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The Legal and Medical Ethical Entanglements of Infant Male Circumcision and International Law

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Abstract

The practice of infant male circumcision has been debated by legal and medical experts for years. The practice, once seen as a social norm, has come under opposition by children's rights, legal, and medical organisations around the world. In order to meet the requirements of international treaty law and allow infant male children the fullest opportunity for self determination, infant male circumcision must be treated under the law and by medical practitioners with the same degree of opposition that female genital mutilation has received.

1. Introduction

The debate over the ethical ramifications involved with the circumcision of infant males has been ongoing for decades and has been passionately argued by legal and medical experts on both sides of the issue.[1] The arguments against and in favour of the practice of infant circumcision for both genders have shifted over the years to reflect the internationally evolving views on the balance of decision making powers, the practice of circumcision itself, and the right of a child to physical integrity and self determination.[2] This article examines the changes in legal and medical ethical shifts involved in the circumcision debate and how such changes could impact the debate's conclusion.

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1 S. Beasley, 'Circumcision: Certain Controversy Over Uncertain Origins', *The New Zealand Medical Journal* 118 (2005), 8.

2 L. Sardi, 'The Male Neonatal Circumcision Debate: Social Movements, Sexual Citizenship, and Human Rights', *Societies Without Borders* 6:3 (2011), 304-329.

1.1. Decision Making Power in the Parent-Child Relationship

1.1.1. Historical Treatment of the Relationship between Parents and Children

Under Roman law, men were considered to be the masters of their wives and children.[3] Until a child reached the age of majority, the child was considered part of their father's property.[4] Due to their legal classification, children of the period had little protection from maltreatment or neglect.[5] A father could sell or kill his child without criminal or civil repercussions.[6] Legal authorities were reluctant to intrude on decisions made by men with regard to their household's property, even when a child's wellbeing was at stake.[7] Men's choices concerning the household were seen as being outside the reach of the courts which were construed to regulate public conduct alone.[8]

Children did not gain widespread legal protection from maltreatment until the early nineteenth century.[9] Through the efforts of anti-cruelty groups and children's protection movements such as the House of Refuge, laws were passed to shield children from societal exploitation and abusive guardians.[10] Over time, governmental intervention on behalf of children became commonplace and the traditional divide between the public and private spheres of conduct weakened so that regulation of private matters by governmental agents was more widely accepted.[11]

1.1.2. Contemporary Approaches to the Relationship between Parents and Children

The transition in children's status under the law from being considered property controlled exclusively by their parents to being regarded

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3 R. Saller, 'Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household', *Classical Philology* 94:2 (1999), 184.

4 S. Dixon, 'Infirma Sexus: Womanly Weakness in Roman Law', *Tijdschrift voor Rechtsgeschiedenis* 52 (1984), 345-346.

5 M. Thomas, 'Child Abuse and Neglect Part 1: Historical Overview, Legal Matrix, and Social Perspectives', *North Carolina Law Review* 50 (1972), 293-294.

6 B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 294-299.

7 B. Woodhouse, '"Who Owns the Child?": Meyer and Pierce and the Child as Property', *William and Mary Law Review* 33:4 (1992), 995.

8 B. Frier & T. McGinn, *A Casebook on Roman Family Law* (New York: Oxford University Press, 2004), 4-5.

9 S. Pfohl, 'The "Discovery" of Child Abuse', *Social Problems* 24:3 (1977), 311-314.

10 *Ibid.* at 312-315.

11 R. van Krieken, 'Social Theory and Child Welfare: Beyond Social Control', *Theory and Society* 15:3 (1986), 421-424.

as a class that requires specialised legal protection is still ongoing.[12] Children are now seen as individuals who have rights and voices of their own, even before they reach the age of majority.[13] While being seen as individuals has provided children with more self-determination, it has raised the question as to where the rights of the child start and the rights of parents end.[14]

A recent trend in the law is to approach the relationship between parents and their children as being a form of fiduciary relationship.[15] The concept of children being held in trust by their guardians has its origins in Roman law, under which children were treated as part of a man's estate and were held in trust, along with the *corpus* of the estate, until the children reached maturity and could legally manage their fathers' estates.[16] By using the fiduciary approach to the parent-child relationship, courts can address a child's wellbeing by affording them remedies in law that would otherwise be barred to them, such as tort damages for sexual assault by family members, allowing courts to consider a child's wishes in the decision making process for matters such as where they live, their education, and their medical treatment.[17] While the fiduciary approach to the child and parent relationship can allow a child more input into the decision making process, its focus on the rights of the parties involved in the process can cause parents to act in their own interests rather than what is the best for their child.[18] Bartlett argues, regardless of the approach chosen, that courts should promote relationships and schemes that emphasise benevolence and responsibility rather than focus on which party holds more power in the relationship.[19]

