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# A Proper Perspective on the Circumcision Battle: Germany, San Francisco, Childhood Autonomy and Freedom of Religion

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## INTRODUCTION

For thousands of years, circumcision has served as a recognized symbol of religious observance. Within the Jewish world, the act, which entails cutting off the foreskin of every male infant at eight days of age, has served as a mode of establishing religious identity. Recently, courts, community organizations and medical researchers have raised questions regarding the ethics of circumcision. Issues surrounding the discussion have focused on undue danger for the child, whether the child should have to agree to the circumcision, whether circumcision is detrimental to the health of an infant, whether it bears negative consequences for the adult male, how much power parents should rightfully have when it comes to their child's body and, finally, where the line between the health and safety of a child and freedom of religion begins and ends. Many proponents of circumcision claim that the argument to ban this ritual is tantamount to an attack on religious rights and on freedom of religion in America.

In the American healthcare system, infants and children are rarely, if ever, given the autonomy to make medical decisions on their own and courts have upheld the right and responsibility of parents to make decisions regarding the healthcare of their children. Typically, parental consent alone is sufficient authorization for a child to receive certain vaccines and care. In these instances, the legal system trusts parents to make the decision that is in the best interest of the child. When religion and healthcare decisions conflict with each other it takes careful analysis and diligent research to balance the necessity of protecting children with an individual's right to practice his or her religion.

In arguing against the humaneness and legality of circumcision, opponents of parentally consented infantile and young-child circumcision in the United States fail to establish that circumcision is both harmful to the child and violates his autonomy. Circumcision is not genital

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mutilation. There is no incontrovertible medical evidence that it can cause undue danger to infants. It is not analogous to religious beliefs that result in the denial of lifesaving medical treatment to minors. The argument that the child's right to autonomy demands that his parents preserve as many of his future options as possible, is inconsistent with the religious requirement that the circumcision take place when the child is eight days old. The autonomy that is "lost" by an infant through parents choosing to circumcise their child is no different than the autonomy lost when infants are given vaccinations early in their lives through parental consent. Those who argue the case of infant autonomy ignore countless other situations in which a parent, guardian or legislature has the power to decide on how best to treat a child. Additionally, in balancing religious freedom and public health, banning circumcision violates the freedom of religion of Americans who consider circumcision to be a Biblical commandment. Taking the decision to be circumcised out of a child's hands and placing it within the purview of the parents is consistent with the basic tenets of the American healthcare system.

This analysis will examine the recent German and American cases against the religious rite of circumcision. In order to accomplish this task, Part I will introduce the importance of circumcision from both a historical and religious point of view. In addition, it will discuss the meaning of circumcision and how it has become an integral part of Jewish identity and American society. Part II will introduce the recent German ban on circumcision. The German law will serve as precedent for any organization within the United States pushing for bans against circumcision in America. Part III will discuss the San Francisco anti-circumcision ballot initiative. This section will argue against the proposed ban and the belief that circumcision amounts to genital mutilation and to parents putting their child's health in danger. Part IV will critique the argument of those who state that circumcision of a child violates his autonomy.

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Using research from a recent study by the American Academy of Pediatrics (“AAP”) this article will show that the potential benefits of circumcision far outweigh the dangers. In addition, this section will aim to demonstrate that in many other healthcare situations, parents are given the autonomy to determine healthcare protocol for their children. Finally, Part V will critique the argument of the San Francisco initiative by highlighting the many areas in which religious freedom and public health are balanced against each other and how circumcision fits on this scale.

## I. HISTORY OF CIRCUMCISION

### *A. Basis of Circumcision as a Religious Tenet*

In the Old Testament book of Genesis, God commands Abraham to be circumcised.<sup>1</sup> The circumcision was meant to serve as a covenant between God, Abraham and Abraham’s progeny.<sup>2</sup> Additionally, the commandment in Genesis stated that all circumcisions must occur on the eighth-day of a male’s life.<sup>3</sup> The Jewish male left uncircumcised was to be “cut off from his people” for having broken the covenant between Abraham and God.<sup>4</sup> Throughout the Hebrew Bible, circumcision is used as a symbol of the Jewish nation and Jewish identity and also serves to separate the Jewish people from other nations.<sup>5</sup> In the centuries that followed Abraham, whether under the rule of the Greeks, Romans or countless other nations, circumcision has been a basic tenet of Jewish identity. At the same time, their enemies have tried to persecute the Jews by curbing the circumcision of Jewish males in an effort to end one of the oldest historical

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

<sup>2</sup> Id.

<sup>3</sup> Genesis 17:12

<sup>4</sup> Genesis 17:14; Joshua 5:9.

<sup>5</sup> Joshua 5:9.

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Jewish traditions and to impact on the continuity of the Jewish people.<sup>6</sup> Abolishment of the Jewish rite of circumcision by the Roman emperor Hadrian, who considered it mutilation, is often considered to be one of the main factors leading to the Bar Kokhba Rebellion, a revolt by the Jews in Roman-occupied Judea in the 2nd Century.<sup>7</sup> During the Spanish Inquisition, circumcision was strongly identified with Judaism and not accepted.<sup>8</sup>

In Islam, circumcision is often considered obligatory or at the very least, highly recommended.<sup>9</sup> The commandment to circumcise males is not found in the Koran but is often cited as a hadith.<sup>10</sup> A hadith is a saying or an act that either gives approval or disapproval to certain religious traditions and is attributed to the Islamic prophet Mohammad.<sup>11</sup> The works of the hadith are used as tools for Muslims to comprehend the Koran and other issues in Islamic law.<sup>12</sup> The timing of the procedure in Islam is different than it is in Judaism. Though it sometimes occurs at birth, Islamic circumcision is typically performed around puberty.<sup>13</sup> Circumcision is not a requirement for converts to Islam.<sup>14</sup>

*B. America v. Europe*

The number of circumcisions occurring annually in the United States is far greater than the number taking place in Europe on a yearly basis.<sup>15</sup> Beyond serving only as a religious rite,

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<sup>6</sup> *The Life of Hadrian: Part 1*, HISTORIA AUGUSTA, [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Historia\\_Augusta/Hadrian/1\\*.html#note118](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Historia_Augusta/Hadrian/1*.html#note118).

<sup>7</sup> Id.

<sup>8</sup> *Inquisition*, JEWISH ENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/8122-inquisition>.

<sup>9</sup> *Circumcision of Boys*, BBC RELIGIONS – ISLAM, (Aug. 13, 2009), <http://www.bbc.co.uk/religion/religions/islam/islamethics/malecircumcision.shtml>.

<sup>10</sup> *Circumcision*, SUNNIPATH, <http://www.sunnipath.com/library/Hadith/H0003P0051.aspx>.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> *Circumcision of Boys*.

