child's development and age, and try to reach a consensus with the child.<sup>226</sup> The court found that the mother and the medical doctor had not taken the child through that process.<sup>227</sup> It also found that the mother was unable to prove that the medical doctor who was going to perform the circumcision had adequately informed her about the procedure.<sup>228</sup>

In examining the welfare of the child, the court stated that the threshold for finding an endangerment of the child's welfare under § 1666d31 BGB is lower or higher depending on the weight placed on the parents' motives for circumcising.<sup>229</sup> The mother of the boy stated that she wanted her son to be viewed as a "full man" on her home visits to Kenya<sup>230</sup> and that she believed circumcision to be necessary for hygienic purposes.<sup>231</sup> The court observed that, in this particular case, such motives do not justify circumcision because the mother's home visits to Kenya are rare.<sup>232</sup> The court took notice that the boy was baptized as a Protestant and that his mother had made her life in Germany rather than Kenya.<sup>233</sup> Moreover, it found that regular personal hygiene, as practiced by most uncircumcised German boys, ensures sufficient cleanliness.<sup>234</sup> The court also found that the psychological welfare of the child was at risk because the mother did not feel capable of accompanying her son to the

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<sup>225</sup> *Id.* para. 29.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* para. 32.

<sup>229</sup> *Id.* para. 33. The court reasoned that the legislature intended the child's interest to be a flexible standard because under § 1631d(1) the welfare of the child has to be considered in regard to the purpose of circumcision. *Id.*

<sup>230</sup> *Id.* para. 35. The mother stated that each time she talked to her relatives, they asked whether her son has been circumcised. *Id.*

<sup>231</sup> *Id.* para. 36.

<sup>232</sup> *Id.* para. 37.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*



procedure.<sup>235</sup> It did not entertain arguments by the father concerning pain or the risks of circumcision because they are present in every medically nonindicated circumcision and covered by § 1631d BGB.<sup>236</sup>

The OLG Hamm case is significant for two reasons. First, the thorough analysis of the mother's motives and the child's welfare took place only because the parents were not in agreement. A unanimity rule could reduce the number of ritual circumcisions in Germany. It could also, in cases of disagreement, give leverage on other matters to the parent who objects to circumcision, without respect to whether the objection is sincere or tactical. Second, the court examined the significance of the mother's motives in deciding whether the child's best interest was endangered. It appears likely that religious motives would carry greater weight than hygienic or cultural motives. It would be intriguing to see how a similar dispute would play out between two parents who belong to different faiths and disagree over religiously-motivated circumcision.

#### 4.1.2. *Undesirable and Perverse Motivations*

Under the new statute, parents do not have to justify their purposes in circumcising their son provided that his welfare is not endangered.<sup>237</sup> It might appear that parents could have any motivation for circumcision, even undesirable or perverse motivations. Still, § 1631d(1) contains the clause "with regard to [the circumcision's] particular purpose."

Professors Merkel and Putzke contend that this clause "is patently unfit to filter out inappropriate parental motives,"<sup>238</sup> because the statute implicitly assumes that circumcision is objectively harmful in causing pain and loss of functional tissue. Otherwise there would be no point to the legislation. The statute explicitly bars any investigation, they write, into parental motives: "circumcision itself, irrespective of the motives for which it might be initiated, is deemed compatible with the child's well-being once it is

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<sup>235</sup> *Id.* para. 40.

<sup>236</sup> *Id.* para. 39.

<sup>237</sup> *See supra* text accompanying note 203.

<sup>238</sup> Merkel & Putzke, *supra* note 49, at 449.

expressly endorsed by the law.”<sup>239</sup> Their point is that once circumcision is allowed by the new statute, parental motives become irrelevant:

The fundamentalist Catholic father who catches his 8-year-old masturbating, and, in order to prevent the habit from taking hold, hits him hard in the face, acts unlawfully and is punishable by the criminal law. If he, for the very same purpose, decides to have the boy circumcised, the new law paves the way for him.<sup>240</sup>

Merkel and Putzke, aided perhaps by the official legislative commentary,<sup>241</sup> raise a classic law professor’s hypothetical for testing the interpretation and limits of § 1631d. Whether many parents would circumcise for undesirable or perverse motives is doubtful. Perhaps it is also doubtful that German courts will scrutinize parental religious motives, agree to hear evidence on undesirable or perverse motivations, or conclude that circumcision dependent on such motives would be against the child’s welfare.

#### 4.1.3. Enforcement of Anesthesia Requirements

Section 1631d BGB requires that ritual circumcision be performed according to medical standards,<sup>242</sup> which includes effective pain management.<sup>243</sup> The legislature did not set any

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> BT 17/11295, at 18 (Ger.). “In the context of determining child welfare, the aim of the circumcision must also be taken into account (be it a circumcision for purely aesthetic reasons, or with the goal of impeding masturbation).” (“Im Rahmen der Kindeswohlprüfung muss auch der Zweck der Beschneidung in den Blick genommen werden (etwa bei einer Beschneidung aus rein ästhetischen Gründen oder mit dem Ziel, die Masturbation zu erschweren).”)

<sup>242</sup> Beschneidung des männlichen Kindes [Circumcision of the Male Child], BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Aug. 18, 1896, BGBL. I at 2749, §1631d (Ger.), available at [http://www.gesetze-im-internet.de/bgb/\\_1631d.html](http://www.gesetze-im-internet.de/bgb/_1631d.html).

<sup>243</sup> Gesetzentwurf der Bundesregierung, Nov. 5, 2012, DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/11295, at 17, available at <http://dipbt.bundestag.de/dip21/btd/17/112/1711295.pdf>. (stating that the law on circumcision requires “an adequate and effective anesthesia under the circumstances”) [“eine im Einzelfall angemessene und wirkungsvolle Betäubung”]. The phrase *im Einzelfall* usually means “in the individual case” but in this context it means “under the circumstances.”

determinate standards for effectively managing pain.<sup>244</sup> Some critics of neonatal circumcision argue that even local anesthesia by means of injection is not always effective in managing pain.<sup>245</sup> In orthodox Jewish communities, boys are often circumcised without local anesthesia and without stitches.<sup>246</sup> The mohel may put a few drops of wine into the baby's mouth to soothe the baby or ease his pain.<sup>247</sup> It is not settled whether the drops of wine constitute effective pain management or whether additional anesthesia is legally necessary. Moreover, it is unclear how the state can monitor effective pain management if circumcision takes place, not in a hospital, but in a place of worship or a private home.

#### 4.1.4. Two Constitutional Complaints

The new law has yet to meet a head-on constitutional challenge.<sup>248</sup> Two recent decisions by the Federal Constitutional Court (*Bundesverfassungsgericht*) deal with technical points.

<sup>244</sup> Gesetzentwurf der Bundesregierung, Nov. 5, 2012, [BT] 17/11295, at 8 ("Some [anesthesia] involves local anesthesia by the way of injection after sedation with a suppository, and some [anesthesia] is performed with the application of an anesthetizing ointment (for example, EMLA). In older children the [circumcision] procedure is also performed under general anesthesia.") ["Zum Teil wird dabei nach einer Sedierung durch ein Zäpfchen eine Lokalanästhesie im Wege der Injektion vorgenommen, zum Teil erfolgt die Auftragung einer anästhesierenden Salbe (etwa EMLA). Bei älteren Kindern wird der Eingriff auch unter Vollnarkose durchgeführt."]. EMLA is a topical anesthetic consisting of lidocaine 2.5% and prilocaine 2.5% and comes in a cream or in a patch (disc). See *EMLA Topical*, WEBMD.COM, <http://www.webmd.com/drugs/2/drug-2358-8170/emla-top/lidocaine-prilocainecream-topical/details> (last visited Aug. 26, 2014).

<sup>245</sup> E.g., Reinhard Merkel, *Die Haut eines Anderen* [The Skin of Another], SÜDDEUTSCHE.DE (Aug. 30, 2012), <http://www.sueddeutsche.de/wissen/beschneidungs-debatte-die-haut-eines-anderen-1.1454055> (stating that creams like EMLA are ineffective and that nerve blocks are reliable only when administered by trained specialists and even then are ineffective in five to ten percent of cases).

<sup>246</sup> Johannes Kuntze, *Rechtsfragen zur religiösen Knabenbeschneidung*, 58 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 47, 52 (2013).

<sup>247</sup> See Leonard B. Glick, MARKED IN YOUR FLESH: CIRCUMCISION FROM ANCIENT JUDEA TO MODERN AMERICA 60-61 (2005) (placing more emphasis on the religious and mythic aspects of the wine than its anesthetic properties).

<sup>248</sup> Cf. Stephan Rixen, *Das Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes* [The Law on the Scope of Care and Custody in the Case of the Circumcision of a Male Child], 5 NEUE JURISTISCHE WOCHENSCHRIFT 257, 262 (2013) (opining that the new law on circumcision is constitutionally sound).

In February 2013, the Court declined to render a decision on a constitutional complaint directed against § 1631d BGB.<sup>249</sup> The complainant alleged that he was still suffering from the consequences of his circumcision that was performed in 1991, when he was six years old.<sup>250</sup> His constitutional challenge rested on the fact that the procedure was done by a religious circumciser who lacked medical training.<sup>251</sup> The Constitutional Court held that, from the outset, the complainant did not meet one of its requirements: that an alleged violation must affect the complainant "him or herself, directly and presently."<sup>252</sup> Section 1631d(2) BGB applies only to religious circumcisions performed up to six months after the child's birth.<sup>253</sup>

The second case involved circumcision and a custody dispute.<sup>254</sup> A local court in Düsseldorf granted sole custody to the mother of a two-year-old boy.<sup>255</sup> The father, who was divorced from the mother and who opposed the circumcision of his son, filed a complaint with the higher regional appellate court in the same city.<sup>256</sup> The appellate court rejected the father's complaint on December 27, 2012, one day before § 1631d BGB went into effect.<sup>257</sup> The court found that owing to the parents' differences, especially with regard to the circumcision of their son and the issuance of identification papers,

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and an appropriate response to the controversy in the context of a pluralistic society).

