Anti-Circumcision: A Case Comparison in Germany, Norway, and the U.S.

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“Banning mila[1] was the route chosen by two of the worst enemies the Jewish people ever had, the Seleucid ruler Antiochus IV and the Roman emperor Hadrian, both of whom set out to extinguish not only Jews but also Judaism,” Chief Rabbi Jonathan Sacks has remarked (Sacks, 2012). Prohibitions on circumcision have existed since the ancient Roman and Greek civilizations, and as recently as the Soviet era last century (Eddy, 2012). The possibility of banning circumcision has arisen even in this century through a court case in Germany in May of 2012. This German case, as well as similar worries that arose in Norway and the United States, has sparked a wave of debates regarding the role of the state in protecting the bodily integrity of children as opposed to the religious rights of parents to raise their children as they see fit. Though the anti-circumcision debate in Europe and the United States has sprung from similar concerns, it has led to different outcomes and reactions. In largely Protestant, European countries like Germany and Norway, the government has initially reacted to limit or ban non-medical circumcision, whereas in the United States, the Californian state government has prohibited bans on circumcision. These different outcomes may be due to differing legal precedents, with a greater focus on state interest in European countries, as opposed to the greater focus on parental rights in the United States. Further, the divergent reactions may be accounted for due to differing historical precedents, with the legacy of Lutheran Protestantism in these European countries as opposed to the influence of Anglican Protestantism in the United States. Perhaps due to these legal and historical precedents, the United States is more likely to protect religious free exercise and parental rights, whereas Lutheran, European governments are more likely to seek secularizing decisions which increase governmental control.

The government would impose a significant burden on the Muslim and Jewish religions if circumcision were banned. In the Muslim faith, although the Koran does not give direct authority on circumcision, the practice is considered obligatory by many, based on tradition and Muhammad’s example (Behrns, 2013). “The practice symbolizes a
submission to God’s will and a surrendering of immoral sexual desires” (Behrns, 2013). Further, when performed on an adolescent boy, the act is considered a traditional celebration symbolic of an entrance into manhood and it allows the boy to participate in public prayer.

Circumcision plays an even more fundamental role in Judaism than in Islam in that the practice is directly mandated in the Torah, and is the oldest Jewish practice. It is first mentioned in Genesis as part of Abraham’s original covenant with God (Johnson, 1987, 37).

Genesis 17.9-14: “God further said to Abraham, ‘Such shall be the covenant between Me and you and your offspring to follow which you shall keep: every male among you shall be circumcised. You shall circumcise the flesh of your foreskin, and that shall be the sign of the covenant between Me and you. And throughout the generations, every male among you shall be circumcised at the age of eight days. ..Thus shall my covenant be marked in your flesh as an everlasting pact. And if any male who is uncircumcised fails to circumcise the flesh of his foreskin, that person shall be cut off from his kin; he has broken My covenant.” (Berlin & Brettler, Eds., 2004, 38)

The first act of circumcision mentioned in the Torah is that of Moses’ son, who is circumcised at birth by his mother Zipporah, as described in Exodus. After this instance, “the ceremonial removal of foreskin on the eighth day after birth was then enshrined in the Mosaic legislation” (Johnson, 1987, 37). Thus, the Israelites made circumcision “an indelible symbol of an historic covenant and membership of a chosen people” and an “indelible sign of the unity between the people and their beliefs” (Johnson, 1987, 37). Today, this practice welcomes the baby to the Jewish community and allows the boy to share in God’s covenant (Behrns, 2013).

The debate over circumcision first sprang up in Germany, due to a case in the District Court of Cologne (Landergericht Cologne Judgment, 2012). On May 7, 2012, the Court held that the circumcision of a four year old Muslim boy was unlawful due to the bodily harm it caused the child and due to the lack of consent from the child. The court ruled that parental consent did not extend to circumcision, and asserted that the child’s right to bodily integrity, self-determination and well-being took precedence over and limited
the parents’ right to raise their child in their religious faith. The court used the principle of proportionality to strike a proper balance between the child’s rights and parental rights, determining that because circumcision changes the child’s body permanently and keeps the child from independently deciding his religious affiliation, circumcision is unreasonable in the sense of proportionality. The doctor performing the circumcision was, however, acquitted because the court decided that he acted under an unavoidable mistake of the law due to the lack of unanimous opinion on this issue at the time.