2. Decision Making Powers and Medical Treatment

2.1. Contemporary Views on Children's Decision Making Rights

McFall writes that along with parental rights come duties to ensure that a child has an upbringing that does not violate their basic rights or

12 S. Heart, 'From Property to Person Status historical Perspective on Children's' Rights', *American Psychologist* 46:1 (1991), 53-55.
13 *Ibid*.
14 See note 6 at 1051-1052.
15 M. Bryan, 'Parents as Fiduciaries: A Special Place in Equity', *International Journal of Children's Rights* 3 (1995), 227.
16 J. Eckelaar, 'The Emergence of Children's Rights', *Oxford Journal of Legal Studies* 6:2 (1986), 163.
17 See note 15 at 229-230.
18 E. Scott & R. Scott, 'Parents as Fiduciaries', *Virginia Law Review* 81 (1995), 2413.
19 K. Bartlett, 'Re-Expressing Parenthood', *The Yale Law Journal* 98:2 (1998), 294.

do them psychological harm.[20] It is necessary for parents to make decisions as to the upbringing of a child; however, those choices should take into consideration the child's autonomy and wishes.[21] In order to help protect children and allow a voice in determining their futures a series of international agreements were passed that culminated in the United Nation's Convention on the Rights of the Child being passed in 1989.[22] The majority of the countries that are members of the United Nations have ratified the Convention, with the United States[23] and South Sudan being the only members that have not.[24]

The Convention was written to protect the rights of children while respecting the customs and traditions of a variety of cultures.[25] The inclusion of respecting cultural norms in the Convention has caused international legal conflicts due to nations interpreting the Convention in accordance with their own cultural viewpoints and allowing acts that are seen by other nations as impermissible.[26] While the balance between protecting children and acknowledging cultural practices under the Convention has not been perfected, the various disagreements have allowed United Nations members to examine a number of issues through a cross-cultural perspective that would otherwise might not have been possible.[27] Among the issues that have been debated is when children should be allowed to make decisions on their own.[28] The international trend has been for life altering decisions in a child's life to be made after a constructive conversation between the child and the child's parents so that the child's views can be taken into consideration.[29] Under Article 12 of the Convention, children have the right to have their views heard in decisions that will impact their lives.[30]

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20 M. McFall, *Licensing Parents: Family, State, and Child Maltreatment* (Lanham: Lexington Books, 2009), 141.

21 T. Buck, *International Child Law*, 2nd ed. (New York: Routledge, 2011), 33.

22 A. Wright & K. Jaffe, *Six Steps to Successful Child Advocacy Changing the World for Children* (Los Angeles: Sage Publications, 2014), 6.

23 United Nations, 'United Nations Treaty Collection Convention on the Rights of the Child', https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, 16 April 2015.

24 United Nations International Children's Emergency Fund, 'South Sudan National Legislative Assembly passes the bill for Ratification of UN Convention on the Rights of the Child', www.unicef.org/southsudan/media_ratification-CRC.html, 20 November 2013.

25 See note 22 at 7.

26 See note 21 at 40.

27 *Ibid*. at 41-42.

28 UN Committee on the Rights of the Child, General Comment No. 12 (2009) *The Right of the Child to be Heard* (New York: United Nations Publications, 2009), 5.

29 *Ibid*. at 5-6.

30 United Nations Convention on the Rights of the Child (New York: United Nations Publications, 1989), Article 12.

2.2. Ethical Considerations in Medical decision Making

Parents have the authority to cause a child to undergo medical treatment; however that authority is not absolute.[31] Medical and legal guidelines require that a patient's consent be given before any treatment is performed.[32] For a patient's consent to be valid it must be given willingly, be free of coercion, the patient must be competent, and the consent must be given after the patient has been provided all the information that they need to make the decision.[33]

Medical decision making can be a complex and confusing process.[34] While children were considered incapable of making informed medical decisions in the past,[35] studies have found that children can be as competent as adults in making health care choices.[36] The use of strict age ranges to determine whether a child is capable of making an informed medical decision has been discouraged due to the wide variation in children's cognitive abilities.[37] Medical professionals are tasked with helping parents and children make medical decisions by discussing treatment options with both the parents and children involved.[38] Medical professionals must determine whether a child is capable of giving consent to medical treatment by testing whether a child understands the information that they have been given, believe that the information applies to their condition, can use the information to make a choice based on their own thoughts, and are able to communicate that choice.[39] If a medical treatment is not essential to a child's wellbeing or can be deferred without undue risk, the wishes of the child should be given considerable weight by those who are facilitating the treatment.[40]

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31 N. Manson, 'Transitional Paternalism: How Shared Normative Powers Give Rise to the Asymmetry of Adolescent Consent and Refusal', *Bioethics* 29:2 (2015), 69-71.