<sup>249</sup> Bundesverfassungsgericht [BVerG] (Federal Constitutional Court), Feb. 8, 2013, docket no.1 BvR 102/13, available at [http://www.bverfg.de/entscheidungen/rk20130208\\_1bvr010213.html](http://www.bverfg.de/entscheidungen/rk20130208_1bvr010213.html).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Bundesverfassungsgericht [BVerG] (Federal Constitutional Court), Feb. 12, 2013, docket number 1 BvQ 2/13, available at [http://www.bverfg.de/entscheidungen/qk20130213\\_1bvq000213.html](http://www.bverfg.de/entscheidungen/qk20130213_1bvq000213.html).

<sup>255</sup> *Id.* For the lower court opinion, see Amtsgericht Düsseldorf [AG] [Local Court Düsseldorf], July 16, 2012, docket number 269 F 69/12.

<sup>256</sup> BVerG, Feb. 12, 2013, docket number 1 BvQ 2/13. For the appellate court opinion, see Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court Düsseldorf], Dec. 27, 2012, docket number II-1 UF 212/12.

<sup>257</sup> BVerG, Feb. 12, 2013, docket number 1 BvQ 2/13.

<sup>258</sup> joint custody of the child was impossible.<sup>259</sup> Because the child was primarily attached to the mother, she won sole custody.<sup>260</sup> The father sought a preliminary injunction against the custody order in the Constitutional Court.<sup>261</sup> In his filing, he referred to the Cologne appellate decision, and argued that because the court denied him custody of his child, he was deprived of the ability to protect his son from a violation of his constitutional right to bodily integrity.<sup>262</sup>

The Constitutional Court denied a preliminary injunction for procedural reasons. It could not intervene because the claimant had the option to seek recourse through other courts.<sup>263</sup> Section 1631d BGB permits the parent who has sole custody of the child to consent to the child's circumcision.<sup>264</sup> The claimant could seek a preliminary modification of custody, or request the court's analysis of the welfare of the child under § 1666 BGB.<sup>265</sup> The Court further noted that there was no indication that the circumcision of the child was imminent.<sup>266</sup> Section 1631d BGB may have made the decision of the Constitutional Court predictable given that the father could have challenged the circumcision of his son by seeking an analysis of the child's welfare.<sup>267</sup>

#### 4.1.5. *Was It, or Was It Not, a Circumcision Metzitzah B'Peh?*

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<sup>258</sup> *Id.* Although the opinion states that the father and mother had religious differences, it does not mention the religious affiliation of the mother or the father. *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> BVerG, Feb. 12, 2013, docket number 1 BvQ 2/13. Similar to federal civil procedure in the United States, Germany's Federal Constitutional Court may grant a preliminary injunction only if it is necessary "for the prevention of substantial disadvantages, for the prevention of an imminent threat of force, or for another important reason that is in the public interest" ("zur Abwehr schwerer Nachteile, zur Verhinderung drohender Gewalt oder aus einem anderen wichtigen Grund zum gemeinen Wohl.") *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> The Court pointed out that the new law increased the possibility that the child would be circumcised. *Id.*

In March 2013, the German newspaper *Der Tagesspiegel* reported on the circumcision of the son of Rabbi Yehuda Teichtal.<sup>268</sup> The boy, who was three weeks old at the time, was circumcised in the presence of approximately 400 invited guests by a mohel who flew in from Israel.<sup>269</sup> The non-profit organization MOGiS<sup>270</sup> filed a complaint against Rabbi Teichtal and the mohel for committing a criminal battery. The criminal complaint alleged that the circumcision was a *metzitzah b'peh*.<sup>271</sup> The victim was allegedly subjected to the use of "dangerous means" – specifically, a knife –<sup>272</sup> for a circumcision that failed to meet accepted medical standards as required by § 1631d BGB.<sup>273</sup>

MOGiS failed in its effort to trigger prosecution. According to the prosecutor's office,<sup>274</sup> there was no evidence that the

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<sup>268</sup> Claudia Keller, "Mazel-tov!", *DER TAGESSPIEGEL* (Mar. 4, 2013), <http://www.tagesspiegel.de/berlin/zu-gast-bei-einer-beschneidung-mazel-tov/7869864.html>. The article does not state that blood from the boy's wound was removed with the mohel's mouth. *Id.*

<sup>269</sup> Claudia Keller & Jost Müller-Neuhof, *Berliner Staatsanwälte prüfen neuen Fall* [Berlin Prosecutors Examine New Case], *DER TAGESSPIEGEL* (Apr. 12, 2013), <http://www.tagesspiegel.de/politik/strafanzeige-nach-beschneidung-berliner-staatsanwaelte-pruefen-neuen-fall/8047730.html> (including a video of part of the circumcision ritual of Rabbi Teichtal's son, but not showing the circumcision procedure itself).

<sup>270</sup> MOGiS is an association of victims of sexual abuse. It is active on such issues as sexual autonomy, child protection, and constitutional rights. About Us, *Wer Wir sind* [Who We Are], MOGiS e.V., <https://mogis-verein.de/wer-wir-sind> (last visited Jul. 21, 2014). The acronym MOGiS stands for "MissbrauchsOpfer gegen InternetSperrn" [Abuse Victims against Blocking Access to the Internet.] MOGiS arose in 2009 to oppose the government's plan to block internet access to websites containing child pornography. Old About Us, *Wer Wir sind (alt)* [Who We Are (old)], MOGiS e.V., <https://mogis-verein.de/sitemap/archive/wer-wir-sind-alt/> (last visited Jul. 21, 2014). The position of MOGiS is that all child pornography should be deleted. *Id.* It holds that merely to block access would allow society to ignore the problem of child pornography. *Id.*

<sup>271</sup> Keller & Müller-Neuhof, *supra* note 268. On *metzitzh b'peh*, *seesupra* text accompanying note 102. For an explanation of the criminal complaint by the founding member of MOGiS, see Christian Bahls, *Why I am Sueing [sic] the Orthodox Rabbi Yehuda Teichtal for having a Circumcision Performed on his Son*, MOGiS e.V., Mar. 23, 2013, <http://mogis-verein.de/blog/2013/03/23/circumcision-mendel-teichtal-en>.

<sup>272</sup> Bahls, *supra* note 271.

<sup>273</sup> Keller & Müller-Neuhof, *supra* note 269.

<sup>274</sup> Statement by the Berlin Prosecutor's Office (Staatsanwaltschaft Berlin), 222 Js 600/13, Mar. 11, 2013, available at <http://www.beschneidungsforum.de/index.php?page=Thread&threadID=3467> (last visited July 22, 2013) [hereinafter Prosecutor's Statement]. The statement was issued in the form of a letter explaining why the prosecutor's office decided not to file the charges. The letter is not a public state-

circumcision included direct oral suction.<sup>275</sup> The prosecutor's office said that even if the mohel, Menachem Fleischmann, had circumcised the child according to that practice, there was no evidence that the parents<sup>276</sup> had knowledge of the practice's nature at the time of giving consent.<sup>277</sup> Rabbi Teichtal said that he had instructed Fleischmann to perform the circumcision "in accordance with medical standards and in compliance with German laws."<sup>278</sup> The prosecutor declined to pursue charges against the mohel because he was no longer in Germany.<sup>279</sup>

This case illustrates the reluctance of governmental authorities to get involved in some ritual circumcisions after the Cologne firestorm. As examined by the prosecutor, Matthias Weidling, the case is unsatisfying. So far as one can tell, the prosecutor's investigation reveals little enthusiasm for getting to the bottom of what actually happened. He did take note of press accounts.<sup>280</sup> He questioned at least one journalist, Claudia Keller.<sup>281</sup> It seems surprising, though, that apparently he asked none of the 400 invited

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ment. Rather, it is directly sent to the person or entity that filed the criminal complaint. In the version available online, the recipient's name is redacted. It is unclear who posted the letter on the Internet.

<sup>275</sup> *Id.* at 5. None of the press materials reviewed by the prosecution showed that the boy was circumcised according to the practice *metzitzah b'peh*. The prosecutor questioned the journalist Claudia Keller, who wrote the first article for *Der Tagesspiegel*. Keller, *supra* note 268. She said that she did not observe the removal of blood with the mohel's mouth. Prosecutor's Statement, *supra* note 274, at 5.

<sup>276</sup> Prosecutor's Statement, *supra* note 274, at 2-6. The prosecutor's statement names explicitly only Rabbi Teichtal (there referred to as Rabbiner Yehuda Elyokin Tiechtel). However, when discussing the issue of his possible criminal liability, the prosecutor mentions both parents (*Kindeseltern*). *Id.* at 3-4. He also notes that there was no evidence of criminal behavior by other individuals, such the person (*sandek*) who holds the child during the ceremony. *Id.* at 2, 6.

<sup>277</sup> *Id.* at 4.

<sup>278</sup> *Id.* at 5 ("die Beschneidung nach den Regeln der ärztlichen Kunst und unter Beachtung der deutschen Gesetze durchzuführen").

<sup>279</sup> *Id.* at 2.

<sup>280</sup> *Id.* at 4, 5.