The first case to arise from this anti-circumcision ruling in the District Court of Cologne was one concerning Rabbi David Goldberg of Bavaria, who was charged with committing bodily harm due to his role as a ritual circumciser (JTA, 2012). The charges held against this rabbi confirmed the fears of the Jewish community that the ruling would be applied to limit Jewish religious expression and prohibit one of the core religious practices in Judaism. Though the original case in Cologne addressed a Muslim family, the Jewish community feared the legislation may be even more pertinent to Judaism due to the obligatory nature of this religious practice. Further, historically, anti-circumcision laws have been passed as acts of severe anti-Semitism, and thus, the Jewish community responded with great concern that this would be a first step in the re-emergence of German anti-Semitism.

The Cologne case also prompted hospitals as far away as Zurich to suspend circumcisions, and it emboldened an anti-circumcision movement in Germany, as well as in Northern European countries like Norway. In November 2013, Norway’s health minister announced that Norway will promote new legislation to regulate non-medical, ritual circumcision for boys under the age of eighteen (JTA, 2013). The reasons for the legislation proposal included similar concerns about the violation of children’s rights as well as concerns that the procedure is irreversible, risky and painful, as seen in the ruling of the District Court of Cologne in Germany. The Jewish and Muslim communities in Norway, as in Germany, have responded with escalating concerns since they feel this legislation would create a severe burden on their religious expression.

The District of Cologne Case, moreover, led to a general consideration of circumcision as a human rights violation in the Council of Europe. The report issued in October 2013 by
the Parliamentary Assembly of the Council of Europe, expressed a worry regarding violations of the physical integrity of children, particularly in cases in which these are presented as beneficial to the children despite life-long consequences. The report addressed the religiously-motivated circumcision of young boys along with female genital mutilation, medical interventions during the early childhood of intersex children and the coercion of children into piercings, tattoos or plastic surgery. Further, the report urged member states to promote further awareness of these issues and to protect child health and well-being by adopting “specific legal provisions to ensure that [these]... operations and practices will not be carried out before a child is old enough to be consulted” (Parliamentary Assembly, 2013). This Council of Europe Report enlarged the debate over circumcision making it a continental, European issue.

The Council of Europe report increased the concerns of the Jewish community due to the Parliamentary Assembly’s support for the restriction of religious circumcision, and especially given the link the report established between religious male circumcision and female genital mutilation (Fisher, 2013). Concerned members of the Jewish and Muslim communities have pointed to the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (UN General Assembly, 1981), and have claimed that the Parliamentary Assembly is disregarding the importance of this document as well as the religious rights it protects. They point to Article 5 in particular, which states: “The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.” The Council of Europe report caused a growing concern in Jewish and Muslim communities that European governments will ban their essential religious practice without a consideration for striking a balance between the rights of the child to bodily integrity and the rights of the parents to religious expression (Fisher, 2013).

Concerns regarding circumcision, however, are not limited to the European continent, and have recently been sparked in North America as well, particularly in the United States, in the state of California. A San Francisco anti-circumcision advocacy group attempted to place a bill banning circumcision on the November 2011 election ballot; the
bill qualified for ballot placement as the group was able to collect over 12,000 valid supporting signatures. The Male Genital Mutilation bill called for the expansion of the U.S. Female Genital Mutilation Act of 1996 to include protection against non-medical male mutilation as well. It also urged the U.S. President to encourage nations worldwide to ban the practice of non-medical male circumcision, and urged the United Nations to formally classify male circumcision as a human rights violation (MGM Bill, 2011). Importantly, the bill lacked a religious exemption. Further, the writers and advocates of this bill turned to the UN Convention on the Rights of the Child for support, particularly using Article 14, which declares that States must respect a child’s right to freedom of conscience and religion, and Article 19, which declares the State’s responsibility to protect a child from physical violence, including that which occurs while the child is under the care of parents. Article 24 was also used, which states that governments must take all necessary measures to protect a child including the abolishment of traditional practices which are harmful to a child’s health (UN General Assembly, 1989). The anti-circumcision advocates in San Francisco expressed ideas about the importance of the rights of children over the rights of parents which were similar to the ones used in the European debates.

Unlike the European response to anti-circumcision claims, however, the Californian state government responded to the MGM Bill by passing the CA Assembly Male Circumcision Bill, which prohibited California County or City administrations from banning or restricting male circumcision. Further, the legislative declared that the practice of male circumcision has many health and affiliative benefits, and that it is necessary for this bill to take immediate and uniform effect in order to ensure the preservation of public peace, health and safety within Article IV of the Constitution (California Assembly, 2011). Thus, in the United States when the issue of circumcision surfaced, the immediate response was to protect the religious right of parents to circumcise their children.