32 L. King, 'Parental Refusal of Consent for their Child's Medical Treatment: An Ethical, Professional and Legal Dilemma', *British Journal Anesthetic and Recovery Nursing* 14:1-2 (2013), 11-16.

33 E. Wicks, *Human Rights and Healthcare* (Portland: Hart Publishing, 2007), 71.

34 B. Taylor, 'Parental Autonomy and Consent to Treatment', *Journal of Advanced Nursing* 29:3 (1999), 572-575.

35 S. Campbell & L. Weithorn, 'The Competency of Children and Adolescents to Make Informed Treatment Decisions', *Child Development* 53:6 (1982), 1589.

36 M. McCabe, 'Involving Children and Adolescents in Medical Decision Making: Developmental and Clinical Considerations', *Journal of Pediatric Psychology* 21:4 (1996), 507-508.

37 See note 35 at 1596.

38 C. Cummings & M. Mercurio, 'Autonomy, Beneficence, and Rights', *Pediatrics in Review* 31:6 (2010), 253-254.

39 M. Levy, V. Larcher & R. Kurz, 'Informed Consent/Assent in Children Statement of the Ethic Working Group of the Confederation of European Specailists in Paediatrics (CESP)', *European Journal of Pediatrics* 162:9 (2003), 631.

40 Committee on Bioethics, 'Informed Consent, Parental Permission, and Assent in Pediatric Practice', *Pediatrics* 95 (1995), 316.

2.3. Court Involvement in Medical Decision Making

If there is a dispute between parents, children, and medical professionals as to treatment options, the courts can be called on to review the situation and determine what cause of action would be in the best interests of the child.[41] The best interests standard requires that decisions as to medical treatments maximise the net benefits, minimise aggregate harms, and take into account the rights of the parties involved.[42] If a court feels that intervention regarding medical treatment is needed, it can give legal or physical custody of a child to a state agency, particularly in situations involving life sustaining treatment, so that the proper course of action can be taken.[43] Even when potentially life or death determinations are not at issue, courts and other state actors have stepped in to resolve disputes concerning medical treatment of children.[44] Under the law, when examining disputes over non-therapeutic procedures, state actors have the duty to protect children from unnecessary and potentially dangerous surgery.[45]

3. Cases that Examine a Child's Decision Making Rights with Regard to Infant Circumcision

3.1. The Cologne Case

In 2012, a holding by the Higher Regional Court of Cologne added vigour to the circumcision debate.[46] The Cologne case stemmed from the circumcision of a four year old child who was admitted to hospital two days later for emergency care due to excessive bleeding from the surgery site.[47] The local prosecutor brought charges against the physician who performed the circumcision under section 224(1) of the German Criminal Code which prohibits, 'causing bodily harm to another using a dangerous instrument'.[48] The *Amts-*

41 B. Dimond, 'Legal Aspects of Consent 9: When Parents are Overruled', *British Journal of Nursing* 10:13 (2001), 880-881.
42 L. Kopelman, 'The Best-Interests Standard as Threshold, Ideal, and Standard of Reasonableness', *Journal of Medicine and Philosophy* 22:3 (1997), 287.
43 E. Sher, 'Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State', *New York University Law Review* 58 (1983), 156-206.
44 F. Edwin & R. Ladd, 'Making Decisions – Whose Choice?', in: *Children's Rights Re-Visioned*, ed. R. Ladd (Belmont: Wadsworth Publishing, 1996), 175-183.
45 D. Diaz, 'Minors and Cosmetic Surgery: An Argument for State Intervention', *DePaul Journal of Health Care Law* 14:2 (2012), 235.
46 K. Dyer, 'Lessons from Germany: Should UK Legislation Circumnavigate or Circumvent the Issue of Male Circumcision?', *Denning Law Journal*, 25 (2013), 233.
47 Landgericht Köln, 151 Ns 169/11, paragraph 4.
48 *Ibid*. at paragraph 3.

gericht Cologne ruled that the physician was not criminally liable for performing the circumcision as a physician using a scalpel to perform a medically accepted procedure did not constitute a criminal act.[49] The *Amtsgericht* Cologne held that since the child's parents had consented to the procedure and that the practice of infant circumcision was allowed under German law as part of a parent's right to religious freedom the physician had not violated the German Criminal Code when he performed the procedure.[50] The *Amtsgericht* Cologne further held that the physician's actions were permissible since the circumcision would provide health benefits for the child.[51]