<sup>14</sup> *Circumcision for Converts*, QIBLA, [HTTP://QA.SUNNIPATH.COM/ISSUE\\_VIEW.ASP?ID=13339&HD=3&CATE=0&T=RSS](http://QA.SUNNIPATH.COM/ISSUE_VIEW.ASP?ID=13339&HD=3&CATE=0&T=RSS).

<sup>15</sup> *Trends in In-Hospital Male Circumcision --- United States, 1999—2010*. CENTERS FOR DISEASE CONTROL AND PREVENTION: MORBIDITY AND MORTALITY WEEKLY REPORT, (Sep. 22, 2011), [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6034a4.htm?s\\_cid=mm6034a4\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6034a4.htm?s_cid=mm6034a4_w); *The Global Prevalence of*

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circumcision in the U.S. has become commonplace in hospitals across the country. The U.S. Center for Disease Control and Prevention recently released analysis from national surveys that discovered circumcision over the past decade in U.S. hospitals has decreased slightly from where it was during the 1990's.<sup>16</sup> This decrease does not include circumcisions that occur within the Jewish community on eight-day old boys, as is required by Jewish law.<sup>17</sup> Despite the slight decrease in number, in the three polls that were used, circumcisions on newborn males still occurs in 54.7 to 56.9 percent of births.<sup>18</sup> In Europe on the other hand, circumcision of males is much less prevalent than it is in the U.S. In many of the larger and more populated countries in Europe, the circumcision rate is under 20 percent.<sup>19</sup> In Germany, the German Health Interview and Examination Survey for Children and Adolescents found that only 10.9 percent of males under the age of 18 were circumcised.<sup>20</sup> The disparity between these numbers shows a clear distinction between the importance and necessity of circumcision in the mindset of Americans versus Europeans.

While the numbers are telling, a look at popular culture in America may further explain the psyche of Americans regarding circumcision. Many television shows, movies and newspapers have addressed circumcision not through an ethical or autonomous lens but rather through a more comedic and farcical way.<sup>21</sup> Shows like *Seinfeld* and *Southpark* have addressed non-circumcised males as a rare and irregular breed.<sup>22</sup> The continued propensity for popular culture mediums to accept the idea of circumcision and to poke fun at those who are not

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*Male Circumcision, Information Package on Male Circumcision and HIV Prevention: Insert 2*, WORLD HEALTH ORGANIZATION, [http://www.who.int/hiv/mediacentre/infopack\\_en\\_2.pdf](http://www.who.int/hiv/mediacentre/infopack_en_2.pdf).

<sup>16</sup> *Trends in In-Hospital Male Circumcision --- United States 1999---2010*.

<sup>17</sup> *Id.*

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

<sup>19</sup> *The Global Prevalence of Circumcision*.

<sup>20</sup> P. Kamtsiuris, *Results of the German Health Interview and Examination Survey for Children and Adolescents*, SPRINGERLINK, (2007), <http://www.springerlink.com/content/16110k483n8736r3/>.

<sup>21</sup> *Treatment of Circumcision on TV*, CIRCUMSTITIONS, <http://www.circumstitutions.com/TVSitcoms.html>.

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

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circumcised clearly reflects the fact that circumcision in the U.S. is more prevalent than in other parts of the world, specifically in Europe.

## II. THE 2012 GERMAN CIRCUMCISION LAW

In May 2012 a German court in the city of Cologne passed a regional law banning circumcision with criminal penalties for those who administered the circumcision procedure.<sup>23</sup> While the ruling outlawed the predominantly Jewish and Muslim custom in the Cologne region alone, reverberations were felt throughout Germany, specifically in Jewish communities still sensitive to the persecution and anti-Semitism they had faced in Germany during the Holocaust.<sup>24</sup> As mentioned above, circumcision is an ancient tradition among Jews. Criminalization of such an act, according to both local communities in Germany and international Jewish organizations, logically amounts to the total rejection of Jewish life, culture and tradition in Germany.<sup>25</sup> Charlotte Knoblauch, a German Jewish leader, wrote an editorial in a German paper and stated, “I am asking myself seriously whether Germany still wants us.”<sup>26</sup> Echoing this sentiment, Germany Central Council of Jews’ president, Dieter Graumann, stated that if the circumcision ban was upheld on appeal it would “make Jewish life in Germany, just as it is blooming again, practically impossible.”<sup>27</sup>

While the court decision in Cologne covered the Cologne region only, for months after the ruling, other regions in Germany complied with the ruling for fear of legal actions that could

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<sup>23</sup> Ben Cohen, Europe’s Assault on Jewish Ritual, COMMENTARY (Nov. 2012), <http://www.commentarymagazine.com/articles/europes-assault-on-jewish-ritual>.

<sup>24</sup> Jack Ewing, *Circumcision Debate in Germany Reflects Religious-Secular Tensions*, NEW YORK TIME: EUROPE (Sep. 19, 2012), <http://www.nytimes.com/2012/09/20/world/europe/circumcision-debate-in-europe-reflects-deeper-tensions.html?pagewanted=all>.

<sup>25</sup> *Circumcision in Germany: Incisive Arguments*, THE ECONOMIST (Jul. 7, 2012), <http://www.economist.com/node/21558299>.

<sup>26</sup> *Berlin Clears Ritual Circumcisions Ahead of New Law*, REUTERS (Sep. 5, 2012), <http://www.reuters.com/article/2012/09/05/us-germany-circumcision-idUSBRE88418J20120905>.

<sup>27</sup> *Circumcision in Germany: Incisive Arguments*

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be taken throughout Germany if circumcisions were administered in other regions.<sup>28</sup> Finally, in September, the Berlin Senate paved the way for doctors to legally perform circumcisions for religious reasons in the Berlin region.<sup>29</sup> This statement of support by the Berlin Senate, may give legal clarity as to whether circumcisions could presently be performed without prosecution throughout the rest of Germany outside Cologne.<sup>30</sup> To deem it a victory for pro-circumcision forces, however, would be premature as the entire episode actually underscores the fragility of the right to circumcise in Germany and the highlights the instability of religious freedoms in the country.

The decision by the Cologne court was supported by many medical groups in Germany including the German Academy of Child and Adolescent Medicine Association (“DAKJ”), which serves as an umbrella organization in Germany for pediatric associations.<sup>31</sup> That group cited a 6 percent chance of medical complications from circumcision.<sup>32</sup> At the same time, the German National Ethics Council spoke out against the decision, though recommending boys receiving a circumcision receive information and give consent.<sup>33</sup> How an infant Jewish boy could be expected to give proper consent was not discussed.

While the court in Cologne may have support among many in German medical fields, the outcry and public relations fallout from the decision has worked its way up to the chancellor of Germany herself, Angela Merkel.<sup>34</sup> In her time as German leader, Merkel has been a staunch supporter of the State of Israel and has spoken out often in support of the German Jewish

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<sup>28</sup> *Berlin Clears Ritual Circumcisions Ahead of New Law.*

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

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

<sup>31</sup> Janelle Damalaon, *Circumcision Ban Ignites a Religious Battle in Germany*, WASHINGTON TIMES (Aug. 29, 2012), <http://www.washingtontimes.com/news/2012/aug/29/circumcision-ban-ignites-a-religious-battle-in-ger/?page=all>.