Both the United States and Europe had similar concerns regarding the bodily integrity and well-being of the child, as well as the child’s lack of consent, in the practice of male circumcision. The responses to anti-circumcision advocates, however, were very different in the United States, as opposed to in Germany and Norway. The Californian
government prohibited bans on circumcision, protecting religious free exercise, while the German District Court passed a ban on non-medical circumcision for boys under age 18, as a measure to protect the child’s rights. In these debates, Europe seems more concerned with individual self-determination and the state’s role in protecting the best-interest of the child, whereas the United States seems to be more concerned with protecting religious liberty and parental rights.

The substantial difference between the American and European responses to anti-circumcision advocacy may be due to the differing legal precedents in these regions. The Supreme Court of the United States, for instance, has traditionally and continuously upheld a parental rights theory that gives parents the fundamental right to direct the education and upbringing of their children. In *Meyer vs. Nebraska*, the Court held that parents have the fundamental right to instruct their children in a foreign language based on the Due Process Clause of the Fourteenth Amendment, which states that parents have the right to “establish a home and bring up [their] children” (*Meyer v. Nebraska*, 1923). Two years later, in *Pierce vs. Society of Sisters*, the Court decided that the state could not force students to be instructed exclusively in public schools and granted individual parents more authority in determining the education of their children, famously stating: “the child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations” (*Pierce v. Society of Sisters*, 1925). A few decades later, in *Prince vs. Massachusetts*, the Court wrote that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder” (*Prince v. Massachusetts*, 1944). The landmark decision in parental rights came in 1972 in *Wisconsin vs. Yoder*. In this case, the U.S. Supreme Court found that, due to the First and Fourteenth Amendments, Amish children could not be forced under compulsory education to attend schools past eighth grade. This case established the parents’ fundamental right in determining the religious education of their children, and determined that the parents’ freedom of religion outweighed the state interest for compulsory education. The Court famously stated:

“This case involves the fundamental interest of parents, as contrasted with that of the
state, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition” (Wisconsin v. Yoder, 1972).

A few years after this case, another case, *Parham v. J.R.*, established the application of parental rights theory to medical decisions. Here, the Court, acting on the presumption that parents act in the best interest of their children, found that parents have the right to make medical decisions for their children. Further, the Court noted that “[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions” (*Parham v. J.R.*, 1979). This is a particularly important case to the anti-circumcision debate in that it addresses the proper parental role in medical procedures that carry similar health risks to circumcision. These United States Supreme Court cases clearly establish legal precedent for granting greater authority to parents than to the state in the upbringing of children, and may help explain why the United States reacted to protect parental rights in the anti-circumcision controversy.

The European legal precedent, in contrast, places a greater value on state interest and state intervention in the lives of citizens than on parental rights. Particularly, it is interesting to consider past cases in Germany and Norway, as these are the countries involved in the anti-circumcision debates. In Germany, in *Konrad v Germany*, the Konrad family sought to educate their children at home rather than in primary school in order to teach Biblical and Christian values. According to the Konrads, primary school education gravely contradicted their beliefs about sex education and violence, and they asserted their right and duty to educate their children in their religion. Further, the Konrads belonged to a religious minority so there were no religious private schools in accordance with their beliefs. The European Court of Human Rights, however, declared that the State has the right to establish compulsory education due to its interest in providing for the acquisition of knowledge and the integration into society through primary schooling, which cannot be accomplished to a comparable degree through home schooling. Further, the Court noted the general interest of society in avoiding the
development of parallel societies with separate philosophes, and the importance of integrating minorities into one unified society (Konrad v. Germany, 2006). In a similar case, Dojan and Others vs. Germany, a group of families expressed religious objections to the sex education classes and theatre programs that their children were compelled to attend in school. Authorities refused to exempt their children from these compulsory classes, which the families saw as a disproportionate restriction on their right to educate their children in accord with their religious beliefs. The Court asserted that the sex education classes sought to provide neutral knowledge to students based on educational and scientific standards, in order to prevent sexual abuse and violence. Further, the Court ruled that these classes were necessary in order to educate responsible, emancipated citizens, with a view to integrating minorities and preventing the emergence of “parallel societies” as established by Konrad v Germany (Dojan and Others v. Germany, 2011). Thus, these cases demonstrate the German focus on the interest of the state which is seen as outweighing the interests of parents in the education of children.

