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## Attempting to Slice Out Male Circumcision

Cover Page Footnote

Howard Rubin; Stephanie Kevil

## ATTEMPTING TO SLICE OUT MALE CIRCUMCISION

And the uncircumcised man child whose flesh of his foreskin is not circumcised, that soul shall be cut off from his people; he hath broken my covenant.

*Genesis 17:14*<sup>1</sup>

Because of our traditions, we've kept our balance for many, many years.

*Tevye, Fiddler on the Roof*<sup>2</sup>

Traditions are a sacred part of society. Sometimes traditions are as simple as watching the Dallas Cowboys on Thanksgiving.<sup>3</sup> Other times traditions are so engrained in society that we willingly participate without even knowing why. But, whatever the tradition, it is important to review them every so often to ensure they remain in compliance with societal norms and desires.

Recently, a ballot measure to ban the traditional practice of male circumcision in San Francisco made national news. Most people in the United States consider the choice to circumcise a male infant as a normal part of having a child.<sup>4</sup> But Matthew Hess, who spearheaded the bill proposal in San Francisco, believes that the debate on circumcising male children should be revisited by legislatures.<sup>5</sup> He is not alone. Over 7,100 Californian voters signed a petition in the spring of 2011 to see a mea-

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<sup>1</sup> *Genesis 17:14* (King James).

<sup>2</sup> *Prologue: Tradition by Fiddler on the Roof*, LYRICS MUSE, (last updated July 28, 2009).

<sup>3</sup> The Dallas Cowboys have played on Thanksgiving every year since 1976. *History: Thanksgiving Day Games*. PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/history/stats/thanksgiving.aspx> (last visited Mar. 5, 2011).

<sup>4</sup> See Anthony Weil, *To Circumcise or Not*, DR.WEIL.COM (Feb. 19, 2010), <http://www.drweil.com/drw/u/QAA400690/To-Circumcise-or-Not.html>.

<sup>5</sup> See MGMBILL.ORG: A BILL TO END MALE GENITAL MUTILATION IN THE U.S., <http://mgmbill.org/index.htm> (last visited Mar. 5, 2012).

sure banning male circumcisions on the November 2011 ballot.<sup>6</sup> While the measure was removed from the ballot—for technical reasons that will be discussed later—there were few questions answered on what would have happened if the ballot had passed.<sup>7</sup> And while some believe that the United States is at a tipping point where circumcision will soon become less “normal,”<sup>8</sup> there appears to be a need to revisit the prevailing arguments on the practice.

This note conducts an in-depth discussion on the many aspects that surround this traditional medical procedure.<sup>9</sup> In accordance with Tevye’s strong desire to maintain tradition, Part II highlights the importance of circumcision in the Jewish and Islamic faiths, as well as the historical non-religious reasons for performing the procedure. Part III discusses the recent events in California and the impact they may have on other states that could attempt to ban the procedure. Part IV focuses on the substantive reasons for and against allowing the procedure for children, and the fundamental differences between male and federally-banned female circumcisions. From there, Part V discusses the medical impact of banning infant circumcisions and instead having the procedure performed on people after they turn eighteen. Part VI includes a discussion pertaining to the impact that a ban on circumcisions could have on other widely accepted medical procedures, such as infant ear-piercing. Fi-

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<sup>6</sup> Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES, June 5, 2011, <http://www.nytimes.com/2011/06/05/us/05circumcision.html>.

<sup>7</sup> See Petition for Writ of Mandate, Jewish Cmty. Relations Council of San Francisco v. Arntz, No. CPF-11-511370, (Cal. Super. Ct. July 28, 2011), *available at* <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=863>; Response Brief, Jewish Cmty. Relations Council of San Francisco v. Arntz, No. CPF-11-511370, (Cal. Super. Ct. July 28, 2011), *available at* <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=836>.

<sup>8</sup> Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL’Y & L. 497, 501 (2002).

<sup>9</sup> This article is not meant to debate the validity of male circumcisions when they are medically necessary for the health of the child. The article will instead focus on instances where the circumcision is performed voluntarily.

nally, Part VII briefly looks into the future, determines where the controversy is likely to go next, and discusses possible solutions.

## II. BACKGROUND

The tradition of circumcising infant male children goes back thousands of years.<sup>10</sup> Some scholars believe circumcision is the oldest form of surgery.<sup>11</sup> While circumcisions have often been synonymous with children of the Jewish and Islamic faiths, there was a strong movement in the final decades of the nineteenth and first decades of the twentieth century to circumcise children for non-religious reasons.<sup>12</sup>

Over the last couple of centuries, the medical world has altered society's perceptions by depicting the "uncircumcised penis as polluted, unnatural, harmful, alien, effeminized and disfigured, and depict[ing] circumcision as true, orderly, and good."<sup>13</sup> Originally, medical experts changed society's perception of circumcision by explaining that circumcisions were beneficial because they deterred masturbation, spermatorrhoea ("wet dreams"), and various medical disorders.<sup>14</sup> Science has since discredited many of those original ideas,<sup>15</sup> but modern medicine has discovered links between circumcision and various medical benefits, including protection against penile cancer and urinary tract infections ("UTI") and a reduced risk for Human Immunodeficiency Virus ("HIV") infections.<sup>16</sup> By 1977, circum-

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<sup>10</sup> J.M. Glass, *Religious circumcision: a Jewish view*, 83 *BRIT. J. OF UROLOGY INT'L* 17 (2002).

<sup>11</sup> 3 *ENCYCLOPEDIA OF RELIGION AND ETHICS* 659, 670–80 (J. Hasting ed. 1951).

<sup>12</sup> Miller, *supra* note 8, at 501.

<sup>13</sup> *Id.*

<sup>14</sup> See DAVID L. GOLLAHER, *CIRCUMCISION: A HISTORY OF THE WORLD'S MOST CONTROVERSIAL SURGERY* 91, 102–04 (2000) (discussing of early circumcision health claims).

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

<sup>16</sup> *Id.* at 105.

cision became the most common operation performed on males in the United States.<sup>17</sup>

While many people today circumcise their children for the perceived health benefits, there are also those that perform the procedure for religious purposes.<sup>18</sup> In the United States, Judaism and Islam are the two main religions that promote circumcisions of male children.<sup>19</sup> The following sections will touch on the religious principles that are used today to justify male circumcision.