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

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

<sup>34</sup> Gareth Jones, *Circumcision Ban Makes Germany Laughing Stock*, REUTERS (Jul. 17, 2012, 8:24 PM), <http://uk.reuters.com/article/2012/07/17/uk-germany-circumcision-idUKBRE86G11D20120717>.



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community.<sup>35</sup> Merkel has acknowledged that while she cannot overturn the ruling herself, she will promote a quick solution in order to avoid turning Germany into a “laughing stock.”<sup>36</sup>

Additionally, Merkel is sensitive to the plight Judaism and Jewish culture have faced in Germany.<sup>37</sup> Merkel believes Germany has “a special obligation to cultivate Jewish culture” and she is “grateful that the Jews have once again found a homeland in Germany.”<sup>38</sup> The Berlin decision notwithstanding, the decision by the Cologne court makes Merkel’s hope for a flourishing Jewish identity in Germany difficult to attain and cannot help but remind some Jews who have remained there after World War II, hoping to forgive a homeland that nearly destroyed them, that their religion and culture make them outsiders to the rest of the country.<sup>39</sup>

Chancellor Merkel’s concern for German Jews is founded in the tumultuous history of Jews in Germany.<sup>40</sup> Freedom of religion has long been a contentious issue in Germany, especially within the Jewish community there. Jews played a major role in German society in the late 19th and early 20th Century.<sup>41</sup> During that time, when the Jews lived in the German Empire they obtained some economic success.<sup>42</sup> A higher percentage of Jews fought for Germany in World War I than any other ethnic, religious or political group in the country.<sup>43</sup> In post-WWI Germany, when the Weimar Republic was in power, Jews served in government oppositions and even took part in the writing of the Weimar constitution and played an integral

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<sup>35</sup> Bridget Johnson, *Merkel Makes History in Speech to Knesset*, ABOUT.COM WORLD NEWS, <http://worldnews.about.com/od/germany/qt/merkelknesset.htm>; *AJC Honors Angela Merkel for Jewish, Israel Support*, JTA – JEWISH AND ISRAEL NEWS (Jan. 20, 2011), <http://www.jta.org/news/article/2011/01/20/2742640/angela-merkel-honored-by-ajc>.

<sup>36</sup> Jones, *Circumcision Ban Makes Germany Laughing Stock*. <http://uk.reuters.com/article/2012/07/17/uk-germany-circumcision-idUKBRE86G11D20120717>.

<sup>37</sup> Judy Dempsey, *Germany, Jews and Muslims, and Circumcision*, NEW YORK TIMES (Sep. 17, 2012), <http://www.nytimes.com/2012/09/18/world/europe/18iht-letter18.html>

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Marion Kaplan, *The Making of the Jewish Middle Class: Women, Family, and Identity in Imperial Germany* (1991).

<sup>42</sup> Id.

<sup>43</sup> *German Jewish Soldiers*, DIE JUDISCHEN GEFALLENEN, <http://www.germanjewishsoldiers.com/introduction.php>.

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role in German cultural fields.<sup>44</sup> The anti-Semitism that arose as the Weimar Republic crumbled and the Third Reich took power was exemplified by laws aimed at removing Jews from their roles in society. The Nuremberg Laws were passed in 1935 and took citizenship away from Jews and other laws eventually banned Jews from many jobs.<sup>45</sup> This anti-Semitism and anti-Jewish sentiment ultimately culminated in the Holocaust and the murder of a high percentage of German Jewry.<sup>46</sup>

This is the historical context in which the Cologne court ban on circumcision must be evaluated. In response to the ban, the president of the Conference of European Rabbis has publically stated that this decision was “part of the growing infringement upon religious freedom in Europe.”<sup>47</sup> The backlash against the court decision has been broad and swift both in Germany<sup>48</sup> and internationally.<sup>49</sup>

Months after the decision, it appears as though an answer to the uproar is coming. In late September, a proposal was made in the German parliament that may allay the fears of religious leaders, at least for the time being, by protecting the circumcision procedure in Germany.<sup>50</sup> The draft, which hopes to amend the German Civil Code, would legalize circumcision if it is performed using “appropriate medical procedures” in addition to not putting the child’s health in danger. Trained individuals, specifically Jewish mohels, the individuals who typically perform

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<sup>44</sup> *Weimar Republic (1918-1933)*, YAD VASHEM, [http://www1.yadvashem.org/odot\\_pdf/microsoft%20word%20-%207794.pdf](http://www1.yadvashem.org/odot_pdf/microsoft%20word%20-%207794.pdf).

<sup>45</sup> *Nuremberg Laws*, YAD VASHEM, [http://www1.yadvashem.org/odot\\_pdf/Microsoft%20Word%20-%205971.pdf](http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205971.pdf).

<sup>46</sup> *German Jews During the Holocaust, 1939-1945*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005469>.

<sup>47</sup> *Germany Wants Religious Circumcision Protected*, ASSOCIATED PRESS (Jul. 13, 2012), <http://www.foxnews.com/world/2012/07/13/germany-wants-religious-circumcision-protected/>.

<sup>48</sup> Gareth Jones, *Circumcision Ban Makes Germany Laughing Stock: Merkel*, REUTERS (Jul 17, 2012), <http://www.reuters.com/article/2012/07/17/us-germany-circumcision-idUSBRE86G0EW20120717>.

<sup>49</sup> Shmuel Rosner, *Nip and Tuck*, NEW YORK TIMES: INTERNATIONAL GLOBAL TRIBUNE (Aug. 27, 2012), <http://latitude.blogs.nytimes.com/2012/08/27/when-german-judges-ban-circumcision>.

<sup>50</sup> The Forward, *Germany Debates Proposal to Protect Circumcision*, HAARETZ (Oct. 9, 2012, 10:04 AM), <http://www.haaretz.com/jewish-world/jewish-world-features/germany-debates-proposal-to-protect-circumcision-1.468858>.

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the circumcision during the Jewish ritual, will be permitted to circumcise a child during the first six months of life. Whether this proposal is ultimately passed by parliament is another question. Though to Jews this is a matter of freedom of religion, an overwhelming number of German citizens do not practice circumcision and view the act as archaic: A German polling organization, TNS Emnid found that 56% of Germans agreed with the May decision by the Cologne court banning circumcision.<sup>51</sup>

The decision by the Cologne court was based on the view held by the German Academy for Pediatric Medicine.<sup>52</sup> This group believes that circumcision causes irreversible physical and mental trauma.<sup>53</sup> This organization did not take into account research done by the World Health Organization and the AAP, which support circumcision and consider its medical benefits.<sup>54</sup> Why the Cologne court did not consider such studies and responded to a single medical emergency at a Muslim circumcision is a question for the court on appeal. Whatever the answer, it raises modern day questions as to whether Germany is a place where individuals can live a free religious life and not have to worry about being arrested or prosecuted for fulfilling their religious convictions. It raises the troubling possibility that the anti-circumcision movement in Germany is grounded more in the anti-Semitism of old than in modern day concerns for individual rights and the cautions expressed by contemporary medical experts.