Cases in Norway also point to the greater emphasis on state interests and state regulation of child education. In Norway in 2007, the government enacted a law which required students to be instructed in Christianity, religion and philosophy. A group of parents were refused exemption from this law, and they sued in a case known as Folgero and Others vs. Norway, claiming that the law violated their rights, and their children’s right, to religious freedom. The European Court of Human Rights found that Norway cannot require education in KRL, a subject that focuses heavily on the study of Christianity, without providing the option of a full exemption to those who find the teaching to be a violation of their religious of philosophical beliefs (Folgero and Others v. Norway, 2007). Although the European Court’s ruling is more in line with the U.S. courts’ continued protection of the parental right to educate children, the fact that Norway enacted this law in the first place shows their emphasis on state regulation of child education, which is similar to the German approach to the issue.

Perhaps along with the different legal precedents regarding conflicting state and parental interests, differing historical factors may also play into the discrepancy between European and American responses to anti-circumcision, and may even explain the
development of these legal precedents. Specifically, perhaps the tradition of Lutheran Protestantism in Germany and Norway has historically established greater religious uniformity as well as greater state control over religion in these countries. The origin of Anglo-Protestantism in Britain and its role in the foundation of the United States, however, may have led to greater religious tolerance as well as greater protection of religion from state control in the United States.

The emergence of Lutheran Protestantism in Germany and Scandinavian states established near-absolute state control over religion, as well as enforced religious uniformity. Due to the Lutheran Reformation, Church properties were sequestered, religious orders were suppressed, the authority of the Pope was rejected, and importantly, the succession of churches was placed completely under the crown (Madeley, 1982).

“The classic Lutheran doctrine of the institutional Church which legitimated this subjection, stated that the Church constituted only the human framework for the working of God’s free grace; it possessed as an institution no inherent or derived authority to dispense miraculous benefits or to interpret the will of God, such as was claimed by the Catholic Church” (Madeley, 1982).

Thus, the Prince in Lutheran regions became both the spiritual and political leader, responsible to God alone, and the Church ceased to exist as an independent entity, instead becoming “a branch of royal bureaucracy” (Madeley, 1982). Further, the wars of religion united Nation and Church in the struggle for national autonomy and power, making it easier for Churches to become nationally dominated and to lose their independent power. Until the late eighteenth century, this organization of church-state relationships provided for almost complete religious uniformity and conformity in Lutheran states.

The emergence of Anglican Protestantism in Britain, however, led to greater independence from state control and greater religious diversity than in Lutheran states. Anglican churches also ceased to exist independently from the State, but the clergy there did not have the character of the Lutheran ecclesiastical state bureaucracy and was able to maintain a greater degree of dignity and independence (Madeley, 1982). There were
also extensive patronage rights bestowed upon bishops, landowners, and corporations which made State control less rigid than in Lutheran countries. Further, the development of parliamentary government led to a much less uniform religious establishment than in the absolutist rule that existed in Lutheran Europe (Madeley, 1982). Religious toleration was also a principle that developed early in Anglican Europe, allowing more independence and free exercise to those in Britain than to those in Lutheran states. “Toleration in all cases entailed a renunciation on the part of state authorities of the effort to maintain conformity and orthodoxy” (Madeley, 1982), and in England, the State gave up efforts to enforce religious conformity early on. Thus, with the diminished state control over the Anglo-Protestant Church, a competitive pluralism of beliefs was able to develop, leading to increased religious diversity in Britain.

The diversity and religious toleration which resulted from the development of the Anglo-Protestant tradition in Britain played a significant role in the foundation of the United States. Due to the value placed on greater religious freedom from state control, Anglo-Protestant colonists established themselves as freely private subjects capable of shaping a religiously plural, diverse nation (Fenton, 2006). Further, the Founders of the United States saw Protestantism as a fundamental guarantor of religious liberty through privacy.

“Within the context of Anglo-American politics, the very idea of religious privacy derives from post-Reformation theologies of private judgment that positioned the individual as a rational subject capable of fashioning his or her own religious conscience without the interference of a dogmatic clerical or governmental hierarchy” (Fenton, 2006).

Thus, in effect, the Continental Congress treated ‘religious liberty’ and ‘Protestantism’ as synonymous, presenting religious pluralism as possible only within the borders of a nation surrounded by the Anglo-Protestant ideal of privacy. Many of the Founding Fathers explicitly turned to the British model as a nation surrounded by such Anglo-Protestant ideals; for instance, Jay wrote in a letter to the British that there is “much virtue, much justice, and much public spirit in the English nation...Permit us to be free as yourselves” (Fenton, 2006). Thus, Britain’s Anglo-Protestant tradition helped to establish the values of privacy and tolerance, as well as independence from state control,
at the foundation of the United States, and the Founders saw these values as intrinsically linked to Anglo-Protestantism.

