


1999

## Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States

Ross Povenmire

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### Recommended Citation

Povenmire, Ross. "Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States." *The American University Journal of Gender, Social Policy & the Law* 7, no.1 (1998-1999): 87-123.

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# DO PARENTS HAVE THE LEGAL AUTHORITY TO CONSENT TO THE SURGICAL AMPUTATION OF NORMAL, HEALTHY TISSUE FROM THEIR INFANT CHILDREN?: THE PRACTICE OF CIRCUMCISION IN THE UNITED STATES

ROSS POVENMIRE\*

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## I. INTRODUCTION

There is no interest so vital and personal to the individual as that of controlling one's own body. This interest is a fundamental precept of the common law<sup>1</sup> and an essential element of the right to privacy pro-

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tected under the United States Constitution.<sup>2</sup> The right to bodily integrity is also a "sacred"<sup>3</sup> and "fundamental"<sup>4</sup> right which derives its compelling indispensability from the instinctual desire for self-preservation common to all sentient beings.<sup>5</sup> The instinct to protect oneself is palpably present in an infant from the moment it emerges from the womb.<sup>6</sup>

The routine infant circumcision of males in the United States consists of surgically amputating healthy tissue.<sup>7</sup> In the overwhelming majority of cases, this procedure is performed at the parents' discretion, without any compelling medical or religious purpose.<sup>8</sup> This ar-

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1. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1890) (holding that the court has no right to order a surgical exam); see also *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (permitting the state of Missouri to require evidence in order to withdraw life sustaining equipment); *In re Gardner*, 534 A.2d 947, 956 (Me. 1987) (holding that a patient, who prior to an accident stated that he did not want to be kept alive in a vegetative state, had the right to refuse life support); *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (stating that every adult has control over his or her own body).

2. See *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (concurring that there exists a constitutionally protected liberty interest which includes the right to bodily integrity); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (describing the right of privacy as "the right of the individual . . . to be free from unwarranted governmental intrusion" rather than a right of the family as an entity); *Conservatorship of Valerie N.*, 707 P.2d 760, 785 (Cal. 1985) (holding that prohibiting sterilization violated privacy and liberty interests). The court in *Conservatorship of Valerie N.* stated, "[T]he great conceptual background for due process privacy law [is] bodily autonomy . . . . At present only the most powerless members of society appear to need to rely on the Constitution for such a basic right. The courts have . . . recognized individual liberty in things of the body as a touchstone." See *id.* (quoting Note, *Due Process Privacy and the Path of Progress*, U. ILL. L. FORUM 469, 515 (1979)); *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (discussing the right to determine what to do with one's own body); *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 414-15 (La. 1988) (stating that the "[t]he choice of whether to undergo surgery or other medical treatment, no less than the decision to continue or terminate pregnancy is, to an extraordinary degree, an intrinsically personal decision.").

3. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. at 251 (stating that there is no right more sacred than the right to control one's own person).

4. See *Cruzan*, 497 U.S. at 278 (inferring from prior court decisions a constitutionally protected liberty interest in declining medical treatment).

5. See THOMAS AQUINAS, *SUMMA THEOLOGICA* 2 (Fathers of the English Dominican Province trans., Benzingers Bros. 1947) (1498) (communicating the significance of religious dogma); see also Steven M. Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos*, 2 ANIMAL 179, 181 (1996) (discussing the chain of being, ranging from the corporeal to the intellectual).

6. See Wise, *supra* note 5, at 181.

7. See EDWARD WALLERSTEIN, *CIRCUMCISION AN AMERICAN HEALTH FALLACY* 1 (1980) (discussing the number of American males who undergo this type of surgery and the techniques used, even though no religious ritual or puberty rites are involved); see also *infra* note 14 and accompanying text.

8. See Randi Hutter Epstein, *Circumcision Controversy: Doctors Debate the Benefits and Risks of This Common Procedure, but for Most Parents the Decision is Personal*, WASH. POST, Oct. 7, 1997, at Z14 (describing circumcision and comments for and against it).

ticle argues that routine infant circumcision implicates important constitutional rights which should supercede parental discretion, and that parental authorization for this procedure is legally insufficient to constitute effective consent.

For female infants, the right to the integrity of the genital organs is protected against surgical "mutilation"<sup>9</sup> by federal law<sup>10</sup> and United Nations resolutions.<sup>11</sup> Under the law, the right to bodily integrity is deemed so fundamental that it displaces any consideration of the parents' cultural or religious beliefs.<sup>12</sup> Unfortunately, no similar recognition has been extended to male infants in the United States. The failure of the law to provide equal protection to males can find no "exceedingly persuasive"<sup>13</sup> justification, and is therefore unconstitutional.