<sup>281</sup> See *supra* note 274 (noting that the prosecutor questioned journalist Claudia Keller about whether the boy was circumcised according to the practice of *metzitzah b'peh*).

guests to give an account of the event.<sup>282</sup> Perhaps the prosecutor wanted to avoid controversy. Perhaps he was just uncurious.<sup>283</sup>

However, a relevantly similar hypothetical case could be intriguing. Imagine that a mohel based in Germany performs a circumcision *metzitzah b'peh* in Germany, to which both parents of a male infant have knowingly consented and for which at least three or four witnesses testify to every aspect of the ritual. Imagine also that the entire event is captured, in full detail, in a video placed on the Internet by the parents. Imagine, finally, that one or more citizens file a complaint for criminal battery with the prosecutor's office. It would now seem that the prosecutor has to consider whether the circumcision is permissible under § 1631d BGB. Was the procedure according to German medical standards under subsection (1), first sentence, last clause? If the answer is no, then does the circumcision "endanger[] the welfare of the child" under subsection (1), second sentence? If the answer is yes, does the circumcision involve "dangerous means"? If the answer is yes, what is the dangerous means – the knife/scalpel or the mohel's mouth, or both? Although only an ultra-Orthodox minority perform direct oral suction, these are some of the questions that could arise in a case involving *metzitzah b'peh*.

This hypothetical case underscores the uneasy relation between the new statute on the one side and the policies of toleration and multiculturalism on the other. The new statute aims to strike a balance, in the face of severe criticism of the Cologne decision, between the religious freedom of parents and the rights and interests of male minors. The very existence of this statute stems from pressure on Germany to tolerate mainstream Jewish and Muslim circumcision practices and in that way to honor a policy of

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<sup>282</sup> Prosecutor's Statement, *supra* note 274, at 2. "Other witnesses, of whom it can be assumed that they were able to watch the entire event with an unhindered view, despite the reported limited visibility, are not known." ("Weitere Zeugen, von denen anzunehmen ist, dass sie trotz geschilderter eingeschränkter Sichtverhältnisse das gesamte Geschehen ungehindert beobachten konnten, sind nicht bekannt.") *Id.* Owing to the sandek's role in holding the child, one would think that he had an unobstructed view of the event. *Id.* at 2. There is no evidence that the prosecutor questioned him.

<sup>283</sup> Bahls, *supra* note 271, writes: "In the video published on the website of the Berlin Tagesspiegel one can see how Mr. Menachem Fleischmann takes a mouthful of wine, then leans down over baby Mendel Teichtal to suck blood from his bleeding penis." If the website once contained such an explicit video, it no longer does.



multiculturalism. Metzitzah b'peh is a Jewish practice but it lies far outside mainstream Jewish circumcision practices.

So, should Germany tolerate direct oral suction, or is that practice intolerable? Any satisfactory answer to this question should be alive to the political, not merely the philosophical, dimensions of toleration. Wendy Brown's valuable study *Regulating Aversion* points out that toleration has multiple political "discourses."<sup>284</sup> One is that toleration is often "a discourse of power."<sup>285</sup> Powerful individuals and organizations, such as the state, can tolerate others' practices that are seen to be "undesirable," "tasteless," "revolting," "repugnant," or even "vile."<sup>286</sup> The powerful are, however, free to withdraw their toleration of these practices. Another discourse is that toleration marks a distinction between the tolerators, who are "civilized," and the tolerated, who are "barbarians."<sup>287</sup> When examined in terms of these discourses, the hypothetical case raises an issue about whether the practice of metzitzah b'peh should be tolerated by the German state even if the practice is repugnant and those who engage in it are barbarians. Multiculturalism, which Brown mentions often,<sup>288</sup> sometimes might have to be purchased at the price of something that powerful individuals and organizations see as intolerable.

#### 4.1.6. Female Genital Mutilation and the Issue of Sex Discrimination

On September 28, 2013, a new law on female genital mutilation was added as § 226a to the Penal Code (Strafgesetzbuch) ("StGB").<sup>289</sup>

<sup>284</sup> WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (2006). She generally uses the word "tolerance" rather than "toleration." See *id.* at 13-24.

<sup>285</sup> *Id.* at 25 and *passim*.

<sup>286</sup> *Id.* at 25.

<sup>287</sup> *Id.* at 149 and *passim*. I leave to one side other discourses of toleration examined by Brown.

<sup>288</sup> See, e.g., *id.* at 19, 93, 150, 152, 168, 180, 190-91, 194, 200-01 (articulating the idea that in order to be tolerant of other cultures, people may have to accept practices that they find highly objectionable).

<sup>289</sup> Verstümmelung weiblicher Genitalien [Mutilation of Female Genitalia], STRAFGESETZBUCH [StGB] [Penal Code], May 15, 1871, BGBl. I at 3671, § 226a (Ger.), available at <http://dejure.org/gesetze/StGB/226a.html> (hereinafter StGB Mutilation). For the state of German law prior to this addition, see SCHRAMM, *supra* note 51, at 221-24.

Under this section, any person who mutilates the external genitalia of a girl or woman is to be punished with a minimum sentence of one year<sup>290</sup> up to a maximum sentence of fifteen years.<sup>291</sup> Before the creation of female genital mutilation as a separate offense, it was punishable as a criminal battery and carried a maximum sentence of ten years.<sup>292</sup> The new law aimed to strengthen the protection of victims and increase social disapproval of mutilating young girls.<sup>293</sup> According to the draft bill, the law is intended to apply to forms of female genital mutilation ("FGM") described by the World Health Organization ("WHO"), which include "partial or total removal of . . . the prepuce" and "incising, scraping and cauterizing the genital area."<sup>294</sup>

In the context of the developing German law on circumcision, § 226a is problematic because it might violate the German

<sup>290</sup> StGB Mutilation, *supra* note 289. In minor cases of female mutilation the sentence ranges from six months to five years. Section 226a(2) StGB.

<sup>291</sup> StGB sec. 38, para. 2; Gesetzentwurf der Fraktionen der CDU/CSU und FDP [Draft Bill of the CDU/CSU and FDP Parties], Jun. 4, 2013, BT 17/13707 at 1, available at <http://dip21.bundestag.de/dip21/btd/17/137/1713707.pdf>.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Preputial (clitoral hood) removal and incising, scraping and cauterizing belong to types 1 and 4 described in WHO Media Centre, *Female Genital Mutilation* (Fact Sheet no. 241, updated Feb. 2014) [hereinafter WHO Fact Sheet]; Gesetzentwurf der Fraktionen der CDU/CSU und FDP [Draft Bill of the CDU/CSU and FDP Parties], Jun. 4, 2013, BT 17/13707 at 6, available at <http://dip21.bundestag.de/dip21/btd/17/137/1713707.pdf>. The drafters of the bill did not intend the law to apply to aesthetically motivated procedures, such as piercings and cosmetic surgery. *Id.* Minor cases, as defined under § 224a(2) StGB, involve situations where the bodily and psychological harm is much less than that of most female genital mutilation victims. *Id.* The WHO Fact Sheet states that "FGM is recognized internationally as a violation of the human rights of girls and women" and identifies four types of FGM:

1. Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
2. Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (which are "the lips" that surround the vagina).
3. Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.
4. Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

constitutional guarantee of equal treatment of the sexes.<sup>295</sup> The problem would arise if § 226a is read to criminalize cutting female genitalia in a way that is comparable in degree to male circumcision, given that § 1631d BGB expressly permits the latter.<sup>296</sup>

The prepuce (hood) of the clitoris is embryologically homologous with the prepuce (foreskin) of the penis. The two structures are anatomic counterparts. In sexual arousal each may receive increased blood flow but neither is, strictly speaking, part of the human erection system.<sup>297</sup> The sexual functioning of women and men is, let us suppose, largely unaffected by removal of all or part of the prepuce of each. Often religious and cultural considerations motivate such removal.<sup>298</sup> Groups that have historically practiced female genital cutting often prefer highly invasive practices. Nevertheless, it is possible that some groups might remove only the clitoral hood, which would be analogous to the removal of the foreskin in male circumcision. Under some interpretations of Islam, these parallel practices would meet the requirement of circumcision for both sexes.

To prevent misunderstanding, I emphasize that the hypothetical case presented here does not rest mainly on the embryological and anatomic similarities between the foreskin and the clitoral hood. Rather, the essential point is that if adjustments were made in Islamic practice to conform somewhat to the dictates of local cultures, there would be striking ritual similarities. The removal of the foreskin in boys and all or part of the clitoral hood in girls could respond to the Islamic obligation of circumcision for both sexes.

Yet if German law were interpreted to permit male circumcision but to criminalize comparable removal of the clitoral hood, that would run counter to a German constitutional guarantee of equal

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<sup>295</sup> Art. 3(2) GG, available at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

<sup>296</sup> Henning Ernst-Müller, *Der neue § 226a StGB: Verstümmelung weiblicher Genitalien – verfassungswidrig?* [The New § 226a StGB: Mutilation of Female Genitalia – Unconstitutional?], BECK-BLOG (Oct. 4, 2013), <http://blog.beck.de/2013/10/04/der-neue-226-a-stgb-verst-mmelung-weiblicher-genitalien-verfassungswidrig>; Tonio Walter, *Das unantastbare Geschlecht* [The Sacrosanct Sex], ZEIT ONLINE (July 4, 2013), available at <http://pdf.zeit.de/2013/28/genitalverstuemmung-gesetzfrauen.pdf> (arguing that legalizing male circumcision while punishing the removal of parts of the clitoral hood constitutes sex discrimination because both procedures are comparable in degree).

<sup>297</sup> Walter, *supra* note 296.