These Anglo-Protestant values led the Founders of the United States to limit government power and state interference in the realm of religion through the separation of church and state, a fundamental act at the core of the American legal system. Madison, for instance, warned against the problem of tyranny and suggested that only a multiplicity of views could protect citizens’ rights by cultivating a diversity of interests (Fenton, 2006). This logic of multiplicity and religious pluralism, originally Anglo-Protestant values, helped shape the church-state relations outlined in the Bill of Rights—instead of positively defining the role the state would play in securing religious liberty, the Bill of Rights includes prohibitions against the establishment of a national religion, and against interference in the “free exercise” of religion. Thomas Paine acknowledged that the major threat to liberty stems from the merging of church and state (Fenton, 2006). Thus, provisions were made to separate church and state, and to protect religion from the State, but not vice versa. Under this logic, the State should not impose uniformity or conformity of beliefs, as was the case in Lutheran countries, and instead let a religious diversity develop independently of state control. Thus, the United States was founded based on the values of the Anglo-Protestant tradition, through the expansion of the greater independence from state control that religion was granted in Britain after the emergence of Anglo-Protestantism.

Thus, perhaps the historical emergence of Lutheran Protestantism, and its significantly greater state control over religion, led to greater state interference in current issues over religion in Lutheran countries like Germany and Norway. In contrast, perhaps the incorporation of Anglo-Protestant values, like religious pluralism and religion’s greater independence from state control, in the foundation of the United States has led to less state intervention in current religious affairs. This historical difference in the religious influences of these countries may help explain Germany and Norway’s greater willingness to interfere with and prohibit the practice of male circumcision and America’s greater willingness to leave that practice within the sphere of religion and outside the realm of the State.
The recent debate over male circumcision interestingly bridges concerns over government interference in the realm of parenting and in the realm of religion. The issue began in Germany, with a court ruling which sought to ban male circumcision due to its disregard for the bodily integrity of the child and due to the lack of consent from the child. This same issue sprung up in Norway as well where the government expressed similar concerns for the well-being of the child. The Parliamentary Assembly of the Council of Europe responded by issuing a report on practices which harm the physical integrity of the child, urging European countries to take measures to protect children from acts like male circumcision. In the United States, concerns over male-circumcision were brought up by a human rights advocacy group which attempted to place a ban on circumcision on the ballot. The response, however, was very different; the state legislature passed an act prohibiting bans on male circumcision. Though the concerns that arose in the European countries and in the United States were similar, it is important to consider why the responses to these claims were so different. One idea is that the legal precedents that exist in these various countries allocate different degrees of control to the state as opposed to parents in debates regarding children. The United States Supreme Court, for instance, has ruled in most cases according to a parental rights theory, protecting the parents’ right to raise their children as they see fit. Case decisions in Germany and Norway, however, have more often upheld the right of the state to interfere in a child’s upbringing. Further, it is interesting to consider why these legal precedents developed in this way. Some scholars have pointed to historical precedents and the differing traditions that developed in Lutheran Protestant countries as opposed to Anglo-Protestant countries. It has been suggested that the Lutheran Reformation led to much greater state intervention in the realm of religion, as well as to greater uniformity and conformity in religious matters; the development Anglo-Protestantism, however, allowed for greater church independence from state control. This historical influence may partially account for why the controversy over male circumcision began in largely Lutheran countries, like Germany and Norway, and why the European response was so different from the American one.

This controversy over male circumcision has far-reaching relevance, and raises important questions regarding the difference in American and European responses to similar issues. This case, for one, demonstrates the difficulty and importance of striking
an appropriate balance between state interests and religious liberties, and between government intervention and parental authority. It is important to not only consider why European countries veer on the side of government regulation and why American cases tend to rule in favor of religious and parental rights, but also to consider which approach is more appropriate and in which circumstances. European countries and the United States would each argue that they are acting out of liberal intentions and each value human rights. Germany, for instance, seems to be acting out of a concern for the human rights of children, possibly in an attempt to ensure that it does not repeat its recent, horrendous human rights violations in the Holocaust. In doing so, however, Germany is steering dangerously close to inciting the kinds of religious discrimination and anti-Semitism which were the building blocks leading up to this genocide. The danger, then, in issues in which religious liberties and human rights clash, is favoring one side over the other too extremely without a regard for the consequences. In the increasingly diverse world in which we live, and in an increasingly diverse Europe with its influx of immigrants, European countries in particular need to be mindful of taking their values of human rights and state regulation too far, as religious discrimination is also a human rights violation.

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[1] Hebrew for circumcision; the full term is “brit mila,” which means ‘Covenant of circumcision’