### A. *Judaism*

Under Jewish law, the tradition of circumcising male children goes back to a covenant made between Abraham and G-d.<sup>20</sup> At that time, Abraham was told:

[t]his *is* my covenant, which ye shall keep, between me and you and thy seed after thee; Every man child among you shall be circumcised. And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you. And he that is eight days old shall be circumcised among you, every man child in your genera-

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<sup>17</sup> Miller, *supra* note 8, at 532; see George W. Kaplan, *Circumcision—An Overview*, 7 CURRENT PROBS. IN PEDIATRICS 1, 3 (1977).

<sup>18</sup> Neil K. Kaneshiro, *Circumcision*, MEDLINE PLUS: A SERVICE OF THE U.S. NATIONAL LIBRARY OF MEDICINE AND NATIONAL INSTITUTES OF HEALTH, <http://www.nlm.nih.gov/medlineplus/ency/article/002998.htm> (last updated Mar. 21, 2012).

<sup>19</sup> THE ENCYCLOPEDIA OF RELIGION, 511–14 (Mircea Eliade ed. 1987), available at <http://www.male-initiation.net/anthropology/eliade.html> (last visited Mar. 7, 2012). The article also lists Coptic Christianity as a religion that commonly circumcises its youth, but Coptic Christianity is practiced more throughout Egypt and the Middle East than back in the United States. *Id.* For purposes of this article, the author will be focusing on Judaism and Islam.

<sup>20</sup> The spelling used here is done out of respect for the Jewish practice that prohibits erasing or defacing a Name of G-d. The name is written this way so that it is not later defaced, obliterated, or destroyed accidentally by someone who is not aware of the traditional Jewish practice. See Tracy R. Rich, *The Name of G-d*, JUDAISM 101, <http://www.jewfaq.org/name.htm> (last visited Mar. 7, 2012); see also *Deuteronomy* 12:3 (King James).

tions, he that is born in the house, or bought with money of any stranger, which *is* not of thy seed. He that is born in thy house, and he that is bought with thy money, must needs [sic] be circumcised: and my covenant shall be in your flesh for an everlasting covenant. And the uncircumcised man child whose flesh of his foreskin is not circumcised, that soul shall be cut off from his people; he hath broken my covenant.<sup>21</sup>

Abraham was the first Jew to be circumcised, but this was a process that he performed on himself.<sup>22</sup> The first neonate to be circumcised was his son Isaac at the age of eight days.<sup>23</sup> In the Jewish religion, circumcising a male child is considered to be a commandment and is thus required.<sup>24</sup> The tradition is so strong that Jews would even perform circumcisions in Ancient Greece and Rome where those who engaged in such procedures could be punished by death.<sup>25</sup> Today, circumcisions are one of the few traditions which are performed by almost all Jews, no matter how religious or observant the family.<sup>26</sup>

In Judaism, the father has the duty to have his son circumcised.<sup>27</sup> Traditionally, the circumcision is performed by either the son's father or by a *mohel*.<sup>28</sup> The *Talmud* defines the laws concerning the steps that must be taken during the circumcision and the timeline for the procedure.<sup>29</sup> The procedure must abide by the *Talmud* or the circumcision will not be considered complete under Jewish law.<sup>30</sup> The circumcision occurs on the infant's eighth day of life, unless there is a concern for the child's

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<sup>21</sup> *Genesis* 17:10–14 (King James) (emphasis in original).

<sup>22</sup> Glass, *supra* note 10, at 17.

<sup>23</sup> *Genesis* 21:4 (King James) (“And Abraham circumcised his son Isaac being eight days old, as [G-d] had commanded him.”).

<sup>24</sup> Glass, *supra* note 10, at 17.

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.* (A *mohel* is a ritual expert in the Jewish religion.).

<sup>29</sup> The *Talmud* is a religious commentary on the laws of the *Torah* where the details of each law are discussed and detailed. See Glass, *supra* note 10, at 18.

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

safety.<sup>31</sup> In those instances, the ceremony occurs on the seventh day after the child is deemed healthy enough for the circumcision.<sup>32</sup> The actual ceremony can occur anywhere, but generally the procedure is performed at someone's home where family and friends are invited to attend.<sup>33</sup> The entire procedure lasts between one and two minutes.<sup>34</sup> Due to the speedy nature of the process, most *mohelim* do not use any anesthesia; there is nothing in the *Talmud*, however, forbidding the use of anesthesia.<sup>35</sup> Many *mohelim* will instead give the child a drop of wine as a substitute for the anesthesia.<sup>36</sup>

### B. Islam

Under Islamic law, male circumcision is a rite of faith and part of the *fitrah*.<sup>37</sup> The Prophet Muhammad said, "Five are the acts quite akin to *fitrah*: circumcision, clipping or shaving the pubes, cutting the nails, plucking or shaving the hair under the armpits

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<sup>31</sup> See Shulkham Arukh (Yoreh De'ah 263:1) ("It is forbidden to circumcise a child in whom there is a suspicion of illness since danger to life takes precedence over all else, for it is possible to perform circumcision at a subsequent time."). The Shulkham Arukh is a legal code compiled by Sephardic Rabbi Joseph Caro in the mid-1500's and is still considered the standard legal code of Judaism. See *The Shulkhan Arukh*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/Judaism/shulkhan\\_arukh.html](http://www.jewishvirtuallibrary.org/jsource/Judaism/shulkhan_arukh.html) (last visited Mar. 7, 2012).

<sup>32</sup> Glass, *supra* note 10, at 18.

<sup>33</sup> *Frequently Asked Questions*, BRIS MILAH RITUAL CIRCUMCISION, [http://www.brismilah.org/\\_faqs.php](http://www.brismilah.org/_faqs.php) (last visited Mar. 23, 2012).

<sup>34</sup> There are multiple ways the surgery can be performed, including one medical step-by-step version. Glass, *supra* note 10, at 19.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (Upon request from the parents, most *mohelim* will use anesthesia, but it is not considered a normal part of the ceremonial process.)