<sup>298</sup> *Id.*

treatment of the sexes. Furthermore, if a particular male circumcision procedure did not comply with § 1631d, and if it were successfully prosecuted as a criminal battery, then the maximum sentence would be less than the maximum sentence under § 226a if the clitoral hood were removed under the new law on female genital mutilation.<sup>299</sup>

We have traveled uneasily once more into the territory of toleration and multiculturalism. For most Germans, removing part or all of the clitoral hood of female minors is repugnant. Perhaps some Germans feel the same way about removing the foreskin of male minors when not medically indicated. Now German courts face a decision on whether they can make the former a legal offense without having to backtrack on the new statute allowing circumcision of boys. Presumably some forms of multiculturalism would allow both practices.<sup>300</sup> Yet to most Europeans it seems intolerable to remove part of the genitalia of girls.<sup>301</sup>

#### 4.2. *Two Specimens of German Recalcitrance*

Support exists among many Germans for the resolution of the circumcision debate exemplified by the new statute. But some are recalcitrant. Limits on space allow me to mention only two: an unpersuaded journalist and the German medical profession.

There seems to be no recent poll on public opinion on circumcision in Germany. Perhaps there has been no significant change since 2012. In light of the divided level of German support for the Cologne decision, it was predictable that some Germans would view the new law as an unjustifiable capitulation to religious groups.

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<sup>299</sup> See Ernst-Müller, *supra* note 296 (stating that there is no good reason why the mutilation of female genitals is worse than the mutilation of male genitals).

<sup>300</sup> On the general German predicament, see Russell A. Berman, *Multiculturalism Uber [sic] Alles?*, *DEFINING IDEAS: A HOOVER INSTITUTION JOURNAL* (Dec. 13, 2010), available at <http://www.hoover.org/research/multiculturalism-uber-alles> (last visited July 15, 2015) (explaining the role that multiculturalism plays in German society).

<sup>301</sup> See *supra* text accompanying notes 289-299 and *infra* note 381 (discussing multiculturalism and the role it plays in the male circumcision debate).

This view finds expression in a short book by Tilman Jens, a well-known German journalist.<sup>302</sup> He inveighs against what he calls the coalition of the pious (*die Koalition der Frommen*).<sup>303</sup> Insofar as Jens believes that the new law gives special rights to religious groups, he is not correct. The Bundestag made clear that the law does not give religious groups a “special right” (*Sonderrecht*) and in fact the law allows circumcisions for cultural and prophylactic as well as religious reasons.<sup>304</sup> Because Germans who are neither Jewish nor Muslim infrequently circumcise in the absence of medical indication, as a practical matter the law advances mainly the interests of Jewish and Muslim groups.

Jens arguably hits the trifecta of religious antagonism: anti-Semitic, anti-Muslim, and anti-Catholic. He regards both circumcision by Jews and Muslims and the sexual molestation of boys by Catholic clergy as forms of abuse. Nowhere is his attitude clearer than in a cartoon, by the caricaturist Jacques Tilly, that bears the title *Die Koalition der Frommen* and that Jens reproduces in his book.<sup>305</sup> The cartoon shows leaders of the main German political parties – the CDU, CSU, FDP, SPD, and the Greens – as well as Angela Merkel prostrate before three religious figures in the Bundestag.<sup>306</sup> The religious figures – a Muslim cleric, a Catholic bishop, and a Jewish mohel – hold a banner that in colloquial German reads “For the Right to Circumcise Young Boys.”<sup>307</sup> The bishop has a broad smile on his face. The Muslim cleric seems to be laughing and the mohel has a silly grin on his face. Both men hold scissors aloft in their hands, as if they find it most enjoyable, in a creepy way, to circumcise newborns and young boys.

A caricaturist does not intend to represent things exactly as they are but rather to exaggerate uncomplimentary features to make a point. Still, the overall effect of the cartoon is anti-Semitic and anti-

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<sup>302</sup> TILMAN JENS, *DER SÜNDENFALL DES RECHTSSTAATS: EINE STREITSCHRIFT ZUM NEUEN RELIGIONSKAMPF. AUS GEGEBENEM ANLASS* [The Fall of the Rule of Law: A Polemic for the New Religious Struggle. In Light of Recent Events] (Gütersloher Verlagshaus, Gütersloh, 2013).

<sup>303</sup> *Id.* at 7.

<sup>304</sup> Gesetzentwurf der Bundesregierung [Draft Bill of the Federal Government], Nov. 7, 2012, BT 17/11295, at 16 (Ger.).

<sup>305</sup> JENS, *supra* note 302, at 28.

<sup>306</sup> Indecorously, Tilly depicts Chancellor Merkel and a few other politicians with butt cracks. *Id.*

<sup>307</sup> “Für das Recht auf Beschneidung kleiner Jungs.” *Id.*

Muslim, and possibly anti-Catholic as well. Jens is, as he says, writing a polemic (*Streitschrift*). His polemic does little to advance serious analysis, but it may play well with those who disagree with the new law.

More significant is the strong resistance of German doctors to circumcision without medical indication. American readers may find this resistance surprising because secular circumcisions greatly outnumber religious circumcisions in the United States. The American Academy of Pediatrics ("AAP") and the American College of Obstetricians and Gynecologists ("ACOG") do not recommend routine neonatal circumcision, but they support access to it. In 2012, the AAP stated that "current evidence indicates that the health benefits of newborn male circumcision outweigh the risks and that the procedure's benefits justify access to this procedure for families who choose it."<sup>308</sup> In 2011, the ACOG reaffirmed its earlier position of 2001 that there are "potential medical benefits" to circumcision even though they are "modest."<sup>309</sup> Circumcision is so prevalent in the United States that some American women have a negative attitude toward uncircumcised penises in intimate situations.<sup>310</sup>

In contrast, the German Academy for Children and Youth Medicine and the German Professional Association of Pediatricians sharply opposed circumcision without medical indication until the individual to be circumcised is old enough to give informed consent.<sup>311</sup> Pediatricians from Canada and sixteen European

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<sup>308</sup> American Academy of Pediatrics, Task Force on Circumcision, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585 (2013). The AAP buttressed this verdict with a 30-page Technical Report on Male Circumcision, available at <http://www.pediatrics.org/cgi/content/full/130/3/e756> (last visited Dec. 17, 2014).

<sup>309</sup> American College of Obstetricians & Gynecologists, Committee on Obstetric Practice, *Circumcision*, 98 OBSTET. & GYNECOL. 707 (2001) (Comm. Opinion No. 260).

<sup>310</sup> Shawnee Barton, when pregnant with a male child, sought the views of doctors and friends on circumcision. One voice in favor of circumcision said: "An OBGYN mother-in-law asked my friend, who was carrying her grandson-to-be at the time, 'Don't you want him to get blow jobs some day?'" Shawnee Barton, *The Circumcision Wars: What's a Parent to Do?*, THE ATLANTIC, July 29, 2013, available at <http://www.theatlantic.com/health/archive/2013/07/the-circumcision-wars-whats-a-parent-to-do/278155/> (last visited Dec. 17, 2014). Cf. Amy Schumer, *Mostly Sex Stuff* (Comedy Central, 2012) (making fun of uncircumcised penises).

<sup>311</sup> *Pressemeldung der Berufsverbandes der Kinder- und Jugendärzte (BVKJ) zum Beschneidungsgesetz: "Gesetz missachtet Kindeswohl!* [Press Release of the Professional Association of Pediatricians on the Circumcision Law: "Law Disregards Child Welfare!"], BVKJ, Dec. 11, 2012, available at <http://www.bvkj.de/presse/>

countries published a counter-piece to the AAP's policy position and technical report, in which they concluded that circumcision's health risks exceed its benefits.<sup>312</sup> They contended that non-medically-indicated circumcision violates the basic principle of medicine: *primum non nocere* ("First, do no harm").<sup>313</sup> They argued that only one of the reasons given by the AAP – namely, a lower incidence of urinary tract infections in infant boys – has "some theoretical relevance," but such infections "can easily be treated with antibiotics without tissue loss."<sup>314</sup>

It is scarcely possible to adjudicate this medical and scientific dispute here. The immediate point is that despite the wide acceptance of neonatal circumcision in the United States, Israel, and predominantly Islamic countries, most Western and westernized nations and most Asian nations do not circumcise male children without medical indication.

#### 4.3. *Developments Affecting Jews in Germany*

Evidence exists for a rise in anti-Semitism in Germany, but it is doubtful that any rise has to do with the statute-driven availability of ritual circumcision. Those opposed to the new statute, such as Tilman Jens, may reveal anti-Semitic attitudes by, for example, caricaturing those who sought or supported religiously-based circumcision.<sup>315</sup> However, most instances of anti-Semitism take more familiar, and uglier, forms: graffiti on synagogues, defacement of headstones in Jewish cemeteries, physical assaults on Jews, and

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pressemittellungen/ansicht/article/pressemeldung-des-berufsverbandes-der-kinder-und-jugendaerzte-bvjkj-zum-beschneidungsgesetz-ge/ (last visited Feb. 27, 2015).

<sup>312</sup> Morten Frisch et al., *Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796 (2013).

<sup>313</sup> *Id.* at 799.

<sup>314</sup> *Id.* at 796. J. Steven Swoboda & Robert S. Van Howe, *Out of Step: Fatal Flaws in the Latest AAP Policy Report on Neonatal Circumcision*, 39 J. MED. ETHICS 434 (2013), is a withering, if at times overheated and impolite critique of the AAP. The AAP's response urged politeness but lacked substance. AAP Task Force, *The AAP Task Force on Neonatal Circumcision: A Call for Respectful Dialogue*, 39 J. MED. ETHICS 442 (2013).