Part II of this article reviews the historical background of routine infant circumcision in the United States and surveys the positions of various medical associations and medical researchers concerning the practice of male circumcision. Part III reviews the legal prerequisites for obtaining an effective consent to surgery, including circumcision. Part IV analyzes the *parens patriae*<sup>14</sup> power of the state to intervene in parental decisions affecting minor children, while drawing parallels between circumcision and cases involving sterilization and amputation. Part V discusses the recently passed Criminalization of Female Genital Mutilation Act, emphasizes the inability of parents to consent to genital surgery on minor females under the Act, and exposes the Act's vulnerability to Fourteenth Amendment Equal Protection chal-

9. The term "female genital mutilation" has been the subject of considerable controversy. Some scholars argue for the use of the term "female genital surgery" in an effort to be more objectively descriptive and culturally neutral. See Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 7 (1995) (noting that there are objections to the word "mutilation" because it has a negative connotation and elicits a misunderstanding of its purpose). Most authors have dispensed with the term "female circumcision" on the premise that the surgical procedures gathered under the term are more abhorrent than male "circumcision." *Id.* at 6.

10. Criminalization of Female Genital Mutilation Act, Pub. L. No. 104-208, § 645, 110 Stat. 3009-708, (1996) (codified as amended at 18 U.S.C. § 116).

11. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 180, U.N. GAOR, 34th Sess., Item 75, U.N. Doc. A/RES/34/180 (1980). More recently, the U.N. General Assembly passed the *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/629 (1993). Article 2 of DEVAW includes FGM as an example of violence that is covered under the resolution.

12. See *infra* Part V. (outlining the possible legal implications for circumcision decisions in light of the Criminalization of Female Genital Mutilation Act).

13. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that gender based classifications require an "exceedingly persuasive justification").

14. See HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 769 (6th ed. 1991) (defining *parens patriae* as the "role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . .").

lenges under the United States Constitution. Part VI concludes that a change in societal attitudes is necessary in order to extend to males the same protection from intrusive amputation of genital tissue currently provided to females in the United States under the Criminalization of Female Genital Mutilation Act.

## II. HISTORICAL AND MEDICAL PERSPECTIVES OF ROUTINE INFANT CIRCUMCISION IN THE UNITED STATES

Circumcision, as practiced in the United States, involves the surgical removal of the penile prepuce, or foreskin.<sup>15</sup> The United States is the only western country to practice routine infant circumcision for non-religious reasons.<sup>16</sup> For Jewish infants, the procedure is typically performed in a non-hospital setting by a specially trained lay person, or *mohel* (a religious leader who performs Jewish circumcisions),<sup>17</sup> on the eighth day following birth, without anesthetic, except for the ritualized use of wine.<sup>18</sup> For non-Jewish infants, the procedure is typically performed in a hospital within days of birth, also without the use of anesthetic.<sup>19</sup> Approximately eighty percent of the males living in the United States in 1970 were circumcised.<sup>20</sup> Given a total male population in the United States of approximately 130 million, it appears that approximately 104 million males have been affected by the practice in this country alone.<sup>21</sup> The rate of infant circumcisions reported for the years 1991 through 1993 was approximately sixty percent, showing a decline in the acceptance of this technique.<sup>22</sup> For

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15. For a step by step description of several different circumcision techniques, including illustrations see ROSEMARY ROMBERG, CIRCUMCISION: THE PAINFUL DILEMMA, 162, 168 (1985) (explaining the Gamco and Plastibell techniques of circumcision).

16. See Epstein, *supra* note 8, at Z14 (commenting on the factors parents consider when deciding whether to circumcise); see also EDWARD WALLERSTEIN, CIRCUMCISION: AN AMERICAN HEALTH FALLACY 1, 6-14 (1980) (stating that other countries conduct circumcisions only as religious rituals or puberty rites); *infra* notes 27-36 and accompanying text.

17. See Epstein, *supra* note 8, at Z14 (discussing the circumcision procedure).

18. See ROMBERG, *supra* note 15, at 41-47 (describing the Jewish circumcision ceremony from the night before until the time of circumcision). Jewish circumcision practices have varied over the course of history. Circumcision was initially practiced upon adolescents. *Id.* at 36. Some aspects of the rite, such as the ritualized sucking of blood from the penile wound, have been modified or abandoned. *Id.* at 45.

19. See Katherine Kelly, M. Bruce Edmonson & John M. Pascoe, *Pediatric Residency Training in the Normal Newborn Nursery: A National Survey*, 151 ARCHIVES OF PEDIATRICS AND ADOLESCENT MED. 511, 513 (1997) (stating that in a national survey of pediatric care practices, anesthesia was used in approximately ten percent of the circumcisions).

20. See WALLERSTEIN, *supra* note 16, at 217 (indicating that the rate of circumcision rose from approximately 5% in the year 1870 to approximately 85% in 1979). Some studies indicate that rates have been over 90%. *Id.*

21. The 1996 estimated population for the United States is 264,867,900. 1997 Market Statistics, available in 1997 WL POPDEMO.

22. The rates of circumcision in the United States for 1991, 1992 and 1993 are 61.6%,