<sup>37</sup> See *Male Circumcision in Islam*, MISSION ISLAM, [www.missionislam.com/health/circumcisionislam.html](http://www.missionislam.com/health/circumcisionislam.html) (last visited Mar. 7, 2012). *Fitrah* is the innate disposition and natural character and instinct of the human creation. *Id.* "As-Shawkani said in his book *Nayl al-Awtar* (1/184): 'What the Prophet (s.A.w.) means by *Fitrah* is that if these characteristics are followed by a man, he would be described as a man of *Fitrah*, which Allah (s.w.t.) has gifted his servants with, and encouraged them to follow, so that they attain a high degree of respectability and dignity.'" *Id.*



and clipping (or shaving) the moustache.”<sup>38</sup> The earliest recording of circumcision in the Islamic religion is by the Prophet Ibrahim, who circumcised himself with an axe when he was eighty years old.<sup>39</sup> Circumcision is believed to be mandatory because the Prophet Ibrahim would not have troubled himself at such a late stage of life if it were not obligatory.<sup>40</sup> The circumcision procedure is meant to be done as early as possible in the child’s life; the tradition’s timeline, however, is not as strict as it is in the Jewish faith.<sup>41</sup> Most of the time, the circumcisions are done at the time of the boy’s *Aqiqah*.<sup>42</sup> According to Imam Nawawi,<sup>43</sup> “circumcision is recommended to be performed on the seventh day of infancy—the day of *Aqiqah*.”<sup>44</sup> But the timeline can vary, including having children circumcised when they are a few years old.<sup>45</sup> Islamic tradition states:

It is not essential for the child to remain as he is when he comes forth from his mother’s womb, if there is something that may be done for him that serves a purpose and is enjoined by the pure religion. Such things include shaving his head after he is born, because that is in his best interests. The

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<sup>38</sup> *Id.*

<sup>39</sup> See *Male Circumcision in Islam*, *supra* note 37. Abraham is called Ibrahim by Muslims. See Dr. Mona Siddiqui, *Ibrahim - the Muslim view of Abraham*, BBC—Religions, <http://www.bbc.co.uk/religion/religions/islam/history/ibrahim.shtml> (last updated Sept. 4, 2009).

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

<sup>41</sup> The process of circumcising the child is much less strict than the Jewish faith. See *Circumcision of Boys*, BBC—RELIGIONS, <http://www.bbc.co.uk/religion/religions/islam/islamethics/malecircumcision.shtml> (last updated Aug. 13, 2009). In fact, many Islamic circumcisions simply happen in a hospital. *Id.*

<sup>42</sup> *Id.* (describing how *Aqiqah* is the traditional celebration for the birth of a child which involves the sacrifice of an animal in thanks to Allah).

<sup>43</sup> Nawawi was a renowned scholar for his work studying Islamic learning. See <http://www.bysiness.co.uk/ulemah/bionawawi.htm> (last visited Mar. 10, 2012).

<sup>44</sup> *Male Circumcision in Islam*, *supra* note 37.

<sup>45</sup> See *id.*

Prophet of Islam (peace and blessings of Allah be upon him) said: "Remove the harm from him."<sup>46</sup>

Circumcising a male infant is viewed similarly to washing the blood from him at birth or cutting the umbilical cord that attaches him to his mother.<sup>47</sup> According to Dr. Muhammad 'Ali al-Baar,<sup>48</sup> circumcision is in the best interest of Islamic children because the procedure removes harm from the child by: (1) guarding against local infection in the penis; (2) reducing infections of the urethra; (3) preventing cancer of the penis; (4) lowering the likelihood of sexually transmitted diseases; and (5) protecting future wives against cervical cancer.<sup>49</sup> Under Islamic law, the exact circumcision procedure is less formalized and of less importance than what is described in the Jewish tradition.<sup>50</sup>

### III. CALIFORNIA LEGISLATION

This Part begins by exploring the July 2011 California ballot initiative that nearly ended with a referendum on the local ballot to ban male circumcision. This Part will then discuss the state law that Governor Jerry Brown signed in October 2011 to prohibit banning circumcisions in California. While the controversy appears unlikely to resurface any time soon in California, the purpose of this Part is to show how one state dealt with the issue and further to show how quickly the controversy can affect any state.

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

<sup>47</sup> *Id.*

<sup>48</sup> A member of the Royal College of Surgeons in the UK and a consultant to the Islamic Medicine Department of the King Fahd Centre for Medical Research in the King Abdul Aziz University in Jeddah. *See id.*

<sup>49</sup> *Id.* (Dr. Muhammad 'Ali al-Baar says in his book *al-Khitaan* (Circumcision): "Circumcision of newborn boys (i.e., within the first month of life) brings numerous health benefits.").

<sup>50</sup> *See Circumcision of Boys, supra* note 41.

### A. *San Francisco Ban*

On July 28, 2011 Superior Court Judge Loretta Giorgi ruled on *The Jewish Community Relations Council of San Francisco v. Arntz* (CPF-11-511370). The City and County of San Francisco was scheduled to vote on a ballot initiative seeking to ban the circumcision of male minors.<sup>51</sup> However, Judge Giorgi ruled that as a matter of law, the proposal that would have been on the ballot was preempted by a state “healing arts professional” law that regulates medical professionals to the exclusion of local governments.<sup>52</sup> The proposed ban would have amended the San Francisco Police Code:

**ARTICLE 50: GENITAL CUTTING OF MALE MINORS**

**SEC. 5001. PROHIBITION OF GENITAL CUTTING OF MALE MINORS.**

Except as provided in SEC. 5002, it is unlawful to circumcise, excise, cut, or mutilate the whole or any part of the foreskin, testicles, or penis of another person who has not attained the age of 18 years.

**SEC. 5002. EXCEPTIONS.**

(a) A surgical operation is not a violation of this section if the operation is necessary to the physical health of the person on whom it is performed because of a clear, compelling, and immediate medical need with no less-destructive alternative treatment available, and is performed by a person

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<sup>51</sup> Madison Park, *San Francisco Judge Removes Circumcision Ban from Ballot*, CNN (July 28, 2011), <http://www.cnn.com/2011/HEALTH/07/28/circumcision.ban.voting/index.html> (The measure was initially set to be on the November 8, 2011 ballot.).

<sup>52</sup> See Section Cal. Bus. & Prof. Code § 460(b) (West), (protecting healing arts professionals from municipalities attempting to “prohibit a healing arts professional licensed with the state . . . from engaging in any act or performing any procedure that falls within the professionally recognized scope of practice of that license”).

licensed in the place of its performance as a medical practitioner.