The prosecutor appealed the matter to the *Landgericht* Cologne.[52] The *Landgericht* Cologne overturned the *Amtsgericht* Cologne's holding and ruled that the physician had committed a criminal act when he circumcised the child, but that he would be acquitted of the charges due to his acting under an unavoidable mistake of law.[53] The *Landgericht* Cologne held that the circumcision of the child expressly violated section 223(1) of the German Criminal Code, was not a protected act under the parents' right to free religious practice, and the parents' consent to the procedure could not be substituted for the informed consent of the child.[54] The *Landgericht* Cologne further held that the circumcision of the child before he was of age to make the determination of whether he would follow Islamic practices or not violated the child's right to make his own religious determinations.[55] The *Landgericht* Cologne stated that the *Amtsgericht* Cologne's finding that the circumcision of the child was a benefit to his health was in error and that there was a lack of convincing evidence that infant male circumcision has a positive medical impact on a child.

Jewish and Muslim groups decried the decision on the grounds that circumcision is a vital part of their religious practice and that the Cologne decision infringed on their right to freely worship.[56] Anti-circumcision activists hailed the decision as a step towards banning infant circumcision[57] and a victory for children's rights advocates.[58] Merkel, the Chancellor of Germany at the time of the decision, said that the legislature would act quickly to rein in the impacts

49 Amtsgericht Köln, 528 Ds 30/11, paragraph 9.
50 *Ibid*. at paragraph 6.
51 *Ibid*. at paragraph 4.
52 Landgericht Köln, 151 Ns 169/11, paragraph 3.
53 *Ibid*. at paragraph 17.
54 *Ibid*. at paragraphs 10-14.
55 *Ibid*. at paragraph 14.
56 B. Hans, 'Parents vs. the State Muslims and Jews Outraged by Circumcision Decision,' *Spiegel Online International*, 27 June 2012, www.spiegel.de/international/germany/religious-communities-debate-court-s-circumcision-ruling-a-841276.html.
57 H. Putzke, 'LG Köln fällt wegweisendes Urteil: Religiöse Beschneidungen von Jungen verboten', *Legal Tribune Online*, 26 June 2012, www.lto.de/persistent/a_id/6472/.
58 M. Stehr, 'Unzumutbare Schmerzen', *Der Spiegel*, 23 July 2012, 124.

of the Cologne decision so that Germany would not be considered 'a laughing stock' by other European nations.[59] The German Parliament passed an amendment to the German Criminal Code that would allow parents to circumcise their children for religious reasons so long as the child was less than six months of age.[60]

3.2. The *Oberlandesgericht* Hamm Ruling

After the Cologne decision and subsequent legislative action, the German courts clarified the law that controlled infant male circumcision with the *Oberlandesgericht* Hamm decision.[61] The *Oberlandesgericht* Hamm case began when a woman of Kenyan descent sought to have her five year old son circumcised so that he would fit in with the rest of his family when they visited Kenya.[62] Upon being informed of the pending procedure, the father of the child sought an injunction to bar the circumcision.[63] The child's mother argued against the injunction, claiming that the circumcision was necessary for the child to be accepted by his Kenyan family and for reasons of hygiene.[64]

The court stated that both of the mother's offered reasons for having her child circumcised did not pass legal scrutiny.[65] The court stated that the child was a German citizen, had lived the majority of his life in Germany, and had been baptised a Protestant so there were no cultural or religious compulsions for the child to be circumcised.[66] The court further stated that health considerations were not relevant in determining whether the circumcision of child was legal under German law.[67] The court stated that due to the level of animosity between the child's parents concerning the divorce, and the decision to have the child circumcised or not, that the child's best interests seemed to have been put aside by the child's parents.[68] In order to prevent the child from suffering unnecessary pain and possible psychological trauma due to the circumcision, the court held that the child would be placed under the guardianship of the

59 G. Jones, 'Circumcision Ban makes Germany "Laughing stock": Merkel', *Reuters*, 16 July 2012, http://in.reuters.com/article/2012/07/17/germany-circumcision-idINDEE86G08X20120717.

60 *Deutscher Bundestag Drucksache* 17/11295 (Berlin: Buch-und Offsetdruckerei H. Heenemann, 5 November 2012), 5.

61 'Cutting Controversy: German Court Sets New Circumcision Rules', *Spiegel Online International*, 27 September 2013, www.spiegel.de/international/germany/new-circumcision-ruling-requires-doctors-to-discuss-procedure-a-924984.html.

62 Oberlandesgericht Hamm, 3 UF 113/13, paragraph 4.

63 *Ibid*. at paragraph 5.