<sup>315</sup> See *supra* text accompanying notes 301-306 (showing that journalists like Jens have caricatured politicians who support religiously-based circumcision by depicting them as subservient to malicious religious leaders).

hate speech.<sup>316</sup> These episodes prompted Chancellor Merkel to give a moving speech against anti-Semitism in Germany.<sup>317</sup> She stated: "Whoever desecrates gravestones in Jewish cemeteries pollutes our culture."<sup>318</sup> Today it "is a gift," she said, that "more than 100,000 Jews are living in Germany again."<sup>319</sup> "We want Jews in Germany to feel safe," for this country "is our common home."<sup>320</sup>

Some have questioned whether there is actually a rise in anti-Semitism in Germany or, for that matter, in Western Europe generally. James Fletcher, for example, finds the evidence inconclusive.<sup>321</sup> As to Germany specifically, he writes that "anti-Semitic acts declined in the decade to 2011, before rising slightly in 2012."<sup>322</sup> He does not give more recent figures for Germany but notes that the pattern in France was similar to that in Germany and that anti-Semitic acts rose sharply in the United Kingdom in July 2014.<sup>323</sup> Many of Fletcher's figures for the period ending in 2012 rely on a substantial study by the European Union Agency for Fundamental Rights.<sup>324</sup> At this writing, the best data for June and July 2014 comes from documents prepared by the German government on hate crimes, anti-Semitic acts, and other politically

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<sup>316</sup> E.g., Jochen Bittner, *What's behind Germany's New Anti-Semitism*, N.Y. TIMES, Sept. 16, 2014, at [http://mobile.nytimes.com/2014/09/17/opinion/jochen-bittner-whats-behind-germanys-new-anti-semitism.html?referrer=&\\_r=0](http://mobile.nytimes.com/2014/09/17/opinion/jochen-bittner-whats-behind-germanys-new-anti-semitism.html?referrer=&_r=0) (recounting such incidents); Erik Kirschbaum & Bethan John, *At a Landmark Berlin Rally, Merkel Vows to Fight anti-Semitism*, Reuters, Sept. 14, 2014, <http://reuters.com/assets/print?aid=USKBN0H90MK20140914> (mentioning damage to Jewish gravestones and the beating of a man wearing a skullcap).

<sup>317</sup> Rede von Bundeskanzlerin Merkel anlässlich der Kundgebung des Zentralrats der Juden in Deutschland gegen Antisemitismus am 14. September 2014 in Berlin [Speech by Federal Chancellor Merkel at the Rally of the Central Council of Jews in Germany against anti-Semitism on 14 December 2014 in Berlin], <http://www.bundeskanzlerin.de/Content/DE/Rede/2014/09/2014-09-14-merkel-kundgebung-judenhass.html;sessionid=DDA3C189BA70A384C904C39BFF1096DC.s3t1>.

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

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> James Fletcher, *Is There a "Rising Tide" of Anti-Semitism in the West?*, BBC NEWS MAGAZINE, Aug. 20, 2014, <http://www.bbc.com/news/magazine-28853221>.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, DISCRIMINATION AND HATE CRIME AGAINST JEWS IN EU MEMBER STATES: EXPERIENCES AND PERCEPTIONS OF ANTISEMITISM (Publications of the European Union, 2013).



motivated criminality (“PMK”) in Germany.<sup>325</sup> The category of PMK acts is subdivided by political origin (right, left, by foreigners, and other) and cross-divided by injuries, deaths, and other markers.<sup>326</sup> Careful inspection reveals a total of 53 anti-Semitic acts in June (with four injuries and no deaths) and 131 such acts in July (with three injuries and no deaths) of 2014.<sup>327</sup> The government numbers tally exactly with a Reuters report.<sup>328</sup> It is important to watch for future developments.<sup>329</sup> Yet there does not appear to be any evidence of anti-Semitic acts tied specifically to the availability of ritual circumcision.

Two main factors seem to be at work in the rise in anti-Semitic incidents in mid-summer 2014. First, the Fifty Days War in Gaza (July 8 to August 26, 2014) elicited strong reactions in Germany and other European countries.<sup>330</sup> Although the American press was generally favorable to the Israeli government, the European press was highly critical of the one-sided nature of the war (in terms of armaments and casualties) and displayed sympathy for the Palestinian cause.<sup>331</sup> Here it becomes hard to disentangle anti-Semitism from anti-Zionism, from antagonism against the state of Israel, and from opposition to the policies of the Netanyahu government.<sup>332</sup> Second, many of the roughly four million Muslims

<sup>325</sup> Antwort der Bundesregierung [Answer of the Federal Government], *Politisch motivierte Straftaten in Deutschland im Juli 2014*, Sept. 5, 2014, Deutscher Bundestag, Drucksache 18/2483 [hereinafter July Report] (Ger.); Antwort der Bundesregierung [Answer of the Federal Government], *Politisch motivierte Straftaten in Juni 2014*, Aug. 5, 2014, Deutscher Bundestag, Drucksache 18/2285 [hereinafter June Report] (Ger.).

<sup>326</sup> *Id.*

<sup>327</sup> June Report, *supra* note 325; July Report, *supra* note 325.

<sup>328</sup> Kirschbaum & John, *supra* note 316.

<sup>329</sup> See Jim Yardley, *Europe’s Anti-Semitism Comes Out of Shadows*, N.Y. TIMES, Sept. 24, 2014, at A1 (describing more recent incidents of anti-Semitism in Belgium, France and Sweden as well as Germany).

<sup>330</sup> *Id.* at A12 (reporting that across Europe “[m]any left-wing parties are anti-Israel,” and that “right-wing parties” have “anti-Semitic origins.”). Some Jewish people “describe ‘no go’ zones in Muslim districts of many European cities where Jews dare not travel.” *Id.* at A1.

<sup>331</sup> Roger Cohen, *Why Americans See Israel the Way They Do*, N.Y. TIMES, Aug. 3, 2014, at 3 (commenting that “virulent anti-Israel sentiment now evident among the bien-pensant European left can create a climate that makes violent hatred of Jews permissible once again”) (Sunday Review section).

<sup>332</sup> See, e.g., Roger Cohen, *Zionism and its Discontents*, N.Y. TIMES, July 29, 2014, at <http://www.nytimes.com/2014/07/30/opinion/roger-cohen-zionism-and-israels-war-with-amas-in-gaza.html> (opining, as a self-described liberal Zionist,

living in Germany feel aggrieved by Israeli actions against Gaza, and their motivations and background differ from those of other Germans. Some of the ugliest hate speech and criminal acts against Jews living in Germany and elsewhere in Europe came from Muslims.<sup>333</sup>

Nevertheless, statistics of the sort just cited capture only those anti-Semitic acts that come to the attention of authorities. They do not cover acts such as anti-Semitic insults or messages to Jewish organizations that are not brought to the attention of authorities.<sup>334</sup> Shila Erlbaum, Religious and Educational Affairs Officer of the Central Council of Jews in Germany, has advised me that not only in the summer of 2014 but also during the circumcision debate there was an increase in “anti-Semitic letters to the Central Council of Jews in Germany and anti-Semitic comments on internet platforms and our Facebook page,” including “religious anti-Judaism.”<sup>335</sup> Her sense is that the circumcision debate caused a rise in anti-Semitism in 2012, which dropped again in 2013.<sup>336</sup> Anti-Semitic conspiracy theories were evident even after the new statute was passed.<sup>337</sup>

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that the actions of the Netanyahu government in the Gaza war are a “perversion of Zionism”); Yehuda Shaul, *How We Grew Up: An Israeli Veteran on the Dehumanising Power of Military Control*, NEW STATESMAN, Aug. 29, 2014, <http://www.newstatesman.com/print/node/209416> (asserting that “47 years as an occupying power” has led Israeli society “to glorify power” and to lose “our ability to see Palestinians as people whose lives are no less valuable than ours”).

<sup>333</sup> Bittner, *supra* note 316 (acknowledging the existence of German anti-Semitism on the far right but contending that “the ugly truth [is] that many in Europe don’t want to confront is that much of the anti-Jewish animus originates with European people of Muslim background”). Bittner is the political editor of *Die Zeit*. *Id.*

<sup>334</sup> Jewish organizations in Germany generally do not report to the police messages that are, for example, anonymous or protected by freedom of speech. Email from Shila Erlbaum, of the Central Council of Jews in Germany, to Stephen R. Munzer (Aug. 3, 2015, 3:51 a.m. PST) (on file with the author) [hereinafter Erlbaum email].

<sup>335</sup> *Id.*; undated peer review by Shila Erlbaum, forwarded to the author on June 26, 2015, by Benjamin D. Johnson, Editor-in-Chief, *University of Pennsylvania Journal of International Law* (on file with the author) [hereinafter Erlbaum peer review].

<sup>336</sup> Erlbaum email, *supra* note 334.

<sup>337</sup> Erlbaum peer review, *supra* note 335. See also Center for the Research of Anti-Semitism in Berlin, available at [http://www.tu-berlin.de/fakultaet\\_i/zentrum\\_fuer-antisemitismusforschung/](http://www.tu-berlin.de/fakultaet_i/zentrum_fuer-antisemitismusforschung/) (discussing the role anti-Semitism played in the debate) (last visited July 1, 2015).

## 4.4. A German Muslim Comment

If Hidayet Metin worried in 2012 that without Jewish pressure the Bundestag might not have passed the new statute,<sup>338</sup> Gökçe Yurdakul sees in 2015 that German-Turkish representatives try to put Islam and Judaism on the same political and legal plane with specific reference to the circumcision controversy.<sup>339</sup> Yurdakul, the Georg Simmel Professor of Diversity and Social Conflict at Humboldt University in Berlin, deftly operates at both abstract and concrete levels. Abstractly, she contends that German-Turkish representatives are using the “German-Jewish motif as a political model.”<sup>340</sup> This model, she says, “establishes analogies” between anti-Turkish and anti-Muslim “racism” on the one hand and anti-Semitism on other.<sup>341</sup> It “refer[s] to the Jewish community as a structural model for the organization of a political lobby.”<sup>342</sup> And it “use[s] the German-Jewish motif as a model for demanding [Muslims’ and Turks’] religious rights in Germany.”<sup>343</sup> Overall, Yurdakul approves of employing “the German-Jewish trope in political discourse in order to demonstrate that the racism which exists today in Germany is an update of a historical anti-Semitism.”<sup>344</sup> She is well aware of claims that German Muslims cannot be on exactly the same plane as German Jews owing to the special history of Jews in Germany.<sup>345</sup>

<sup>338</sup> See *supra* text accompanying notes 187-194 (chronicling the history of anti-Islamic resentment and Islamophobia in Germany that left Muslim groups with limited political power).