(b) In applying subsection (a), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

**SEC. 5003. PENALTY.**

Any person who violates any provisions of this Article shall be deemed guilty of a misdemeanor and upon conviction such person shall be punished by a fine not to exceed \$1,000 or by imprisonment in the County Jail for a period not to exceed one year, or by both such fine and imprisonment.<sup>53</sup>

While Judge Giorgi struck down the current proposal to ban circumcisions in San Francisco, she did not take the opportunity to rule on the legality of the ban if there had not been a local “healing arts professional” law.<sup>54</sup>

Proponents of the ban, who gathered the required 7,163 signatures to get the ban on the November ballot, argued that the ban was necessary to prevent a form of genital mutilation being forced on children.<sup>55</sup> While these supporters have verbally said the ban was not meant to be anti-Semitic,<sup>56</sup> the actions of their leaders have made that argument somewhat murky. Leading activist Matthew Hess<sup>57</sup> has also been publishing a comic book,

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<sup>53</sup> SAN FRANCISCO MGM BILL, <http://www.sfmgbill.org/Site/Home.html> (last visited Mar. 30, 2012).

<sup>54</sup> See *The Jewish Community Relations Council of San Francisco v. Arntz* (CPF-11-511370).

<sup>55</sup> Lisa Leff, *Circumcision Ban To Be Stricken From San Francisco Ballot, Judge Says*, HUFFINGTON POST, July 27, 2011, [http://www.huffingtonpost.com/2011/07/27/circumcision-ban-stripped-from-san-francisco-ballot\\_n\\_911590.html](http://www.huffingtonpost.com/2011/07/27/circumcision-ban-stripped-from-san-francisco-ballot_n_911590.html).

<sup>56</sup> Jeff Winkler, *Foreskin Man's Anti-Semitism May Only Be Skin Deep*, THE DAILY CALLER, June 8, 2011, <http://dailycaller.com/2011/06/07/foreskin-mans-antisemitism-may-only-be-skin-deep/> (quoting Matthew Hess “we’re not trying to be anti-Semitic. We’re trying to be pro-human rights.”).

<sup>57</sup> Matthew Hess is the President of Male Genital Mutilation Bill, the main organization pushing for the circumcision ban. See *About Us*, MGMBILL

“Foreskin Man,” which depicts a blonde hair, blue eyed superhero fighting against the “Monster Mohel.”<sup>58</sup> According to Hess, “A lot of people have said that [we are anti-Semitic], but we’re not trying to be anti-Semitic. We’re trying to be pro-human rights.”<sup>59</sup> Whether the organizers in California were trying to protect children or spearheading, an anti-Semitic agenda is unclear. This article will focus mainly on the potential legal aspects of banning youth circumcision that were not undertaken by Judge Giorgi.

### ***B. California Bans Banning Male Circumcisions***

Only months after Judge Giorgi ruled against banning circumcisions in San Francisco, state legislators took action to ensure the controversy surrounding the procedure was short-lived. On October 2, 2011, California Governor Jerry Brown signed into law S.B. 768, which prohibited banning male circumcisions.<sup>60</sup> The new law was meant to “preclude a city, county, or city and county ordinance, regulation, or administrative action from prohibiting or restricting the practice of male circumcision, or the exercise of a parent’s authority to have a child circumcised.”<sup>61</sup> While this legislation appears to momentarily end the chance that California will ban circumcision, the overall national debate is far from over. Therefore, it is necessary to dissect the

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.ORG: A BILL TO END MALE GENITAL MUTILATION IN THE U.S., <http://mgm.bill.org/aboutus.htm> (last visited Nov. 26, 2011) [hereinafter MGM Bill About Us].

<sup>58</sup> See Winkler, *supra* note 56 (One comic depicts a blonde-hair hero saving children from the clawed clutches of satanic-looking rabbis and another comic depicts Foreskin Man fighting off a gang of Orthodox Jewish rabbis attempting to circumcise a child.).

<sup>59</sup> Max Read, *Support Anti-Circumcision Bill with Anti-Semitic Hero ‘Foreskin Man’*, GAWKER.COM (June 5, 2011) <http://gawker.com/5808669/support-anti+circumcision-bill-with-fun-anti+semitic-foreskin-man-comic> (quoting a conversation between San Francisco Chronicle’s Debra Saunders and comic book creator Matthew Hess).

<sup>60</sup> See also Complete Bill History, A.B. No. 768 (2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0751-0800/ab\\_768\\_bill\\_20111002\\_history.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0751-0800/ab_768_bill_20111002_history.html).

<sup>61</sup> *Id.*

various legal arguments involved with banning male circumcisions.

#### IV. ANALYSIS: THE ARGUMENTS FOR AND AGAINST BANNING YOUTH CIRCUMCISION

This Part will explore various arguments given by both supporters and opponents of youth circumcision. The debate will begin by first showcasing reasons for allowing youth circumcisions, such as a decreased risk for UTIs, sexually transmitted diseases, and penile cancer. The focus will then shift to the reasons against allowing youth circumcisions, including the dangers involved with surgery complications and the lack of consent that children are afforded prior to the surgery.

##### A. *Allow Youth Circumcisions*

The most common argument for allowing youth circumcision is that the child's parents should be allowed to make decisions about the child's life. The United States Supreme Court has even held that "the interests of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>62</sup> The United States has always identified the free exercise of religion as an important building block for the country's success.<sup>63</sup> And the same religious protections have been given to the states through the Fourteenth Amendment.<sup>64</sup> "The government may not regulate religious beliefs as such by compelling or punishing their affirmation. (citation omitted) Nor may it target conduct for regulation only because it is being undertaken for religious rea-

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<sup>62</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>63</sup> U.S. CONST. amend. I.

<sup>64</sup> See *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985); see also *Williams v. Episcopal Diocese of Massachusetts*, 766 N.E.2d 820 (Mass. 2002) and *Pierce v. Iowa-Missouri Conference of Seventh-Day Adventists*, 534 N.W.2d 425 (Iowa 1995).

sons.”<sup>65</sup> There is little argument that circumcision is part of the religious practice in Jewish and Islamic faiths.<sup>66</sup> In fact, in the United States, the practice of circumcising infant children has become so accepted that many states even provide an exemption to allow non-medically trained individuals to perform the surgical task, i.e. *mohels* in the Jewish religion.<sup>67</sup> The only conceivable reason to not allow families to raise their children as they see fit is because of potential harm to the child.<sup>68</sup> This subpart will describe the reasons medical and science professionals support male circumcision.

### 1. Decrease in Urinary Tract Infections

According to the American Academy of Pediatrics (“AAP”), “[e]xisting scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data are not sufficient to recommend routine neonatal circumcision.”<sup>69</sup> The first research report done by the AAP reflecting a potential

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<sup>65</sup> See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81 (Cal. 2004).