64 *Ibid*. at paragraphs 35-36.

65 *Ibid*. at paragraph 37.

66 *Ibid*.

67 *Ibid*. at paragraph 37.

68 *Ibid*. at paragraph 42.

youth welfare office until he was consulted by medical and psychological professionals about the procedure and his wishes determined.[69]

3.3. *Boldt v. Boldt*

Germany is not the only jurisdiction that has examined whether children should be able to decide whether to undergo a circumcision or not.[70] In the *Boldt* case, the Oregon Supreme Court was asked to determine whether a child would be compelled to undergo a circumcision due to his father's religious conversion to Judaism and wish for his son to covert to Judaism after the child's mother filed an injunction to prevent the procedure.[71] The child's mother, who was not the custodial parent of the child at the time, testified that she was not against the child converting to Judaism, but feared for the child's wellbeing if the circumcision was performed poorly.[72] She was also concerned since the child, being nine years old at the time of the injunction, told her that he did not want to be circumcised and feared contravening his father on the matter.[73]

The court held that typically decisions regarding elective surgery for a child were left to the family member who had custody of the child[74] but due to the child's age and the possible impact on his relationships with both his father and mother that he should be consulted by the trial court to determine his wishes regarding the circumcision.[75] The court further held that if the child, then twelve years old, decided to not undergo the circumcision that custody over him should be taken from the father and granted to the mother, if it was determined to be in the best interests of the child.[76]

69 *Ibid*. at paragraphs 40-45.
70 *Boldt v. Boldt*, 176 P.3d 388 (Or. 2008).
71 *Ibid*. at 388-390.
72 *Ibid*. at 390-391.
73 *Ibid*. at 391.
74 *Ibid*. at 393.
75 *Ibid*. at 394.
76 *Ibid*. at 395.

4. Perspective Changes on Children's Rights and Circumcision

4.1. Changes in Views on Circumcision for Females and Males

4.1.1. Female Circumcision

Often using the Convention on the Rights of the Child as a framework, nations, cultures, and religions have debated whether or not to allow the continuation of the practice of female circumcision.[77] The practice of female circumcision has been touted as painful rite that facilitates the 'unmaking and remaking' of girls so that they can fit traditional roles and learn to endure the pains and hardships of life.[78] Numerous reasons have been offered for the continuation of female circumcision ranging from the practice being a cultural tradition that assists family and social bonding, cosmetic enhancement of women's genitals, keeping women morally and sexually pure,[79] and that the procedure conveys health benefits.[80]

Though a variety of grounds for the practice have been given, the practice of female circumcision has been fought as a social, religious, and human rights issue.[81] Over time, the outlook on female circumcision changed from it being a cultural norm, to a cultural practice that was questioned, to a medical ethical issue, and then into a global debate on human rights.[82] Female circumcision has been found by medical professionals to be a non-routine procedure that has no positive health benefits, violates human rights, and damages the girls that it is performed on.[83] In addition to physical harm, a number of women suffer from long term psychological trauma due to the act of female genital mutilation.[84]

A number of countries have banned the practice of female circumcision regardless of reasons offered for it to be performed,[85] even for adult consenting

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77 P. Allotey, L. Manderson & S. Grover, 'The Politics of Female Genital Surgery in Displaced Communities', *Critical Public Health* 11:3 (2001), 190-191.

78 See note 71 at 411.

79 R. Abusharaf, 'Virtuous Cuts: Female Genital Circumcision in an African Ontology', *Differences*, 12 no 1. (2001), 111-136.

80 See note 71 at 403.

81 B. Shell-Duncan, 'From Health to Human Rights: Female Genital Cutting and the Politics of Intervention', *American Anthropologist* 110:2 (2008), 227-228.

82 A. Christofferson-Deb, '"Taming Tradition": Medicalized Female Genital Practices in Western Keyna', *Medical Anthropology Quarterly* 19:4 (2005), 404.

83 N. Toubid, 'Female Circumcision as a Health Issue', *New England Journal of Medicine* 331:11 (1994), 714-716.

84 S. Costello et al., 'In the Best Interests of the Child: Preventing Female Genital Cutting (FGC)', *British Journal of Social Work* (2013), 2.