<sup>339</sup> Gökçe Yurdakul, *Jüd/Innen und Türk/Innen in Deutschland: Inklusion von Immigrant/Innen, politische Repräsentation und Minderheitenrechte* [Jewish Men and Women and Turkish Men and Women in Germany: Inclusion of Immigrants, Political Representation, and Minority Rights], in *INKLUSION: WEGE IN DIE TEILHABEGESELLSCHAFT* 363 [Inclusion: Paths to the Participatory Society] (Heinrich-Böll-Stiftung ed., 2015) (Campus Verlag, Frankfurt am Main) (forthcoming Nov. 2015) (page proofs dated July 21, 2015, on file with the author).

<sup>340</sup> *Id.* at 368. (“deutsch-jüdische Motiv als politisches Modell”).

<sup>341</sup> *Id.* “ Sie stellen Analogien zwischen Rassismus und Antisemitismus her.”

<sup>342</sup> *Id.* “Sie beziehen sich auf die jüdische Gemeinschaft als Modell zur Organisation einer politischen Lobby.”

<sup>343</sup> *Id.* “Sie verwenden das deutsch-jüdische Motiv als Modell für die Einforderung religiöser Rechte in Deutschland.”

<sup>344</sup> *Id.* at 369. (“ . . . die deutsch-jüdische Figur im politischen Diskurs, um aufzuzeigen, dass der Heute in Deutschland existierende Rassismus eine Fortschreibung eines historischen Antisemitismus ist.”

<sup>345</sup> *Id.* at 369-70.

The concrete payoff that Yurdakul's German-Turkish representatives seek is minority rights for Muslims, Turks and immigrants—especially Muslim Turkish immigrants—in regard to circumcision as well as *halal* ritual slaughter and availability of the church tax (*Kirchensteuer*) for the building of mosques.<sup>346</sup> These outcomes would put Muslims more nearly in the same position as Jews in Germany. She inveighs against the polarization of German society into the circumcised and the uncircumcised and the insinuation, by Putzke and the German press, of Jewish and Muslim self-stigmatization in practicing circumcision.<sup>347</sup>

On Yurdakul's stimulating article I offer two brief comments. First, the German-Turkish lobbyists whom she studies are trying to elevate Muslims to the same political and legal plane as Jews. The lobbyists' efforts illustrate what I have earlier called plural German secularism.<sup>348</sup> Not since before the Reformation, if then, have German States had just one religion. Now Islam, Judaism and Christianity vie for influence and government benefits.<sup>349</sup>

Second, Yurdakul does not clinch her point about stigmatization because she does not attend to differences between legal and cultural toleration and between toleration and multiculturalism. In fact, she does not use the German words for toleration and multiculturalism at all. Toleration, as I defined it, is declining to interfere with what one sees as the objectionable behavior or practices of other persons or groups.<sup>350</sup> Multiculturalism, as defined earlier, is a governmental and social policy that asks all persons to respect those whose cultural and religious practices differ from one's own.<sup>351</sup> The new statute is a specimen of legal toleration. It does not, however, ensure cultural toleration, i.e., the willingness of

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<sup>346</sup> *Id.* at 371-73.

<sup>347</sup> *Id.* at 373-77.

<sup>348</sup> *See supra* text accompanying notes 52, 179-180 (defining different concepts of secularism).

<sup>349</sup> Not all Christians have the same legal rights. For example, only the Catholic and Protestant (i.e. Lutheran) Churches can teach religion in the public schools. Also, other Christian groups do not have access to the church tax, which authorizes tax-advantaged donations.

<sup>350</sup> *See supra* text accompanying note 6 (defining and describing different examples of the secular impact on toleration across Germany and other European Union countries).

<sup>351</sup> *See supra* text accompanying note 6 (defining and describing different examples of secular impact on multiculturalism across Germany and other European Union countries).

a large number of Germans to ignore religious practices that they regard as objectionable. Neither does the new statute ensure multiculturalism in practice—that is, actual respect, by a substantial majority of Germans, for those who practice religious circumcision.

It could be, of course, that if Yurdakul were to use the language of “multiculturalism,” she might define the word differently from me. It would be possible for her to understand multiculturalism as, for example, a position in political philosophy according to which one has a duty to respect the right of members of other religious and cultural groups to engage in behavior or practices that one sees as objectionable.<sup>352</sup> This second understanding of multiculturalism is stronger than the first. It not merely asks for or expects respect, but creates a moral and political *duty* on the part of Germany and Germans to respect religious practices of circumcision. If this second understanding holds appeal for Yurdakul, I do not think she shows that Muslim Turkish immigrants have a right to have their circumcision practices respected, not merely legally tolerated, by Germany and other Germans as a matter of moral and political duty.<sup>353</sup>

#### 4.5. *European Developments beyond Germany*

The controversy over circumcision in Germany has less highly charged counterparts in some other European countries. In the Nordic countries there has long been strong opposition to ritual circumcision and it continued after Germany enacted the new law. In September 2013, the Nordic Children’s Ombudsmen requested a ban on circumcising boys.<sup>354</sup> However, despite vigorous opposition, in 2014 Norway passed a law that strengthens the legal status of ritual circumcision while also ensuring appropriate health

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<sup>352</sup> This position is akin to that of WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

<sup>353</sup> Although it is now easier for immigrants to become German citizens, some Germans, especially in the former East Germany and above all in Dresden, oppose Muslim immigration and its effect on German culture. Melissa Eddy, *Big Anti-Immigration Rally in Germany Prompts Counterdemonstrations*, N.Y. TIMES, Jan. 13, 2015, at A11; Alison Smale & Melissa Eddy, *Anti-Immigration Movement in Germany Reignites Debate over National Identity*, N.Y. TIMES, Jan. 7, 2015, at A8.

<sup>354</sup> *Let the Boys Decide on Circumcision*, BARNEOMBUDET (Sept. 30, 2013), <http://barneombudet.no/wp-content/uploads/2013/11/English-statement-.pdf> (last visited Oct. 30, 2015).

standards for the child.<sup>355</sup> According to the new law, a mohel may circumcise<sup>356</sup> as long as a medical doctor is present.<sup>357</sup> The new law includes circumcision in the coverage of the National Health Service,<sup>358</sup> which allows public hospitals to perform the procedure.<sup>359</sup> It is hard to say whether the regulation of male circumcision in Germany had any effect on the development of legislation in Norway.

In October 2013, the Parliamentary Assembly of the Council of Europe ("the Assembly")<sup>360</sup> issued a resolution on a children's right to physical integrity as part of fulfilling its broader strategic objective of "[e]liminating all forms of violence against children."<sup>361</sup> The resolution addresses the category of non-medically-indicated procedures that invade a child's physical integrity.<sup>362</sup> According to the Assembly, this "particularly worrisome" category includes female genital mutilation, the circumcision of young boys, and sex-reassignment surgery on children with a physical intersex condition.<sup>363</sup> The Assembly suggests various measures to foster dialogue, raise awareness of the risks of these procedures, and focus on the child's best interest.<sup>364</sup> As

<sup>355</sup> *Neues Beschneidungsgesetz in Norwegen* [New Circumcision Law in Norway], JÜDISCHE ALLGEMEINE (June 30, 2014), <http://www.juedische-allgemeine.de/article/view/id/19540> (last visited Feb. 27, 2015)

<sup>356</sup> *Id.* Mohelim were already permitted to perform a circumcision before the law was enacted, but the law affirmed that fact.

<sup>357</sup> *Id.*

<sup>358</sup> Lars Bevanger, *Male Circumcision Row in Secular Norway*, DEUTSCHE WELLE, Apr. 30, 2014, <http://www.dw.de/male-circumcision-row-in-secular-norway/a-17601519> (reporting on the proposed law).

<sup>359</sup> *Id.* Prior to the law, circumcision was not included in the public health service, and public hospitals did not perform circumcisions.

<sup>360</sup> The Assembly was represented by the Committee of Social Affairs, Health and Sustainable Development and the rapporteur Marlene Rupprecht, a German politician and children's rights activist. Eur. Parl. Ass., *Rep. of the Parl. Ass.*, 4th Sess., Doc. No. 13297 (2013), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20057&lang=en>.

<sup>361</sup> Eur. Parl. Ass., *Children's right to physical integrity*, 4th Sess., Res. 1952 (2013), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20174>.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 2 ("[S]upporters of the procedures tend to present [these procedures] as beneficial to the children themselves despite clear evidence to the contrary.")

<sup>364</sup> *Id.* at 7 ("The Assembly therefore calls on member States to . . . promote interdisciplinary dialogue between representatives of various professions, including medical doctors and religious representatives, so as to overcome some of the

to ritual circumcision, the Assembly recommends that Member States set medical and sanitary standards.<sup>365</sup> In a separate document, the Assembly recommended that the Council of Europe include a child's right to physical integrity in international and European legal instruments and standards.<sup>366</sup>

Shortly after the resolution appeared, Israel's president, Shimon Peres, demanded its rescission.<sup>367</sup> The Israeli Foreign Ministry strongly condemned the document on the ground that it "cast 'a moral stain on the Council of Europe, and fosters hate and racist trends in Europe'."<sup>368</sup> The Ministry accused the Assembly of comparing female genital mutilation with male ritual circumcision by placing both in the same category.<sup>369</sup> In March 2013, the Committee of Ministers of the European Council ("the Committee") issued a reply to the recommendations of the Assembly. In contrast to the Assembly's critical stance towards ritual circumcision, the Committee took a gentler view. It stressed that female genital mutilation is in no way comparable to male circumcision.<sup>370</sup> Moreover, the Committee found no need to set additional standards, because existing international instruments already cover

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prevailing traditional methods which do not take into consideration the best interest of the child and the latest medical techniques.")