<sup>66</sup> See *Jones v. Bradley*, 590 F.2d 294 (9th Cir. 1979) (explaining that the government is allowed to inquire into “truth” or religious doctrines or beliefs is a religious belief); see also *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981) (noting that the government cannot inquire into the truth, validity or reasonableness of religion).

<sup>67</sup> See, e.g., Del. Code Ann. tit. 24, § 1703(e)(4) (2000); Minn. Stat. § 147.09(10) (2000); Mont. Code Ann. § 37-3-103(1)(h) (2000).

<sup>68</sup> See *People ex rel. Sisson v. Sisson*, 2 N.E.2d 660 (1936) (holding “The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.”).

<sup>69</sup> American Academy of Pediatrics: *Circumcision Policy Statement*, 103:3 PEDIATRICS 686 (1999) (reaffirmed by American Academy of Pediatrics on Sept. 1, 2005), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;103/3/686> [hereinafter *Circumcision Policy Statement*].

medical benefit to circumcision was produced in 1989.<sup>70</sup> Since then, a number of studies have shown “an increased risk of UTI in uncircumcised males, with the greatest risk being in infants younger than one year of age.”<sup>71</sup> It is believed that uncircumcised male infants are three to seven times more likely to develop a UTI than circumcised male infants.<sup>72</sup> While each of these studies showed a lower rate of UTIs for circumcised infants, there were some difficulties in coming up with a definitive medical opinion because of “differences in methodology, samples of infants studied, determination of circumcision status, method of urine collection, UTI definition, and assessment of confounding variables. Furthermore, in some studies, methods for determining the reliability of the data were not described.”<sup>73</sup> The studies have also traditionally failed to take into account other variables, such as breastfeeding<sup>74</sup> and method of urine collections.<sup>75</sup> Nonetheless, the AAP does believe that there could be a biologically plausible explanation for the correlation between circumcision and UTIs. An uncircumcised penis has increased periurethral bacterial colonization, which may be a risk factor for UTIs.<sup>76</sup> If a child does have a UTI, the treatment can include an invasive procedure and hospitalization.<sup>77</sup> However, determining the morbidity and mortality related to these procedures is difficult because much of the data includes high-risk neonates and those with congenital anomalies.<sup>78</sup> While the exact benefits may be difficult to determine, it does appear that circumcised children have a decreased risk of contracting a UTI.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 689.

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

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

<sup>74</sup> *Circumcision Policy Statement, supra* note 69, at 689 (Data shows breastfeeding has a threefold protective effect on the incidence of UTIs in a sample of uncircumcised infants. However, breastfeeding status has not been evaluated systematically in studies assessing UTI and circumcision status.).

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

<sup>76</sup> *Id.* at 690.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



## 2. Decreased Risk for Sexually Transmitted Diseases

The studies and data collected by the AAP, regarding the effect of circumcisions on sexually transmitted diseases, are “complex and conflicting.”<sup>79</sup> There are studies that do suggest circumcised males may be at a decreased risk for syphilis compared to uncircumcised males.<sup>80</sup> There are also studies that show a link between non-circumcised penises and an increase in HIV infection.<sup>81</sup> But, the AAP also points to potential biological explanations for the correlations: “the mucous surface of the uncircumcised penis allows for viral attachment to lymphoid cells at or near the surface of the mucous membrane, as well as an increased likelihood of minor abrasions resulting in increased HIV access to target tissues.”<sup>82</sup> Ultimately, the AAP has seen that behavioral factors are probably more important than circumcision status when determining contributing causes to contracting HIV.<sup>83</sup>

While the AAP has had problems determining the effect of circumcisions on sexually transmitted disease in the United States, other studies that have shown a connection between circumcisions and a decreasing rate of HIV and other sexually transmitted diseases. The studies, which sampled different populations in Africa, concluded that circumcising a male child reduced the risk of HIV by 51-60%, genital herpes by 28-34%, and high-risk human papillomavirus (“HR-HPV”) by 32-35%.<sup>84</sup> The studies also showed that there were no significant differences in male sexual satisfaction or dysfunction among those circumcised and those not.<sup>85</sup> Additionally, “97% of female partners reported either no change, or improved sexual satisfac-

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<sup>79</sup> *Circumcision Policy Statement*, *supra* note 69, at 691.

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

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Aaron A.R. Tobian & Ronald H. Gray, *The Medical Benefits of Male Circumcision*, 306:13 THE J. OF THE AM. MED. ASS’N 1479 (2011).

<sup>85</sup> *Id.* at 1480.

tion, after their male partner was circumcised.”<sup>86</sup> Females who had sexual relationships with circumcised males were seen to have the risk of HR-HPV “reduced by 28%, the risk of bacterial vaginosis was reduced by 40%, and the risk of trichomoniasis reduced by 48%.”<sup>87</sup>

The different conclusions derived from the studies could be attributed to the differences that exist between the populations in the United States compared to the ones in Africa. The overall rate of HIV in the United States is much lower than these African regions.<sup>88</sup> Also, the main mode of HIV transmission in Africa is penile-vaginal sex, compared to penile-anal in the United States.<sup>89</sup> That is not to say the results should be ignored in the United States, but simply that the different factors should be taken into consideration when relying on such results.

### 3. Decreased Risk for Invasive Penile Cancer

The study by Dr. Schoen shows the risk for invasive penile cancer (“IPC”) is 22:1 for uncircumcised to circumcised men.<sup>90</sup> In fact, Dr. Schoen concluded that if all men were circumcised, there would be seventy fewer cases of IPC annually.<sup>91</sup> Alternatively, if all men were uncircumcised, there would be an increase of 2,800 cases of IPC annually.<sup>92</sup> IPC is a serious and lethal disease with a five-year survival rate at 65%.<sup>93</sup> The study also showed that “circumcisions performed during the neonatal pe-

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1479.

<sup>88</sup> CDC HIV/AIDS Science Facts: Male Circumcision and Risk for HIV Transmission and Other Health Conditions: Implications for the United States, CENTER FOR DISEASE CONTROL AND PREVENTION, available at <http://stopcircban.com/downloads/CDCFactSheetCircumcision2008.pdf>.

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

<sup>90</sup> Edgar J. Schoen, et al. *The Highly Protective Effect of Newborn Circumcision Against Invasive Penile Cancer*, 105:3 PEDIATRICS 1, 3, available at <http://pediatrics.aappublications.org/content/105/3/e36.full.pdf+html> [hereinafter *Newborn Circumcision*].