85 J. Rogers, *Law's Cut on the Body of Human Rights* (New York: Routledge, 2013), 72-73.

women.[86] After the bans were enacted, traditional practitioners and medical professionals continued to perform circumcisions due, in part, to financial motives.[87] When it was shown that the practice of female circumcision was still being followed, many nations changed their anti-female circumcision laws to include the word 'mutilate' in their titles and increased the penalties for violating the bans or for trying to avoid them by taking a child out of the country to have a circumcision performed.[88] The addition of the word 'mutilate' to the laws was intended to send a clear signal that female circumcision was not tolerated within the jurisdictions that had put the bans into place and that it had no positive benefits for those who underwent the practice.[89]

While most medical professional and humanitarian groups have worked towards sending a strong message that the practice of female genital mutilation was socially and medically unethical, the American Association of Pediatrics has not been as firm in its position on female genital mutilation.[90] In 2010, the Association signalled that it was open to debating whether clinical female genital cutting should be allowed by releasing a statement that called for discussions on whether medical professionals should be able to perform ritualised nicks to the genitals of young girls to allow for cultural differences and that the term 'female genital mutilation' may be too harsh to use when describing traditional cultural practices.[91] After receiving numerous complaints that the new statement on female genital cutting was a major setback in the effort to end the practice of female genital mutilation from medical and humanitarian groups around the world,[92] the American Association of Pediatrics retracted the statement and returned to its no tolerance approach on female genital mutilation.[93] One explanation that has been offered for the American Association of Pediatric's policy change on female genital mutilation is that it sought to bring its policies on female genital mutilation closer to those that it held for male circumcision so that there was not such a stark contrast in the Association's positions regarding the surgical modification of a child's genitals based on a child's gender in order

86 S. Sheldon & S. Wilkinson, 'Female Genital Mutilation and Cosmetic Surgery: Regulating Non-Therapeutic Body Modification', *Bioethics* 12:4 (1998), 283-284.
87 See note 71 at 410.
88 See note 86 at 69-85.
89 *Ibid*.
90 B. Mathews, 'Female Genital Mutilation: Australian Law, Policy, and Practical Challenges for Doctors', *Medical Journal of Australia* 194:3 (2011), 139-141.
91 American Association of American Pediatrics, 'Policy Statement: Ritual Genital Cutting of Female Minors', *Pediatrics* 26 April 2010, http://pediatrics.aappublications.org/content/early/2010/04/26/peds.2010-0187.short.
92 N. MacReady, 'AAP Retracts Statement on Controversial Procedure', *The Lancet* 376:9734 (2010), 15.
93 American Association of American Pediatrics, 'Policy Statement: AAP Publications Reaffirmed and Retired', *Pediatrics* 126:1 (2010), 177.

to protect the income stream that members of the Association received through performing male circumcisions.[94]

4.1.2. Male Circumcision

The precise origins for the practice of male circumcision have been traced back to rituals created to enhance gender differences and emphasise traditional societal roles between the sexes.[95] Early commentators on circumcision praised it for the pain it inflicted and its ability to degrade sexual performance and sensation for males.[96] During the Victorian era, performing circumcisions without anaesthesia or form of pain reduction was institutionalised by medical professionals as a way to curb masturbation in young men and, alongside clinical female clitoridectomy for young women, as a cure to a variety of physical and mental illnesses.[97] Male circumcision has been found to remove specialised sensual nerves, can deform the penis, decrease sexual satisfaction for both partners,[98] and cause long term psychological damage.[99] A key reason that the practice of male circumcision has not faced the level of resistance that female circumcision has is that is male circumcision has been regarded as an accepted cultural norm.[100] While a variety of rationales have been given for the practice of male circumcision to continue, they have been found to not stand up to scrutiny.[101] Infant male circumcision was once common in Australia, America, and parts of Europe, however the practice has declined steadily and a number of groups who oppose the practice have been fighting for its elimination, including the Netherlands Institute of Human Rights.[102] The Institute has released a statement that it views infant male circumcision as a human

94 R. Van Howe, 'The American Academy of Pediatrics and Female Genital Cutting: When National Organizations are Guided by Personal Agendas,' *Ethics and Medicine* 27:3 (2011), 171-173.

95 R. Darby, 'The Riddle of the Sands: Circumcision, History, and Myth', *The New Zealand Medical Journal* 118:1218 (2005), 77-78.

96 M. Maimondies, *The Guide of the Perplexed*, trans. S. Pines (Chicago: Chicago Press, 1963), 609.

97 O. Moscucci, 'Clitoridectomy, Circumcision and the Politics of Sexual Pleasure', in: *Mid-Victorian Britain Sexualities in Victorian England*, ed. J. Adams & A. Miller (Bloomington: Indiana University Press, 1996), 60-78.

98 G. Bensley & G. Boyle, 'Physical, Sexual and Psychological Effects of Male Infant Circumcision: an Exploratory Survey', in: *Understanding Circumcision A Multi-Disciplinary Approach to a Multi-Dimensional Problem* (Boston: Springer US, 2001), 207-239.