### III. SAN FRANCISCO CIRCUMCISION BAN

While Germany is a country with a tumultuous history in terms of religious tolerance and acceptance, the United States has long prided itself on the freedom of its citizens to practice

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup>Roni Caryn Rabin, *Benefits of Circumcision Are Said to Outweigh Risks*, NEW YORK TIMES (Aug. 27, 2012), <http://www.nytimes.com/2012/08/27/science/benefits-of-circumcision-outweigh-risks-pediatric-group-says.html>; *WHO and UNAIDS announce recommendations from expert consultation on male circumcision for HIV prevention*, WORLD HEALTH ORGANIZATION (Mar. 28, 2007), <http://www.who.int/hiv/mediacentre/news68/en/index.html>.

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religion as they choose. The election ballot rules in the U.S. though allow individuals who obtain enough signatures to put a measure on the election ballot.<sup>55</sup> In 2011, a group based in San Francisco called the Bay Area Intactivists, whose website calls for “genital autonomy for all” obtained enough signatures to place a proposal on the ballot that would criminalize circumcision and consequently aim to stop parents and hospitals from circumcising infants, something that is commonplace in U.S. hospitals.<sup>56</sup> If the proposed measure passed, an individual would have to agree to be circumcised and could only make that decision after reaching 18 years of age.<sup>57</sup> For Jews, who perform the circumcision on 8-day old males, the idea of a consent form or agreement from the infant is not possible.

The leader of the anti-circumcision movement is Lloyd Schofield, a San Francisco resident, who along with the other members of the group believe a child should be given the right to choose whether he is circumcised or not.<sup>58</sup> The group believes “foreskin serves an important function in a man’s life, and nobody has the right to perform unnecessary surgery on another human being.” In addition, it claims medical groups have not come out in support of circumcision enough for its supposed health benefits to be a valid defense for the act.<sup>59</sup>

The Bay Area Intactivists are members of the International Coalition for Genital Integrity (“Coalition”), an organization fighting against any type of genital procedures.<sup>60</sup> The Coalition claims that circumcision amounts to harm and has “physical and psychological consequences.”<sup>61</sup> The Coalition states in their Declaration that parents do not have the right to circumcise or

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<sup>55</sup> *Initiative Guide – Elections & Voter Information*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm>.

<sup>56</sup> BAY AREA INTACTIVISTS: GENITAL AUTONOMY FOR ALL, <http://www.bayareaintactivists.org/>.

<sup>57</sup> *Id.*

<sup>58</sup> Mikaela Conley, *San Francisco Circumcision Ban Struck from Ballot*, ABC NEWS (Jul. 28, 2011), <http://abcnews.com/Health/san-francisco-circumcision-ban-striken/story?id=14179024#.UHsHXs24qH8>.

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

<sup>60</sup> *About*, BAY AREA INTACTIVISTS, <http://www.bayareaintactivists.org/about>.

<sup>61</sup> Dan Bollinger, *Circumcision Harm Survey Launched*, INTERNATIONAL COALITION FOR GENITAL INTEGRITY (Jun. 8, 2011), <http://www.icgi.org/2011/06/circumcision-harm-survey-launched>.

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“modify” their child and doing so amounts to harm which amounts to unethical treatment

tantamount possibly to torture.<sup>62</sup> At the same time, the Coalition’s website argues that circumcision’s popularity in the United States is partly a product of the revenues the procedure brings to the medical community.<sup>63</sup> The Coalition claims that the cost of the circumcision, extra hospital stay and erectile dysfunction drugs necessary due to the circumcision bring the medical community \$4.5 billion a year.<sup>64</sup>

On their website, the Coalition cites their erectile dysfunction (“ED”) statistic by stating that the data was calculated by various sources but fails to list these specific sources.<sup>65</sup> A 2011 study in the *International Journal of Men’s Health* surveyed 300 men and found that circumcised men had a 4.5 times better chance of suffering ED than non-circumcised men.<sup>66</sup> The authors of the study are Robert Van Howe and Dan Bollinger, the writer of the ICGI blog on the “Costs of Circumcision.”<sup>67</sup> While on its face the study may raise concerns regarding the connection between circumcision and ED, the study fails to come to any meaningful conclusions for a number of reasons.<sup>68</sup> First, according to the paper, the study was not random, but rather was taken by self-selecting individuals who visited men’s health websites. Further, the individuals who visit such websites are likely more highly aware and sensitive to their bodies than the

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<sup>62</sup> *Declaration*, INTERNATIONAL COALITION FOR GENITAL INTEGRITY. (Sep. 3, 2006), <http://www.icgi.org/information/declaration/>

<sup>63</sup> *Cost of Circumcisions*, INTERNATIONAL COALITION FOR GENITAL INTEGRITY (Aug. 5, 2012), <http://www.icgi.org/information/cost-of-circumcisions/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Madeline Haller, *The Link Between Circumcision and Erectile Dysfunction*, MEN’S HEALTH NEWS (Nov. 2, 2011), <http://news.menshealth.com/is-your-circumcision-making-you-soft/2011/11/02/>.

<sup>67</sup> Dan Bollinger and Robert S. Van Howe, *Alexithymia and Circumcision Trauma: A Preliminary Investigation*, INTERNATIONAL JOURNAL OF MEN’S HEALTH Vol. 10 No. 2. Summer 2011, 184-195. [http://content.ebscohost.com/pdf27\\_28/pdf/2011/RXQ/01Jul11/66853492.pdf?T=P&P=AN&K=66853492&S=R&D=aph&EbscoContent=dGJyMMTo50Sep7E4yOvqOLCmr0qeprVSsKu4SLOWxWXS&ContentCustomer=dGJyM PGssk2xqLJNuePfgex44Hy](http://content.ebscohost.com/pdf27_28/pdf/2011/RXQ/01Jul11/66853492.pdf?T=P&P=AN&K=66853492&S=R&D=aph&EbscoContent=dGJyMMTo50Sep7E4yOvqOLCmr0qeprVSsKu4SLOWxWXS&ContentCustomer=dGJyM PGssk2xqLJNuePfgex44Hy).