<sup>91</sup> *Id.*

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

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

riod (*but not later in life*) [emphasis added] gave almost total protection against invasive squamous cell penile carcinoma. . . . [T]he presence of foreskin, particularly when phimotic, exposes the preputial cavity to many carcinogenic factors and . . . even high standards of hygiene do not fully protect uncircumcised men.”<sup>94</sup> The study also looked at rates of IPC in various countries with different takes on circumcision and proper hygiene:

**COMPARISON OF INVASIVE PENILE CANCER INCIDENCE  
IN FOUR COUNTRIES<sup>95</sup>**

Country	No. Cases per 100,000 males
Israel	.1
Denmark	1.0
Paraguay	4.2
United States	.6

The study chose these countries because of their differences in circumcision rates and hygiene standards. In Israel, circumcision is done almost universally.<sup>96</sup> In Denmark, circumcisions are not normally performed, but hygiene is good.<sup>97</sup> In Paraguay, circumcisions are not performed and poor hygiene is more common.<sup>98</sup> According to the study, “the similar incidence of penile cancer in the United States and Denmark is misleading because in the United States, the rate of circumcision is high and penile cancer is essentially limited to uncircumcised American men, whose hygiene is apparently worse than in Danish men.”<sup>99</sup> The study concluded that the long term protections against IPC should be part of the decision on whether to circumcise a child.<sup>100</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Newborn Circumcision*, *supra* note 90, at 3.

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

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

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 4.

## ***B. The Harm of a Voluntary Surgical Procedure***

Proponents of banning circumcision believe that children's genitals should not be voluntarily mutilated. Most of these advocates do not have any problem with parents making decisions concerning their children's schooling, behavior modification, diet, etc. The problem arises when these activists believe that there are children whose safety is being put in danger. When a child's safety is put in danger, the State has a compelling interest in protecting the child.<sup>101</sup> Thus, due to the voluntary nature of a circumcision surgery, these advocates believe children should not have to undergo the procedure, unless they consent after turning eighteen.

### **1. Surgical Complications**

There are many complications that can arise during the surgical process. The most common problem that arises during a circumcision surgery is bleeding.<sup>102</sup> While there are clamps that can be used to stop the bleeding, an infant's body only contains eighty-five milliliters per kilogram of blood and, therefore, even a small amount of blood loss can cause damage.<sup>103</sup> Another concern from any surgery is the chance that the infant could contract an infection. These infections can range from trivial problems to life-threatening issues.<sup>104</sup> They can be the direct result of the surgery or they can be caused by the plethora of bacteria present in a hospital during the child's stay.<sup>105</sup> Along with the threat of infections, any surgery is susceptible to surgical errors. These errors can result in injuries to the urethra or penis

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<sup>101</sup> See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>102</sup> *Genital Integrity Policy Statement*, DOCTORS OPPOSING CIRCUMCISION, at 19 (2008), <http://www.doctorsopposingcircumcision.org/pdf/GenitalIntegrityStatement.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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

shaft.<sup>106</sup> Any and all of the issues mentioned above can always, in their worst-imaginable cases, result in death.<sup>107</sup>

There are hundreds of stories concerning botched circumcisions.<sup>108</sup> For instance, in New York, a Federal judge awarded \$10.8 million to a boy whose glans penis was amputated by a circumcision clamp.<sup>109</sup> During a 2004 circumcision in Connecticut, a child's penis was partially amputated, which caused traumatic injury.<sup>110</sup> An incident in California occurred when an infant's penis was allegedly disfigured for life when the pediatrician/*mohel* accidentally cut the tip off the child's penis.<sup>111</sup>

In the United States, approximately 117 neonatal circumcision-related deaths occur annually, which accounts for 1.3% of all male neonatal death causes.<sup>112</sup> A May 2011 incident shows just how serious the dangers can be. A two-year-old boy was taken to a Manhattan hospital for his circumcision.<sup>113</sup> He was given general anesthesia and woke up after the procedure.<sup>114</sup> The child asked to eat and drink, but then started complaining of stomach pain.<sup>115</sup> After four hours the child was rushed into surgery, but he did not survive.<sup>116</sup> An initial autopsy was inconclusive and the child's remains were scheduled to undergo fur-

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<sup>106</sup> *Id.* at 20.

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

<sup>108</sup> See, e.g., NOCIRC Annual Newsletter (2011), NAT'L ORG. OF CIRCUMCISION INFO. RES. CTR., <http://www.nocirc.org/publish/2011newsletter-web.pdf>; Circumcision Deaths, CIRCUMCISION INFORMATION AND RESOURCE PAGES, (Dec. 3, 2011), <http://www.cirp.org/library/death/>.

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Id.* at 4.

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

<sup>112</sup> *Id.* at 5.

<sup>113</sup> Katie Moisse, *Brooklyn Toddler Dies After Circumcision*, ABC NEWS, May 6, 2011, <http://abcnews.go.com/Health/Wellness/brooklyn-toddler-dies-circumcision/story?id=13544632#.Tr8TgUOa85A>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

ther testing.<sup>117</sup> While this situation and the few described above are not normal, similar incidents certainly occur every year.

Studies have also shown that the circumcision surgery is in fact a traumatic and painful experience for newborns.<sup>118</sup> These studies also show that the procedure can interfere with the child's proper bonding and nursing relationship with the mother, as well as cause a long-term heightened pain response.<sup>119</sup> The circumcision can also reduce the sensitivity of the penis by removing approximately 80% of the penile skin-covering when the penis is erect.<sup>120</sup>

## 2. *Allowing Children to Give Their Own Consent*

Courts in the United States have a long history of determining standards for minors who participate in voluntary surgical procedures.<sup>121</sup> But, when it comes to circumcisions, the courts do not appear to use the same standard. In *Planned Parenthood v. Danforth*, the United States Supreme Court overturned restrictions on a minor's right to consent to abortion.<sup>122</sup> Specifically, the Court noted that constitutional rights do not "magically" appear when a child reaches a certain maturity.<sup>123</sup> While the Court did concede that the State has broader authority to regulate the activities of children than those of adults, the Court made it clear that children do have rights.<sup>124</sup> Yet, with circumcision, the Court does not require that children grow up before making their own decisions. Rather, it allows parents to make the deci-

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<sup>117</sup> Paul DeBenedetto, *Queens Toddler Dies After Routine Circumcision*, NBC NEW YORK, May 9, 2011, <http://www.nbcnewyork.com/news/local/Cause-of-Death-for-Queens-Toddler-Could-Take-Weeks-121348784.html>.