99 J. Rhinehart, 'Circumcision Reconsidered', *Transactional Analysis Journal* 29:3 (1999), 215-221.

100 M. Fox & M. Thompson, 'Foreskin is a Feminist Issue', Australian Feminist Studies 24:60 (2009), 195-210.

101 S. Hellsten, 'Rationalizing Circumcision: From Tradition to Fashion, From Public to Individual Freedom – Critical Notes on Cultural Persistence of the Practice of genital Mutilation', *Journal of Medical Ethics* 30 (2004), 249-252.

102 G. Boyle et al., 'Circumcision of Healthy Boys: Criminal Assault?', *Journal of Law and Medicine* 7:3 (2000), 301-310.

rights violation that fits the definition of mutilation and that male circumcision should be treated in the same manner as female genital mutilation.[103]

No national medical organisation recommends that infant male circumcision be performed.[104] However, following the release of the American Association of Pediatrics' 2012 technical report on male circumcision, the American Center for Disease Control published that it was preparing to create guidelines concerning infant male circumcision and that it was seeking feedback from concerned parties as to what the guidelines should contain.[105] In the American Association of Pediatrics' 2012 technical report on the practice of infant male circumcision, the Association announced that it had found that the benefits of infant male circumcision in preventing possible health issues later in a child's life, such as sexually transmitted diseases, outweighed the risks and possible adverse outcomes of the procedure and recommended that costs for the procedure to be covered by third parties.[106] This reversed the American Association's of Pediatrics stance from its 1999 circumcision policy statement that found that the procedure was not recommended as a health practice and that behavioural patterns had a greater effect on the contraction of sexually transmitted diseases, including HIV, than circumcision.[107] The report has been criticised by American medical professionals for not giving an overview of the structures and function of the foreskin and for not providing any discussion as to why the Association felt that third parties should cover the costs of the procedure.[108] A number of international medical experts have expressed concerns about the American Association of Pediatrics' selection of sources in support of the report's findings, its discussion on allowing cultural considerations to influence medical decisions, and for the report not addressing the ethical problems of performing a non-therapeutic procedure on a minor who cannot voice their opinion on the matter.[109] Beyond its publication of the 2012 technical report on infant male circumcision, the American Association of Pediatrics has been criticised for having ethical

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103 J. Smith, 'Male Circumcision and the Rights of the Child', in: *To Baeher in Our Minds: Essays in Human Rights from the Heart of the Netherlands*, ed. A. Hendricks et al. (Utrecht: University of Netherlands, 1998), 465-468.

104 G. Boyle et al., 'Male Circumcision: Pain, Trauma, and Psychosexual Sequelae', *Journal of Health Psychology* 7:3 (2002), 330.

105 Recommendations for Providers Counseling Male Patients and Parents Regarding Male Circumcision and the Prevention of HIV Infection, STIs, and Other Health Outcomes, 79 no. 231 Fed. Reg. 71433 (2 December 2014).

106 American Association of American Pediatrics, 'Technical Report: Male Circumcision', *Pediatrics* 130:3 (2012), 778.

107 American Association of American Pediatrics, 'Circumcision Policy Statement', *Pediatrics* 103:3 (1999), 691.

108 R. Howe & Svoboda, 'Out of Step: Fatal Flaws in the Latest AAP Policy Report on Neonatal Circumcision', *Journal of Medical Ethics*, 18 March 2013, www.arclaw.org/sites/default/files/Svoboda-Van-Howe-Out-of-Step-Fatal-Flaws-in-AAP-JME-2013.pdf.

109 M. Frish et al., 'Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision', *Pediatrics* 131:4 (2013), 796-800.

and scientific inconsistencies in its long, and often contradictory, series of publications regarding infant male circumcision.[110] Concerns have been raised that the Association, as a trade association rather than an independent health organisation, may have sought to increase the profits of its members rather than acting in the best interests of infant males by changing its polices on infant male circumcision.[111]

4.1.3. International Legal and Medical Authorities' Views on Infant Male Circumcision

While there are currently no countries that ban infant male circumcision, there have been calls by national legislative[112] and medical groups for the procedure to be made illegal even if religious reasons for the circumcision are given.[113] Infant male circumcision has been found by health organisations to be a non-routine, culturally influenced,[114] and non-therapeutic procedure that may expose medical professionals to legal ramifications due to it violating international humanitarian law and the Convention on the Rights of the Child.[115] Under Article 14 of the Convention, states are compelled to respect a child's right to express their own religious beliefs and put into place laws that allow them to do so, which includes the right to not be subjected to potentially injurious religious rituals, including circumcision as guaranteed under Article 24(3) of the Convention.[116] The Council of Europe has called for its members to take a critical look at infant circumcision as a violation of human rights and for its members to pass laws to shield both male and female children from medical and traditional practices that are not in the best interest of the child.[117] The United Nations General Assembly has held that the circumcision of infant male children to be non-beneficial, a human rights violation, and should be postponed,

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110 M. Giannetti, 'Circumcision and the American Academy of Pediatrics: Should Scientific Misconduct Result in Trade Association Liability?', *Iowa Law Review* 85 (1999), 1514-1568.