<sup>68</sup> *Id.*

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average male.<sup>69</sup> Additionally, a number of the individuals who took the survey were female and their results were ultimately discounted.<sup>70</sup> This further exemplifies the lack of control of important factors by those doing the study. Lastly, the authors themselves stated in their conclusion that their goal was not to make any general conclusions from the “preliminary investigation,” but rather they wanted to “use it as a springboard to further investigation.”<sup>71</sup>

While an individual study like Bollinger’s may claim one thing, an important medical urological mind believes something else.<sup>72</sup> According to Dr. Judd Moul, professor and Chief of the Division of Urologic Surgery at Duke University Medical Center any concern about a causal affect between the two pales in comparison to many other common parts of life.<sup>73</sup> Moul says, “aging, diabetes, obesity, cigarette smoking and poor diet are all going to affect you and your chances of erectile dysfunction more than being circumcised will.”<sup>74</sup> Moul’s statements and these other factors contributing to ED raise into question the validity of Bollinger’s and Van Howe’s study.

The anti-circumcision movement does not address the balance between ethics and freedom of religion. On its website, the Coalition states that alternatives to circumcision exist, such as a ritual celebration of the infant rather than circumcision itself.<sup>75</sup> While this alternative may be acceptable to those who adhere to the biblical precept simply because it has become commonplace and not because they observe the biblical commandment, those who actively follow the religious and biblical laws would not find this alternative acceptable. In order for the

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<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id. at 192

<sup>72</sup> Madeline Haller, *The Link Between Circumcision and Erectile Dysfunction*. <http://news.menshealth.com/is-your-circumcision-making-you-soft/2011/11/02/>.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> *Jewish Group Questions Circumcision, Cites Harm*, INTERNATIONAL COALITION FOR GENITAL INTEGRITY, (Jul. 27, 2011), <http://www.icgi.org/2011/06/jewish-group-questions-circumcision-cites-harm/>.

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Coalition and similar-minded organizations to gain further traction and potentially infringe on the religious rights of individuals in America, it is likely critical that they gain the backing of a highly accredited medical organization in the United States stating that there is a high level of danger in giving an infant a circumcision, so much so that the ethical interests of the child outweigh any religious tradition that exists. This is what those in favor of circumcision seem to have with the AAP's endorsement of circumcision.

Much has occurred since the proposed measure was put on the ballot. Most importantly, the measure was stricken from the San Francisco ballot for being considered a state issue, rather than a city issue.<sup>76</sup> In addition, the AAP has released research that shows circumcision has medical benefits for those who undergo the procedure.<sup>77</sup> Among these benefits is a greater immunity from contracting HIV and a lower likelihood of infantile urinary tract infections.<sup>78</sup> Though the ballot measure ultimately failed, another challenge to circumcision will likely occur in the future considering the ease of placing a proposal on the ballot and the motivation of groups like the Intactivists. Whether new ethical arguments will be raised by those organizations cannot yet be answered.

#### IV. CHILDHOOD AUTONOMY

For individuals under the age of eighteen, whether infants, toddlers, pre-adolescents or teens, healthcare decisions must often be made before they legally become an adult with the right to consent to medical care.<sup>79</sup> For many of these minors, however, particularly as they age, access to medical services becomes a more private matter, something they are less inclined to share with

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<sup>76</sup> Conley, *Proposed Circumcision Ban Struck from San Francisco Ballot*. <http://abcnews.go.com/Health/san-francisco-circumcision-ban-stricken/story?id=14179024#UHsHXs24qH8>.

<sup>77</sup> Rabin, *Benefits of Circumcision Are Said to Outweigh Risks*. <http://www.nytimes.com/2012/08/27/science/benefits-of-circumcision-outweigh-risks-pediatric-group-says.html>.

<sup>78</sup> Id.

<sup>79</sup> *Parental Decision Making: Ethical Topic in Medicine*, UNIVERSITY OF WASHINGTON SCHOOL OF MEDICINE. <http://depts.washington.edu/bioethx/topics/parent.html>.

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their parents or guardians.<sup>80</sup> Minors often confront issues like whether or not to obtain an abortion, how to access birth control and whether to take certain medications.<sup>81</sup> In these scenarios, parental consent is typically needed.

Parental consent continues to be necessary in spite of the fact that many teenagers have a level of maturity which enables them to make medical decisions when necessary, as though they were legally adults.<sup>82</sup> In recent years, a number of state law decisions have actually come down supporting the idea that minors could consent to surgical procedures.<sup>83</sup> In one of those cases, a minor was allowed to consent to a surgery to repair her finger as she was “of sufficient maturity to know and understand the nature and consequences... of the surgery to repair her finger.”<sup>84</sup> In addition, the Illinois Supreme Court overruled a lower court and ruled that a minor Jehovah’s Witness could not be forced to obtain a blood transfusion, as it would violate her religious rights.<sup>85</sup> A child who has been emancipated is also considered an exception to the rule and may legally consent to surgery.<sup>86</sup> The American Medical Association (“AMA”) supports a policy promoting confidential care and health services to minors and adolescents.<sup>87</sup> This policy supports autonomy for minors and when appropriate, calls for minors who are deemed competent to be able to consent to medical care on their own.<sup>88</sup> The AMA believes “confidential care for adolescents is critical to improving their health.”<sup>89</sup>

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<sup>80</sup> Denise Minger, *How to Talk to Your Parents About Birth Control*, LIVESTRONG.  
<http://www.livestrong.com/article/65911-talk-parents-birth-control/>

<sup>81</sup> Minors Access to Contraceptive Health Care, CONTRACEPT.ORG. <http://www.contracept.org/minorsaccess.php>.

<sup>82</sup> *Younts v. St. Francis Hospital & School of Nursing, Inc.*, 205 Kan. 292 (Kan. 1970); *In re. E.G.*, 133 Ill.2d 98 (Ill. 1989).

<sup>83</sup> *Younts*, 205 Kan, 292; *In re. E.G.*, 133 Ill.2d 98.

<sup>84</sup> *Younts*, 205 Kan. At 301.

<sup>85</sup> *In re. E.G.*, at 112.

<sup>86</sup> *Younts*, 205 Kan, at 301.

<sup>87</sup> *Confidential Care for Minors*, AMERICAN MEDICAL ASSOCIATION. [http://www.ama-assn.org/ama1/pub/upload/mm/388/alc\\_adolhealthcare.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/388/alc_adolhealthcare.pdf)

<sup>88</sup> *Younts*, at 292; *In re E.G.* , at 112.

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



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While recent caselaw may, in some cases, support this concept, minor autonomy is becoming more prevalent and important health organizations are also supporting this notion, there has yet to be a true breakthrough in legislation or on the Supreme Court level that would change the framework of childhood autonomy.<sup>90</sup> The reasoning used in both the court cases and by the AMA cites the ability “mature” minors have to make intelligent decisions as the prime reason for giving them further autonomy.<sup>91</sup> Though heightened levels of maturity may be a valid argument for giving a teenager extended autonomy, it does not appear to be an argument that would support infants, toddlers and younger minors having a greater level of autonomy in making medical decisions for themselves.