<sup>118</sup> Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87, 97 (1998-99).

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

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

<sup>121</sup> *See id.* at 101-12.

<sup>122</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>123</sup> Povenmire, *supra* note 118, at 101.

<sup>124</sup> *Id.*

sion for their child. The Court appears to treat the decision to circumcise a child the same way they do decisions regarding a child's education and religion,<sup>125</sup> even though circumcision is a much more permanent decision.

There is a history of the state prohibiting medical intervention over parental discretion, but these cases tend to revolve around sterilization.<sup>126</sup> In these cases, the Court has made sure to safeguard the health of the minor, as well as the interest in preserving the bodily integrity of the minor.<sup>127</sup> Although the Court's power is strong in these sterilization cases, parents have been able to argue that the procedure is "either necessary, or at least in the minor's best interest."<sup>128</sup> The difference between sterilization and circumcision is that there are few arguments on why sterilization could be in the child's best interest.<sup>129</sup> Judging from the arguments made above, it is apparent the argument over whether circumcision is in the child's best interest remains hotly contested.

### *C. Differentiating Male and Female Circumcisions*

Another argument used by activists against circumcising youth males is the similarity of the practice to female circumcision. In the United States, female circumcisions (also commonly referred to as female genital mutilation) are banned under 18 U.S.C. § 116.<sup>130</sup> A key section of the Code explicitly states that female circumcisions cannot be performed under the auspices of

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<sup>125</sup> *Id.* at 103.

<sup>126</sup> *Id.* at 107.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> For a discussion of youth sterilization, see Comm. on Bioethics, Am. Acad. of Pediatrics: *Sterilization of Minors with Developmental Disabilities*, 104:2 PEDIATRICS 337-340 (1999), available at <http://pediatrics.aappublications.org/content/104/2/337.full.pdf+html>. The discussion is much different for male adults who may choose sterilization in the form a vasectomy. See also David Zieve, *Vasectomy*, MEDLINE PLUS (Mar. 22, 2010), <http://www.nlm.nih.gov/medlineplus/ency/article/002995.htm>.

<sup>130</sup> 18 U.S.C. § 116 (2011).

a “custom or ritual.”<sup>131</sup> To understand why such measures have been taken to outlaw female circumcisions at the federal level, it is important to understand the differences in both procedures and their effects.

The practice of female genital mutilation has been widely recognized as a violation of human rights.<sup>132</sup> The mutilation generally ranges from removal of the clitoris to the full excision of the external genitalia.<sup>133</sup> Currently there are no known health benefits to the process.<sup>134</sup> In many cultures, the process is done mainly to “deprive women of sexual pleasure, and it invariably causes painful health consequences, such as severe bleeding, urinary retention, genital scarring and discomfort, and complications in childbirth possibly leading to the death of the child.”<sup>135</sup> This is comparable to male circumcisions, which have documented, although disputed, health benefits. According to Joel Paul, Associate Dean of the University of California-Hastings College of Law: “From a constitutional perspective, male circumcision is not comparable to female genital mutilation. Male circumcision is both medically safe and promotes public health. By contrast, female genital mutilation puts women at high risk for disease, disability and death.”<sup>136</sup>

It is clear the procedures are very different. The one similarity they share is the potential complications that occur during or after the surgery. In those instances, the end result (i.e., infections, death, etc.) for the two procedures can look similar. But, barring complications during the surgery, the actual purpose of the surgeries and the intended outcomes could not be more different.

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<sup>131</sup> *Id.* at § 116(c). *But see id.* at § 116(b) (female circumcision is sometimes allowed, but only for medical purposes).

<sup>132</sup> *Female Genital Mutilation: Fact Sheet, No. 241*, WORLD HEALTH ORG. (Feb. 2012), <http://www.who.int/mediacentre/factsheets/fs241/en/>.

<sup>133</sup> *Id.*

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

<sup>135</sup> Anti-Defamation League, *The Proposed San Francisco Circumcision Ban*, ADL.ORG, [http://www.adl.org/religious\\_freedom/circumcision-qa.asp](http://www.adl.org/religious_freedom/circumcision-qa.asp) (last visited Mar. 12, 2012).

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



## VI. CIRCUMCISE WHEN YOUNG TO PROTECT WHEN OLDER

Banning circumcisions for children would certainly cut down on the number of circumcisions performed nationwide, but there is no reason to believe the ban would stop all circumcisions from occurring. Members of the Jewish and Islamic faith would likely still have the circumcision surgery performed but instead wait until the male turns eighteen years old. If the surgery occurs at a later age, the procedure can likely be performed with local or regional anesthetics.<sup>137</sup> However, the rate of complication for adult circumcisions is 1.5% to 3.8%, whereas the rate for neonatal male circumcisions is between 0.2% and 0.6%.<sup>138</sup> Therefore, the risk of complication would substantially increase for those who choose to abide by their religious requirements.

Having the procedure done on youths can also potentially provide additional medical benefits later in life. Approximately 50% of high school students report having sex before they turn eighteen; circumcision in infancy provides benefits such as prevention of urinary tract infections, meatitis, balanitis, and phimosis, and viral sexually transmitted diseases.<sup>139</sup>

## VII. HOW SLIPPERY IS THE SLOPE?

One of the reasons presented to ban youth circumcisions is that the surgical procedure is optional and done without the consent of the minor. The child could then suffer consequences from a procedure to which he did not consent and possibly never would have. Yet this argument ignores the many optional procedures children across the nation are subjected to daily. If circumcisions were banned due to the possibility of injury, then should ear piercing also be banned? Should various prevent-

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<sup>137</sup> John R. Holman & Keith A. Stuessi, *Adult Circumcision*, 15:59(6) AM. FAM. PHYSICIAN 1514, 1514 (1999), available at <http://www.aafp.org/afp/1999/0315/p1514.html>.

<sup>138</sup> Tobian, *supra* note 84, at 1480.

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

ative shots children receive each year be banned? Should society and the government prevent parents to make any decisions that could result in possible, unintended harm to children?