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

<sup>366</sup> Eur. Parl. Ass., *Recommendation of the Parl. Ass.*, 4th Sess., Recommendation 2023 (2013), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-View-PDF.asp?FileID=20176&lang=en>.

<sup>367</sup> Harriet Sherwood, *Israel Condemns Council of Europe Resolution on Ritual Circumcision*, THE GUARDIAN, Oct. 7, 2013, <http://www.theguardian.com/world/2013/oct/07/israel-council-of-europe-resolution-ritual-circumcision>.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* ("Any comparison of this tradition [of male circumcision] to the reprehensible and barbaric practices of female genital mutilation is either appalling ignorance, at best, or defamation and anti-religious hatred at worst.") If the phrase "female genital mutilation" applies solely to WHO FGM types 1 (clitoridectomy only), 2, 3, and 4, it is quite different from male circumcision *milah* and *peri'ah*. But if "female genital mutilation" includes a "very rare" variation on type 1 ("partial or total removal of . . . only the [female] prepuce"), then the additional included practice might be comparable in degree to male circumcision. WHO Fact Sheet, *supra* note 293. This difficult matter cannot be settled here.

<sup>370</sup> Eur. Parl. Ass., *Reply to Recommendation 2023 (2013) of the Comm. of Ministers*, 2d Sess., Doc. No. 13463 (2013), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20583&lang=en> ("Whilst the resolution does warn that there are distinctions to be made, the Committee of Ministers notes that the formulation of the text is susceptible to cause confusion.").

the risks of non-medically-indicated procedures.<sup>371</sup> Lastly, the Committee found that there was evidence that many countries are already mindful of the conditions in which non-medically-indicated practices are performed.<sup>372</sup>

## 5. RETROSPECT AND PROSPECT

### 5.1. Sources of the Controversy

With the Reformation, people in the various bits of the territory now called Germany split into groups of Protestants and Roman Catholics. Protestants were mainly in the North and East and Catholics mainly in the South and West. But Protestant or Catholic, the religious organizations recognized by the state were Christian. To be sure, Jews were in what is now Germany well before the Middle Ages. Yet as a religion, Judaism was not on a legal or social par with Christianity in Germany, and Jews often suffered greatly from discrimination. Muslims did not come to Germany in significant numbers until after World War II. Before that Islam was not even a secondary religion in Germany.<sup>373</sup>

Secularization and German secularism form one source of the controversy over circumcision. Germany has multiple religions. Christianity is the most important of these for foundational social norms. Neither Judaism nor Islam is on the same social plane as Christianity. As a practical matter, both Judaism and Islam remain restricted minority religions. The core of German secularism is a certain governmental and social policy.<sup>374</sup> The core is not atheism, agnosticism, or dwindling church attendance, though all of these are markers of an increasingly secular society.<sup>375</sup> From a predominantly

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<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> See generally STEVEN OZMENT, *A MIGHTY FORTRESS: A NEW HISTORY OF THE GERMAN PEOPLE* (2005).

<sup>374</sup> See *supra* text accompanying note 52.

<sup>375</sup> See generally PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* (2d ed. 2011).



secular point of view, religious circumcision now strikes some Germans as backward and harmful.<sup>376</sup>

The ritual status of circumcision is, however, more complicated than ascribing everything to secularization and German secularism. That status involves a blindness to the fact that what counts as “secular” is often modeled on Christian norms. What gives “ritual” circumcision a pejorative cast and makes it a practice seemingly eligible for prohibition turns on the facts that some secular views consider nonmedical circumcisions “strange” and that Christian social norms in Germany have never included circumcision as a Christian practice.

If one delves more deeply, one finds that toleration and multiculturalism are lurking underneath. Wendy Brown’s work on the politics of toleration sees toleration as a double-edged sword.<sup>377</sup> On the one hand, it allows the practices of religious minorities to continue. On the other, it stands as a threat to withdraw permission should a religious practice conflict, or seem to conflict, with fundamental social norms. Multiculturalism, as a governmental policy of toleration for an increasingly diverse population, can be thrown into crisis if an overwhelming social majority eventually says, “That’s enough!”

Anti-Semitism and anti-Muslim sentiment are a second source of the controversy. Anti-Semitism is partly a function of German secularism, but anti-Semitism has been a prominent social force in many contexts before Germans and Germany existed. In the nineteenth century, some dialogue occurred between Jews and other Germans, and among Jews themselves, over circumcision. By the beginning of the twentieth century, this dialogue had largely petered out. Nazism tapped into negative beliefs, attitudes, prejudices, and actions relating to Jews. It generated the horrors of the Holocaust. After the Second World War, Germany had to confront its responsibility for the murder of millions of Jewish people. Though anti-Semitism continues to this day in Germany and other European countries, Alan Dershowitz’s commentary on the circumcision controversy is wildly overstated.<sup>378</sup> There is, moreover, scant evidence that anti-Semitism was responsible for

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<sup>376</sup> See *supra* text accompanying notes 151, 305–307.

<sup>377</sup> See generally BROWN, *REGULATING AVERSION*, *supra* note 284.

<sup>378</sup> See *supra* text accompanying notes 150–186.

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Judge Beenken's decision in the Cologne case. After all, the case involved the circumcision of a four-year-old son of Muslim parents.

Anti-Muslim sentiment exists in today's Germany as well. There is little evidence that it affected the appellate court's decision. Yet it was visible in the public debate, even if Muslim spokespersons were less numerous and perhaps less forceful in their protests than Jewish spokespersons. If Germans have long wrestled with their attitudes and practices toward Jews, it is only in postwar Europe that some Germans have begun to sort out their attitudes and practices toward Muslims. German Muslims owe much to Jews in Germany and elsewhere for their role in passing the new statute that legalizes ritual circumcision through the Bundestag. It is no accident that Hidayet Metin asks how the debate might have gone and whether the statute would have passed without Jewish involvement,<sup>379</sup> or that Gökçe Yurdakul would like to elevate Turkish Muslim immigrants in Germany to the legal and social status of German Jews.<sup>380</sup>

Cultural norms are a third source of the controversy. The analysis here largely sets aside the Christian social norms silently prevalent in Germany. Many non-Christian social norms are hardly uniquely German. They are common to the cultures of most Western and Northern European countries.<sup>381</sup> These norms include a deep attachment to human rights, and a strong belief that children have special rights as children. Corporal discipline is generally unacceptable, and permanent physical changes to children's bodies wrought by surgery are permissible only if medically justified. Female genital mutilation is absolutely unacceptable. Surgery on children with physical intersex conditions is under attack. The circumcision of male minors without medical indication is still socially contested. The culture of the German medical profession is to leave the penis in its intact state unless there is a good medical reason to alter it, and German medical doctors are skeptical of arguments for prophylactic circumcision. Moreover, the German legal profession and its norms have also played a role in the controversy. If Judge Beenken had written his opinion differently, accusations of anti-Semitism might have been less prominent and taken less seriously. For instance, had he confined his decision and

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<sup>379</sup> See *supra* text accompanying notes 193–194.

<sup>380</sup> See *supra* text accompanying notes 338–353.

<sup>381</sup> See *supra* text accompanying notes 171–177, 354, 360–366.

opinion to the circumcision of a four-year-old boy who was the son of Muslim parents, its application to the sons of Jewish parents might have been in doubt.<sup>382</sup> As it was, he seemed unaware of some Christian elements within certain German social norms and the consequences of his opinion for German Jews.

Additional cultural norms inform the parent-child relationship. Parents have responsibilities to their children and substantial discretion in their upbringing. If the parents adhere to a particular religion, they can raise their children in that faith. Yet in this domain children are usually not thought of chiefly as adjuncts of their parents or as proto-adherents of their parents' religious community. Though parents have a right and a duty to care for and bring up their children, the German Basic Law provides, "The state shall watch over them in the performance of this duty."<sup>383</sup> As a practical matter, the limitations on and oversight of Christian parents are minor compared to the limitations on Muslim and Jewish parents, because circumcision as a religious ritual is peculiar mainly to Islam and Judaism. Here a legally-constrained cultural norm about parental rights intersects with German secularism. Christian parents experience fewer limitations and less oversight because the background religious affiliation is Christianity – be it Protestant, Catholic or, less frequently, Orthodox. Islam and Judaism appear as socially subordinated religions in this picture.

In sum, German cultural norms disfavoring permanent modifications of children's bodies, increased secularization leading to an ever-increasing emphasis on human rights, and a strong history of anti-Semitism and a recent history of anti-Muslim sentiment go a long way in explaining why the circumcision controversy erupted in Germany.

These factors are not, however, a complete explanation. It is worth recognizing a constellation of facts coincidental to the court's ruling: the boy's hemorrhage after circumcision, the communication difficulties between the boy's mother and German hospital workers, the workers' decision to contact authorities, the prosecutor's decision to charge, the court decision criminalizing circumcision,

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<sup>382</sup> See *supra* text accompanying notes 52–55.

<sup>383</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] May 8, 1949, art. 6(2) (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

and Putzke's actions in bringing the court's ruling to public attention.

Nevertheless, these coincidental facts are a distraction. Whether Rodney King was factually guilty of excessive speeding has nothing to do with the historical impact of his beating by the police.<sup>384</sup> Similarly, these coincidental facts have little or nothing to do with the historical impact of Judge Beenken's decision. Here it is important to emphasize the three factors that structure the analysis of this Article. Beyond these factors, Germany's past served as a catalyst for increased media attention. A German limitation on a Jewish and Muslim ritual drew more attention than if some other European country had created the limitation.