Vaccinations are typically given to children at a young age when they have not yet reached the age of maturity the courts and the AMA are referring to when they discuss older minors.<sup>92</sup> From birth through six years of age, the government recommends children and infants receive immunizations for hepatitis, flu and other diseases.<sup>93</sup> From age seven to eighteen, the government recommends minors receive tetanus, HPV and yearly flu shots among other immunizations.<sup>94</sup> Vaccinations for young children given in hospitals typically include immunizations from the flu and tetanus among other types of potential illnesses.<sup>95</sup> Though these vaccines are considered of utmost importance in the United States, they do not come without their share of negative reactions and injuries resulting from the vaccinations.<sup>96</sup> Compensation for

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<sup>90</sup> Michele Goodwin and Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 Harv. J. L. & Gender 503, 539 (Summer 2011).

<sup>91</sup> Younts, at 301; *Confidential Care for Minors*.

<sup>92</sup> *2012 Recommended Immunizations for Children from Birth Through 6 Years Old*, CENTERS FOR DISEASE CONTROL AND PREVENTION. <http://www.cdc.gov/vaccines/parents/downloads/parent-ver-sch-0-6yrs.pdf>.

<sup>93</sup> Id.

<sup>94</sup> *2012 Recommended Immunizations for Children from 7 Through 18 Years Old*, CENTERS FOR DISEASE CONTROL AND PREVENTION. <http://www.cdc.gov/vaccines/schedules/easy-to-read/preteen-teen.html>.

<sup>95</sup> *Immunization Laws*, CENTERS FOR DISEASE CONTROL AND PREVENTION. <http://www.hhs.gov/nvpo/law.htm>.

<sup>96</sup> Deborah F. Buckman, Annotation, *Construction and Application of Preemption Provisions of National Childhood Vaccine Injury Compensation Act of 1986 (“Vaccine Act”)*, 39 A.L.R. Fed. 2d 155 (2009).

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injuries resulting from vaccines reaches high numbers in the U.S. every year.<sup>97</sup> The National Childhood Vaccine Injury Compensation Act of 1986 (“Vaccine Act”) was enacted in order to speed up suits brought against pharmaceutical companies and manufacturers and enable the injured parties to recover without having to show causation, negligence or defect in the vaccination.<sup>98</sup>

The multitude of lawsuits occurring throughout the country based on vaccination-related injuries made it imperative for Congress to pass such an Act.<sup>99</sup> Countless manufacturers were forced into long and complex legal battles and their potential liability made numerous manufacturers reluctant to enter the vaccination market.<sup>100</sup> Many of the suits brought against these companies were related to products liability and tort claims. One concern regarding vaccinations is the increased risk of autism faced by children given vaccinations with a mercury-based preservative, though after recent studies, the Centers for Disease Control and Prevention does not believe the connection between autism and the mercury based vaccination to be valid.<sup>101</sup> The Institute of Medicine released evidence in 2011 that adverse events following vaccinations though not common do occur in rare situations.<sup>102</sup>

Vaccinations, whether mandatory or optional, are given to children with parental consent.<sup>103</sup> The American Osteopathic Association has gone to lengths to explain to parents the best way to get their child to get a shot due to what it terms as “needlephobia” or “belonephobia”

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<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> *Concerns About Autism*, CENTERS FOR DISEASE CONTROL AND PREVENTION.

<http://www.cdc.gov/vaccinesafety/concerns/autism/index.html>.

<sup>103</sup> *Fact Sheet for Vaccine Information Statements*, CENTERS FOR DISEASE CONTROL AND PREVENTION.

<http://www.cdc.gov/vaccines/pubs/vis/vis-facts.htm>.

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which is a fear of sharp objects.<sup>104</sup> Presumably, children would prefer not to get the vaccination due to fear of needles and the shot itself. Despite this common fear, the goal of the parent and the doctor is to calm the child to the extent necessary to give the shot. A young child is unaware of and unlikely to understand the ramifications of any vaccine and the potential risks that may be involved with a particular vaccine. The government gives both the parent and the doctor the ability to make that decision for the child, even for vaccinations not considered mandatory for schooling.<sup>105</sup> The child is not informed that certain vaccines can cause autism or other negative reactions.<sup>106</sup> Simply, children and minors are not given autonomy when it comes to getting shots and vaccines and parental autonomy seems to be all that typically matters.<sup>107</sup>

While circumcision is not as mainstreamed as vaccines and shots, the negative effects of circumcision are similarly rare.<sup>108</sup> Vaccines though are accepted for their ability to curb disease and similar symptoms, and their benefits are more widely known and understood. There have been few extensive research inquiries into the long-term effects of circumcision on those individuals who are given the procedure when they are young. While certain statistics have been released in Germany from various medical organizations claiming circumcision to have a degree of risk, the most prominent medical release in the United States in recent times has come from the AAP, an organization made up of some of the more influential pediatricians throughout the United States.<sup>109</sup> Earlier reports released by the AAP have come down with a neutral stance on

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<sup>104</sup> *Childhood Needlephobia*, AMERICAN OSTEOPATHIC ASSOCIATION. <http://www.osteopathic.org/osteopathic-health/about-your-health/health-conditions-library/childrens-health/Pages/needlephobia.aspx>.

<sup>105</sup> *Fact Sheet for Vaccine Information Statements*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 20, 2012), <http://www.cdc.gov/vaccines/pubs/vis/vis-facts.htm>.

<sup>106</sup> Buckman, Annotation, *Construction and Application of Preemption Provisions of National Childhood Vaccine Injury Compensation Act of 1986*.

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

<sup>108</sup> Rabin, *Benefits of Circumcision Are Said to Outweigh Risks*. <http://www.nytimes.com/2012/08/27/science/benefits-of-circumcision-outweigh-risks-pediatric-group-says.html>.

<sup>109</sup> Janelle Damalaon, *Circumcision Ban Ignites a Religious Battle in Germany*, WASHINGTON TIMES (Aug. 29, 2012), <http://www.washingtontimes.com/news/2012/aug/29/circumcision-ban-ignites-a-religious-battle-in->

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circumcision.<sup>110</sup> Their most recent report from August 2012 though has come out in support of circumcision and cited many medical benefits that come with circumcising an infant.<sup>111</sup> Dr. Michael Brady, a member of the AAP and one of the minds behind the new AAP release stated, “there’s enough medical evidence to suggest we shouldn’t have been neutral before.”<sup>112</sup> The increase in confidence of the AAP regarding the benefits of circumcision come from new studies that find the health benefits of circumcision are many including lower risk of contracting HIV, genital herpes, HPV, penile cancer and many other diseases.<sup>113</sup>

With the AAP’s new release on circumcision, an important aspect of the argument for childhood autonomy has lost its influence.<sup>114</sup> Though not at the level of a recommendation, AAP’s opinion shifts circumcision closer to the realm of vaccines rather than casting it as simply an optional religious procedure.<sup>115</sup> When a child’s health is not endangered, the argument for autonomy is far less compelling. Many medical care decisions are put in the hands of parents and doctors where children are not given the opportunity to decide one way or the other. If an individual cannot be circumcised until he is of age to consent, many of the potential health risks that circumcision is said to counter may already have been transmitted to him rendering belated circumcision far less effectual.<sup>116</sup>

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ger/?page=all; *Newborn Male Circumcision*, AMERICAN ACADEMY OF PEDIATRICS (Aug. 27, 2012), <http://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Newborn-Male-Circumcision.aspx?nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token>.