When activists speak of a child's safety, it is difficult to see how piercing a child's ear is any different than circumcising a young male. Approximately 20% of ear piercings result in minor complications, such as bleeding, infections, mechanical tissue tearing, and contact allergies.<sup>140</sup> Other complications can include endocarditis, sepsis, and viral infections, such as hepatitis and HIV.<sup>141</sup> Merely putting jewelry into a person's ear can result in complications like hematoma, granuloma, hypertrophied or keloid scars, traumatic earlobe tearing, or the earring becoming embedded.<sup>142</sup> It is believed that 3% of those who receive a piercing suffer from major complications.<sup>143</sup> Currently, there is no age requirement for piercing a child's ear, with some parents electing to pierce their child's ears in the first few months of the child's life.

To fully illustrate the problems that ear piercing can cause for a child, one study presents a story from 2008 of a seven-year-old with complications.<sup>144</sup> Six weeks after having her ears pierced in a beauty parlor, she suffered from inflammatory lesions caused by the presence of a foreign object in both of her earlobes.<sup>145</sup> To prevent losing her earrings, her mother strongly pressed the fixing clips into the child's earlobes.<sup>146</sup> A week later, the child was suffering from inflammation, reddening, and edema from both ears.<sup>147</sup> Also, the child could not find the hind parts of the earring.<sup>148</sup> When the mother looked at her daughter's ear, she

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<sup>140</sup> Marta Fijalkowska, et al., *Should we say NO to body piercing in children? Complications after ear piercing in children*, 50 INT'L J. OF DERMATOLOGY 467, 467 (2011) [hereinafter *Body Piercing in Children*].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Body Piercing in Children*, *supra* note 140, at 467.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 467–68.

<sup>148</sup> *Id.*

could feel foreign objects in the earlobes.<sup>149</sup> The child needed to undergo surgery under general anesthetics.<sup>150</sup> While the child did survive, she was subjected to pain, surgery, and all of the medical complications that can arise from being under general anesthetics.

This is hardly the only reported case where a child suffered complications from an ear piercing. What should be understood is that complications can arise from any medical or quasi-medical procedure. Children often have allergic reactions to preventive medical shots,<sup>151</sup> which is something that could be prevented by banning these *preventative* shots. If someone were to ban circumcisions, then there is no plausible reason not to do the same with ear piercing or preventive medical shots.

## VII. CONCLUSION

The question presented here goes far beyond Tevye's yearning to maintain tradition. While it is true that male circumcisions are considered the oldest form of surgery, that alone does not mean they should automatically be performed on every child. Society should be skeptical of things they are told and be free to ask questions. But, there is a difference between being skeptical and determining that a practice should be banned for every person in a country.

The practice of circumcising male children clearly plays an important role in the Jewish and Islamic faiths. To ban the procedure all-together would inevitably ignore the importance of the ritual to these faiths. Though the law is clear in its intention to protect children, if this issue were to ever reach a courtroom, the law would need to be examined in terms of what would be in the best interest of the child.

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<sup>149</sup> *Id.* at 468.

<sup>150</sup> *Id.*

<sup>151</sup> *Possible Side Effects of Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/side-effects.htm> (last visited Mar. 23, 2012).

When turning to the best interest of a child, the medical world cannot give a definitive answer on whether circumcision is a beneficial procedure that should be recommended for all children.<sup>152</sup> According to the AAP, circumcisions can provide health benefits for children in terms of reduced risk of UTIs, reduced likelihood of contracting a sexually transmitted disease, and reduced risk for invasive penile cancer.<sup>153</sup> While the AAP does see the benefit of circumcisions, they have also been unable to recommend the procedure for all newborn males.<sup>154</sup> The AAP instead believes that parents should make informed decisions after they discuss the possible risks and benefits with their doctors.<sup>155</sup> While the AAP has not formally endorsed circumcisions for all newborn males, some believe this is merely because the AAP has “jurisdictional issues” in seeing all the benefits that circumcision can provide.<sup>156</sup> According to Dr. Edgar Schoen, the AAP may be reluctant to consider all the benefits accruing in adulthood and old age and, therefore, underestimate the benefits of circumcising newborn males.<sup>157</sup> While the support for circumcising male children is strong, there are also equally valid arguments against circumcisions.

Circumcision is an elective surgery to which children cannot consent. Any time a child undergoes surgery there are going to be associated risks. The story of the two-year-old in New York that died after a circumcision is a prime example of why advocates do not want children undergoing these voluntary procedures.<sup>158</sup> These advocates clearly believe that a voluntary, irreversible surgery with the potential for injury to the child cannot also be in the best interest of a child.

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<sup>152</sup> See generally *Circumcision Policy Statement*, *supra* note 69.

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

<sup>154</sup> *Id.* at 691.

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

<sup>156</sup> Schoen, *supra* note 90, at 1 (explaining that the specialty groups may be reluctant to recognize benefits in old age and therefore underestimate the benefit of the procedure to a newborn).

<sup>157</sup> *Id.*

<sup>158</sup> See *supra* notes 113–116 and accompanying text.

With all of the competing medical arguments, the courts may have difficulty determining the best interest of children. In addition, there are other issues that should be taken into consideration. Banning circumcisions is problematic because it sets a precedent for all other voluntary procedures to which youths are subjected. It is difficult to distinguish the effects of piercing a child's ear and circumcising a male child. From the perspective of the child's interests, the chances for complications are similar. The story of the seven-year-old child who underwent surgery due to an ear piercing is an example of the complications that can arise from this seemingly routine practice.

While the debate in California is less likely to gain traction after Governor Brown's passage of SB 768, there is no reason to believe the national debate is ending any time soon. There are always going to be people like Dr. Aaron Tobian and Ronald Gray who believe that: "Based on the medical evidence, banning infant male circumcision would deprive parents of the right to act on behalf of the children's health."<sup>159</sup> There will also be activists like Matthew Hess who believe male genitalia should be protected from destruction in the same way that female genitalia is already protected.<sup>160</sup> Therefore, the courts must be ready to determine what is in the best interest of children.

Where does the right of a parent to make decisions about their child's life fall into the picture, not to mention the possible avalanche of decisions that parents could be deprived of if circumcisions were banned? Tevye made sure to let everyone in town know the importance of tradition.<sup>161</sup> It is clear that circumcisions are predicated on tradition, but modern uses appear to be showing possible signs of health benefits for the traditional

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<sup>159</sup> Tobian, *supra* note 84, at 1480.

<sup>160</sup> MGM Bill About Us, *supra* note 57.

<sup>161</sup> See generally *Prologue: Tradition by Fiddler on the Roof*, LYRICS MUSE, (last updated July 28, 2009).

procedure. Ultimately, the courts will be left to determine the procedure's true worthiness.

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