111 *Ibid*. at 1563-1566.

112 D. Endsjø, 'Eighteen Year Limit for Circumcision', *Chronicle*, 19 June 2012, www.dagbladet.no/2012/06/19/kultur/debatt/omskjering/helse_bergen/bar_overkropp/22180612/.

113 V. Hernandez, 'Denmark, Sweden, Ban Non-Surgical Circumcision', *International Business Times*, 29 January 2014, http://au.ibtimes.com/denmark-sweden-ban-non-medical-circumcision-boys-1330592.

114 E. LeBourdais, 'Circumcision No Longer a "Routine" Surgical Procedure', *Canadian Medical Association Journal* 152:11 (1995), 1873.

115 British Medical Association, 'The Law and Ethics of Male Circumcision, Guidance for Doctors', *Journal of Medical Ethics* 30 (2004), 259-260.

116 E. Brems, *A Commentary on the United Nations Convention on the Rights of the Child Article 14 The Right to Freedom of Thought, Conscience and Religion* (Boston: Martinus Nijhoff Publishers, 2006), 33-34.

117 Council of Europe Parliamentary Assembly, Resolution 1952 Children's Right to Physical Integrity (Strasbourg: PACE, 1 October 2013), 1-2.

if done at all, to allow the child to make the determination as to whether to undergo circumcision or not.[118]

5. Not Protecting Males from Infant Circumcision Allows for Challenges to Laws Barring Female Genital Mutilation

Creating laws that grant protection for both genders equally is required by under the Convention on the Rights of the Child, the United Nations Charter, and the Universal Declaration of Human Rights.[119] When laws are passed that protect one gender while not protecting the other, it can allow for challenges to the law and possibly leave both genders without protection. In *Fishbeck v. State of North Dakota*, a challenge was raised against the banning of female circumcision on the basis that the law did not protect males from circumcision and therefore violated the requirement of equal protection under the 14th Amendment.[120] The court did not examine the merits of the constitutional challenge, but ruled that the action could not proceed due to the parties' lack of standing to bring such a claim since they had not suffered damages and could not be foreseen to suffer damages if the ban remained in place.[121] The court not providing an examination as to whether the banning of female circumcision without providing equal protection for males was permissible or not allows the possibility for more challenges to bans on female genital mutilation in the United States.[122] Such challenges could be used as precedents by litigants globally in attempts to dissolve bans on female circumcision that did not include protection for males due to their inherent gender bias.

6. Conclusion

The law's approach to the child-parent relationship has changed dramatically. Children are no longer considered property of their parents, have been granted the right of mental and physical integrity, and are to have their voices heard in decisions that influence their lives. Internationally, courts and medical groups have stressed that medical professionals should al-

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118 United Nations General Assembly, *Circumcision of Male Children* (New York: United Nations Publications, 2012), 2-5.

119 See note 103.

120 *Fishbeck v. State of North Dakota*, 115 F.3d 580 (U.S. Ct. of App. 8th Cir. 1997) 580.

121 *Ibid*. at 580-581.

122 S. Bond, 'State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment?', *John Marshal Law Review*, 32 (1999), 353-380.

ways act in the best interest of a child and deeply consider a child's wishes with regard to medical treatment, particularly when non-therapeutic procedures are being considered. Infant circumcision, regardless of a child's gender, has far reaching medical, psychological, and religious ramifications that cannot be undone. Once regarded as a socially and medically acceptable practice, infant male circumcision has been challenged around the world by an increasing number of groups using the same ethical, human rights, legal, and medical harm arguments that were used to end the practice of female genital mutilation. Infant male circumcision has been found by international legal and medical groups to be a non-therapeutic procedure that changes a child's genitals without their consent in violation of the Convention on the Rights of the Child and other humanitarian treaties. The current state of national laws protecting females from circumcision while allowing infant male circumcision violates the Universal Declaration of Human Rights and allows for challenges to bans on female genital mutilation due to the lack of equal protection of the sexes under such laws. In order to meet the requirements of international treaty law and allow children the fullest opportunities for self-determination, infant male circumcision must be met with the same level of legal and medical authoritative opposition as female genital mutilation.