<sup>110</sup> Rabin, *Benefits of Circumcision Are Said to Outweigh Risks*.

<http://www.nytimes.com/2012/08/27/science/benefits-of-circumcision-outweigh-risks-pediatric-group-says.html>.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> *Newborn Male Circumcision*

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Throughout the United States teenagers are often sexually active.<sup>117</sup> The National Campaign to Prevent Teen and Unplanned Pregnancy, an organization whose goal is to prevent the negative consequences of unplanned pregnancies, places the 2011 percentage of high school students who have ever had sex at 47 percent in the United States.<sup>118</sup> The childhood autonomy arguments would have denied these high school aged students the opportunity to be circumcised as infants, even if they themselves would have chosen to do so. By age 16 or 17, the benefits created by circumcisions in stopping certain diseases like HIV and STDs would be compromised.

Ultimately, the childhood autonomy argument faces an uphill battle against the AAP report and the support the U.S. medical community has for circumcision. The precedent of giving young children vaccinations for a broad variety of illnesses and the possibility of negative reactions creates a model on which proponents of circumcision can base their arguments. As more medical information about the effects of circumcision is uncovered, the battle between those in favor of circumcision and those opposing it will continue. Going forward, whatever information is discovered has the potential to shift the role of childhood autonomy in medical decisions to the forefront of this important public health battle.

#### V. FREEDOM OF RELIGION AND CIRCUMCISION

The freedom to practice one's religion is a basic tenet of the United States Constitution and a characteristic of the American spirit that has long made the country proud.<sup>119</sup> Such freedoms, while easy to put down on paper, are more difficult to implement in a country of over

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<sup>117</sup> *50 State and National Comparisons*, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY (Jul. 2012) <http://www.thenationalcampaign.org/state-data/state-comparisons.asp?id=10&sID=828>.

<sup>118</sup> *Id.*

<sup>119</sup> U.S. CONST. amend. I. [http://www.usconstitution.net/xconst\\_Am1.html](http://www.usconstitution.net/xconst_Am1.html); *The ACLU and Freedom of Religion and Belief*, AMERICAN CIVIL LIBERTIES UNION. <http://www.aclu.org/religion-belief/aclu-and-freedom-religion-and-belief>.

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300 million people from diverse religious and ethnic backgrounds. Many religions and religious sects across the United States experience a certain level of security through the Constitution.<sup>120</sup>

At the same time, some of these groups like Jehovah's Witnesses and Scientologists, have unique rules and laws that are particularly challenging when it comes to what the government should allow in terms of individuals taking medicine and treatment into their own hands as part of their right to enjoy religious freedoms.<sup>121</sup> Critically then, the government and courts have had to make difficult decisions as to whether individuals are allowed to fully practice their religion if at the same time that practice puts one's health and life at risk.<sup>122</sup> The issue of circumcision falls into this category. While circumcision is not a life or death medical issue, the risks that are cited by those against it, like the groups from San Francisco aiming to outlaw the circumcision right, are ever more serious because the denial of circumcision inhibits an ancient and particularly meaningful Jewish tradition.<sup>123</sup>

Until last year, religious conviction was accepted as a valid defense to some homicide charges against parents who turn down medical care for their children who subsequently die.<sup>124</sup> The Oregon legislature put an end to this defense by passing a legislative bill that takes away that option.<sup>125</sup> Representatives in favor of the bill had cited cases of two children who had died due to "lack of medical care."<sup>126</sup> A religious group called the Followers of Christ believes that

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<sup>120</sup> Id.

<sup>121</sup> *What is Scientology's View on Drugs and Medicine?*, SCIENTOLOGY. <http://www.scientology.org/faq/scientology-attitudes-and-practices/scientology-view-on-drugs-and-medicine.html>; *Our View of Medical Care: Blood Transfusions*, JEHOVAH'S WITNESSES OFFICIAL MEDIA WEBSITE. <http://www.jw-media.org/aboutjw/article01.htm>.

<sup>122</sup> Younts; In re E.G.

<sup>123</sup> Adam Cohen, *San Francisco's Circumcision Ban: An Attack on Religious Freedom*, TIME (Jun. 13, 2011) <http://www.time.com/time/nation/article/0,8599,2077240,00.html>.

<sup>124</sup> *Oregon House Unanimously Votes to End Faith Healing Exception*, OREGON LIVE (Mar. 11, 2011). [http://www.oregonlive.com/politics/index.ssf/2011/03/bill\\_ending\\_faith\\_healing\\_exce.html](http://www.oregonlive.com/politics/index.ssf/2011/03/bill_ending_faith_healing_exce.html).

<sup>125</sup> Id.

<sup>126</sup> Id.

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prayer and not medicine is the way to heal an illness.<sup>127</sup> This resulted in numerous deaths in Oregon and ultimately the new legislation outlawing it in 2011.<sup>128</sup> Followers of the Church of Scientology are better known than the Followers of Christ, and their practice of medical care without medicine is well documented.<sup>129</sup> The Church of Scientology, though, is willing to accept medicine where the Followers of Christ do not. According to Russ Gerber, a manager of media and government relations for the Church of Scientology, “protecting children’s lives is a standard we should all be held to no matter what means of health care we choose.”<sup>130</sup> The practices of the Church of Scientology rejects psychiatric medicine for patients who are mentally ill and will only prescribe medicine to a patient who is physically ill.<sup>131</sup> These views are accepted by courts in the U.S.<sup>132</sup>

Jehovah’s Witnesses are another religious group that has faced off in legal battles in order to maintain their religious ideals.<sup>133</sup> Jehovah’s Witnesses believe the Bible forbids them from having blood transfusions,<sup>134</sup> a procedure often deemed to be medically necessary. A recent study has found that Jehovah’s Witnesses do not face a greater health risk or further complications by choosing not to have blood transfusions.<sup>135</sup> In fact, this same research suggests that refusing blood transfusions may have some health benefits, though there may admittedly be

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<sup>127</sup> Id.

<sup>128</sup> Id.; H.B. 2721, 76th Leg. Assemb., 2011 Reg. Sess. (Or. 2011).

<http://www.leg.state.or.us/11reg/measpdf/hb2700.dir/hb2721.intro.pdf>.

<sup>129</sup> Paul Vitello, *Christian Science Church Seeks Truce With Modern Medicine*, NEW YORK TIMES (Mar. 23, 2010).