## 5.2. Going Forward

### 5.2.1. Legal Issues

The new statute is compact and mostly clear, but since it went into force on December 28, 2012, some issues have come to light:

*Motivations and Parental Disagreement.* The case of the six-year-old boy who was the child of a Kenyan mother and a non-Kenyan father is interesting for two reasons.<sup>385</sup> First, the boy's mother sought circumcision, while his father opposed it. A unanimity rule would probably reduce the number of non-medically indicated circumcisions in Germany and could give leverage on other issues to the parent who refuses to consent to circumcision. Second, the court, in rejecting the mother's plea, saw her motives as cultural and hygienic. It is worth asking whether the court would have reached the same result if the mother's motives had been religious.

*Undesirable and Perverse Motivations.* Because the new statute does not require parents to justify circumcising their son, it seems possible that some parents might circumcise for undesirable or even

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<sup>384</sup> I owe this point and the example to Todd H. Weir.

<sup>385</sup> Oberlandesgericht Hamm [OLG] [Higher Regional Appellate Court Hamm] Aug. 20, 2013, docket number 3 UF 133/13, available at [http://www.justiz.nrw.de/nrwe/olgs/hamm/j2013/3\\_UF\\_133\\_13\\_Beschluss\\_20130830.html](http://www.justiz.nrw.de/nrwe/olgs/hamm/j2013/3_UF_133_13_Beschluss_20130830.html); see also *supra* text accompanying notes 221–236.

perverse reasons. It is unclear whether this possibility can be excluded. At root, the problem seems to be one of statutory interpretation: Does the statute assume that circumcision is objectively harmful and requires a justification, or that the procedure is not harmful and thus needs no justification? To allow undesirable or perverse motivations is unattractive. The willingness of German courts to examine evidence of possibly objectionable parental motivations is unknown. So is the courts' willingness to pronounce that circumcision, even in Germany, is not harmful.<sup>386</sup>

*Anesthesia.* Section 1631d(1) requires that circumcisions be carried out according to German medical standards, which include effective pain management. The legislature did not specify any test or protocol for managing pain. Even if it had done so, Jewish ritual circumcisions are commonly done at home or in a place of worship. Plainly, it would be intrusive to have an Anesthesiology Police identify such occasions and come uninvited to the bris. It is therefore unclear how the anesthesia requirement is to be enforced outside of hospitals and clinics.

*Unsafe Practices.* The main issue here is what to do about the ultra-Orthodox practice of *metzitzah b'peh*, which carries a risk of transmitting bacterial and viral diseases, such as syphilis and HSV-1, from the mohel to the infant. Today this is a fringe practice in Judaism, but it persists in some Hasidic communities. If the court in the case of the Kenyan mother inquired deeply into her motives, the state prosecutor seemed to be in no mood to scrutinize the circumcision of Rabbi Yehuda Teichtal's son for direct orogenital suction.<sup>387</sup> If the prosecutor and appellate judge in the Cologne case were once bitten, the Berlin prosecutor appeared to be twice shy in deciding not to bring charges against Rabbi Teichtal or the mohel he selected.

*Sex Discrimination.* A potential problem with the German Penal Code's new § 226a lies in the fact that the German Constitution guarantees equal treatment of the sexes. Section 1631d of the German Civil Code now permits, with limitations, the removal of the prepuce (foreskin) of the penis. The new statute on female genital mutilation prohibits removal of all or part of the prepuce (hood) of the clitoris. Some German citizens and residents belong to religions or cultures that practice female genital cutting. They might

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<sup>386</sup> See *supra* text accompanying notes 237–241.

<sup>387</sup> See *supra* text accompanying notes 268–283.

fail to persuade a German doctor to remove the clitoris or labia minora, but would have a better chance if the doctor were asked to remove “only” all or part of the clitoral hood as a second-best ritual. The emphasis here is not on embryology and anatomy but on the ritual reconstruction of a religious or cultural requirement to “circumcise” both boys and girls.

### 5.2.2. Broader Problems

The new statute raises broader issues as well. Firstly, there is the question of how Germany should react to members of the German public who are not willing to comply with the official program. Tilman Jens is a poster boy for the recalcitrant. His voice will resonate with Germans who dislike the concessions granted to Muslims and Jews by the new statute.<sup>388</sup> Grounds exist for protecting freedom of speech in the case of such figures. It is less clear how to deal with professions that take strong issue with the circumcisions permitted by the new statute. Most German pediatricians strongly oppose circumcision of male minors without medical indication. There are similar voices in other European countries and regional organizations. Even though Norway passed a law in 2014 that explicitly allows ritual circumcision, it came only after a Nordic Children’s Ombudsman suggested a ban on the procedure in the absence of a medical indication.<sup>389</sup> Moreover, in 2013 the Parliamentary Assembly of the Council of Europe passed a resolution against non-medically-indicated circumcisions, which it lumped together with female genital mutilation and sex-reassignment surgery on children with a physical intersex condition. After protests by Israel’s president, the Committee of Ministers of the European Council took a softer position. Outside Europe, non-medically-indicated circumcision has not been a hotly disputed issue in Australia or New Zealand, but there is some opposition in the United States.<sup>390</sup>

Secondly, a good deal of uncertainty plagues Jews and Muslims in Germany. Anti-Semitism may be rising slightly in Germany.

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<sup>388</sup> See *supra* text accompanying notes 302–307.

<sup>389</sup> See *supra* text accompanying notes 354–359.

<sup>390</sup> See *supra* text accompanying notes 9–11.

Press accounts do not suggest that any anti-Semitic incidents are a holdover from the circumcision controversy. Yet given the dangers of anti-Semitism, Jews and others have reason for grave concern. Anti-Muslim sentiment in Germany seems to be holding steady. This fact is not, however, a cause for rejoicing. One thing that gives rise to concern is a split between Jewish and Muslim groups, in two ways. On the one side, the war in Gaza in summer 2014 and continued tensions in the Middle East have divided these groups. On the other side, Jews and Muslims occupy asymmetric positions on ritual circumcision. Jews are the main beneficiaries of the new statute, for they almost always circumcise eight days after birth and can use mohelim during the first six months of life. Because Muslims circumcise at different ages, and because some Muslim cultures also favor the “circumcision” of girls, it is harder for Jews in Germany to make common cause with Muslims and to persuade the general public to tolerate these practices. Among visible Muslim opinion, Hidayet Metin and Gökçe Yurdakul see the importance of and the difficulties with obtaining for Muslims the same state support and the same political and legal advantages as Jews.<sup>391</sup>

Thirdly, the circumcision debate creates an opportunity for toleration in German society. The new statute is a specimen of legal toleration. But the statute papers over, not resolves, the tensions between some Germans, Jews, and Muslims. Cultural toleration by all Germans of religious circumcision practices does not yet exist. A more careful approach to toleration between and among German Jews, German Muslims, and other Germans is desirable. An opportunity for toleration arises if a person or a society finds a practice of another person or a minority group to be objectionable. It is no use to say that everything should be tolerated. Such a position could theoretically require the toleration of racists and those who are intolerant of others, which one philosopher calls “the paradox of toleration.”<sup>392</sup> No sensible person thinks that everything should be tolerated.<sup>393</sup> Part of what is needed, then, is an account of what should be tolerated and what should not. Wendy Brown’s insights into various discourses of toleration do not seem to show what should and shouldn’t be tolerated.<sup>394</sup> Beyond toleration, it

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<sup>391</sup> See *supra* text accompanying notes 187–194, 338–353.

<sup>392</sup> ANDREW JASON COHEN, *TOLERATION* 111 (2014).

<sup>393</sup> *Id.* at 112–13; D. D. Raphael, *The Intolerable*, in *JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES* 137 (Susan Mendus ed., 1988).

<sup>394</sup> See *supra* text accompanying notes 284–288, 300–301, 350–353.

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would help Jews and Muslims if multiculturalism as a normative doctrine in political philosophy could be established.<sup>395</sup> Normative multiculturalism as earlier defined would give Jews and Muslims a right to have their circumcision practices respected by all Germans. Establishing the doctrine of multiculturalism so understood will require considerable philosophical imagination and argument. It will also require attention to the politics of both toleration and multiculturalism.

Finally, Germans and members of other societies in which ritual circumcision becomes an issue must consider the question, "What is a child?" The controversy over circumcision arose in part because German Jews, German Muslims, and many other Germans have somewhat different views of what a child is. For most Germans, a child has human rights to bodily integrity and a nonviolent upbringing. Though parents might raise their child in a particular religion, or in no religion at all, they do not in the opinion of some Germans have the right to modify their child's body with a permanent mark of religious affiliation. To circumcise boys for religious, traditional, prophylactic or aesthetic reasons, but without a medical indication, appears to some Germans to be at least morally problematic.

In contrast, circumcision of male infants and boys is central to Jews and Muslims for reasons both religious and traditional. Jews and Muslims in Germany might agree that children have rights to bodily integrity and a nonviolent upbringing. Yet for many Jewish and Muslim parents, these rights are limited insofar as a permanent physical modification, which is in fact a sign of religious affiliation and identity, of the bodies of their male children are concerned. For these parents, their children are already fledgling members of Jewish and Muslim communities. The parents, in this view, have a broad scope to consent to circumcision on their boys' behalf.

If future examination of circumcision in societies consisting of more than one religion or culture is to be fruitful, it will have to consider carefully what a child is, and what rights a child has, not merely in general terms, but also in disputed contexts such as ritual circumcision.

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<sup>395</sup> See *supra* text accompanying notes 352-353.