<http://www.nytimes.com/2010/03/24/nyregion/24heal.html?pagewanted=all>.

<sup>130</sup> *Even Religious Freedom Has Limits*, USA TODAY (Mar. 27, 2011).

[http://usatoday30.usatoday.com/news/opinion/forum/2011-03-28-column28\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/opinion/forum/2011-03-28-column28_ST_N.htm).

<sup>131</sup> *What is Scientology’s View on Drugs and Medicine?*

<sup>132</sup> Id.

<sup>133</sup> Younts.

<sup>134</sup> Denise Mann, *No Health Risk When Jehovah’s Witnesses Refuse Blood: Study*, U.S. NEWS AND WORLD REPORT (Jul. 2, 2012). <http://health.usnews.com/health-news/news/articles/2012/07/02/no-health-risk-when-jehovahs-witnesses-refuse-blood-study>.

<sup>135</sup> Id.

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increased risks in other areas.<sup>136</sup> Interestingly, even before this study, Jehovah's Witnesses were given the right to opt out of blood transfusions. This new research brings to light the notion that with modern studies, new discoveries are often found in terms of both the benefits and the hazards of certain medical techniques. At the same time, that makes judging which religious medical practices should be allowed and which should be banned even more fluid.

The contraception mandate in the federal healthcare law has created a great deal of controversy among religious groups that oppose the use of contraception.<sup>137</sup> Arguments have been made that requiring a company health plan to include birth control violates an individual's freedom of religious beliefs by compelling individuals to pay for medical services such as contraceptives, sterilization and abortion-inducing drugs that they find objectionable on religious grounds.<sup>138</sup> Administration officials maintain that the requirement leaves individual decisions regarding the use of birth control in the hands of women and their doctors. They further claim that the requirement is causing no "imminent injury" since it will not go into effect until January 2014 and they assure the mandate's opponents that the religious interests of these organizations will in fact ultimately be accommodated. Early opposition by religious institutions was temporarily blunted by administration offers to arrange to have health insurers rather than Catholic institutions themselves offer this insurance coverage. This accommodation, however, did not satisfy everyone and talks for acceptable implementation ultimately broke down.

Initially, the legal challenges to this aspect of President Obama's healthcare law were dismissed in federal courts.<sup>139</sup> In her decision, U.S. District Judge Carol Jackson held that, "this Court rejects the proposition that requiring indirect financial support of a practice, from which

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<sup>136</sup> Id.

<sup>137</sup> *Federal Court Dismisses Challenge to Contraception Mandate*, ASSOCIATED PRESS (Oct. 2, 2012), <http://www.firstamendmentcenter.org/federal-court-dismisses-challenge-to-contraception-mandate>.

<sup>138</sup> Id.

<sup>139</sup> Id.



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plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise."<sup>140</sup> More recent decisions, however, notably the case of *Roman Catholic Archdiocese of New York v. Sebelius*, have rejected the government's request for dismissal. U.S. District Judge Brian Cogan's decision in this case hinges on striking a balance between his concern with religious freedom and the applicability of the prudential ripeness doctrine which aims to avoid premature assessment of constitutional issues. Cogan's decision is not determinative of the religious implications of the contraception mandate but reflects his concern that the mandate is creating a *fait accompli* which might ultimately cause the plaintiffs either financial or First Amendment injury.<sup>141</sup>

While circumcision and contraception may both be considered under the umbrella of freedom of religion and have both aroused religious freedom sensitivities, circumcision is distinguishable from contraception on a number of counts. A ban on circumcision directly impacts those individuals who practice the right. What both the law in Germany and the San Francisco ballot initiative aimed to achieve would directly inhibit a Jewish or Muslim individual from practicing his religion. The contraception issue that was brought before the courts did not directly inhibit the rights of any individual to practice his or her religion. No matter the negative psychological, financial or religious effect allowing an individual in a company health plan access to contraception may have on a third party, it does not reach the same level of religious restriction as directly stopping an entire religious population from practicing an ancient tradition. Despite these distinctions, Justice Cogan has left the door open to a challenge to even the contraception mandate on First Amendment grounds. *A fortiori*, applicability of a similar

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<sup>140</sup> Karen Gullo, Catholic Groups' Can Pursue Contraceptive Coverage Suit, BLOOMBERG (Dec. 6, 2012), <http://www.bloomberg.com/news/2012-12-06/catholic-groups-can-pursue-contraceptive-coverage-suit.html>; *Roman Catholic Archdiocese of New York v. Sebelius* F. Supp 2d (E.D.N.Y. 2012) (No. 12 Civ. 2542 (BMC)).

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

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challenge to anti-circumcision law is incontrovertible.

#### CONCLUSION

For most, protecting the health of children is a societal imperative, but it is clouded and complicated by numerous competing considerations. Debate over the right to circumcise highlights many of these considerations and compels judicial systems to define the boundaries of this imperative. Complicating the debate is the ever-evolving state of medical research on the benefits and risks of circumcision, as well as new legal rulings on the applicability of the right to religious freedom to health care decisions. The challenge to the courts is creating an acceptable balance that satisfies our commitment to the basic tenets of our healthcare system, that is sensitive to medical wisdom, that takes into account our healthcare culture and that ensures our continued commitment to religious freedom for all.

Whether a population that is not considered mature enough to make their own decisions when it comes to drinking alcohol, voting and other rights should be allowed to make their own healthcare decisions is a debatable issue. With their different histories and with their diverse economic, social and cultural realities, countries must resolve this matter on a very individual basis. Germany, with its historically sensitive relationships with the Jewish community must be particularly cautious when dealing with its Jewish population. The circumcision question there is one that cannot be addressed in isolated fashion without focusing on other infringements faced by Jews in Germany in the past. Interfering with Jewish life in Germany by outlawing circumcision, as Chancellor Merkel seems to believe, will reflect negatively on the country and is not something Germany should be willing to do.

The childhood autonomy argument against circumcision is inconsistent with the usual method of child healthcare in America. Currently, vaccinations and immunizations are given to

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minors regardless of whether they choose to obtain the shot or not. Some of these vaccines have had adverse reactions though most do not. Similarly, while it is true some circumcisions have had adverse reactions, most circumcisions do not. The medical benefits of circumcision are important in the AAP's decision to support circumcision.

Freedom of religion is a basic right in this country and the United States has consistently upheld its citizens' rights to practice their religion without interference by governmental bodies. While vocal minorities may sometimes support legislation that threatens this right, Jews have been able to practice circumcision without opposition for a long time in America. Movements like the ICGI may have noble motives, but their platforms lack the sound medical substantiation that would be required to justify infringement on religious freedoms. As the situation stands today, circumcision has the backing of a major medical organization and is in keeping with the culture of health care decision-making for children in the United States. To violate the religious freedom of America's Jews, the anti-circumcision movement faces an uphill battle.