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THE UNREGULATED PRACTICE OF RITUAL CIRCUMCISION: CONFLICTS BETWEEN NEW YORK CASE LAW & STATUTES AND JEWISH RITUAL LAW

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Editor's Note: Circumcision dates back to father Abraham and has been practiced by Jews and Muslims ever since. Modern societies have to some extent more or less accepted and instituted this procedure. Presently it is utilized as a required religious ritual, and as an elective procedure by many. On the other hand its use has been decried by others. The benefits of circumcision are lauded by its proponents and denied by its antagonists. Some equate it with child abuse, and mutilation, as well as comparing it with female genital mutilation. The author discusses these various aspects as well as the legal aspects and implications.

Circumcision is an operative procedure that cuts off part of all of the foreskin of the penis. It is a prescribed religious ritual among Jews and Moslems. Because some claim that it may have beneficial health and sexual effects, others have performed it voluntarily.

MEDICAL CIRCUMCISION V. RITUAL CIRCUMCISION (BRIS MILAH)

Notwithstanding their unsuccessful suit, the Kalina suit iscussed in this article raises an important distinction between a medical circumcision and its religious counterpart, the *Bris Mi-*

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lah.[1] "The exact number of neonatal circumcisions performed each year is unknown since no systematic record is kept of ritual, religious, or medical circumcisions."[2] The National Center for Health Statistics of the Department of Health and Human Services estimates that 62.7% of males born in 1994 were medically circumcised. This number does not include the ritual circumcisions performed by a Mohel[3] (authorized Jewish circumciser) outside the hospital.

Circumcision is the most common neonatal surgical procedure, and probably the "most frequently performed operation in the United States."[4] Medical circumcision is a relatively safe and minor surgical procedure,[5] yet routine complications can include hemorrhage, infection, surgical trauma, phimosis, and scarring.[6] Improperly performed circumcisions can result in partial or complete amputation of the penis. Most neonatal medical circumcisions are performed by obstetricians[7] within a few hours or days following delivery.[8]

BENEFITS OF CIRCUMCISION

The medical benefits of circumcisions have been hotly debated.[9] It is almost always performed as a prophylactic mea-

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1. *Kalina v. Gen. Hosp. of The City of Syracuse*, 31 Misc. 2d 18 (N.Y.Sup. Ct. 1961), *aff'd* 18 A.D.2d 757, 760 (N.Y.App. Div. 4 Dept. 1962), *aff'd* 13 N.Y.2d 1023 (1963).

2. William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. Fam. L. 337, 339 (1984-85).

3. Jewish Ritual Circumcisor. Pl. mohalim.

4. David Grimes, M.D., *Circumcision of the Newborn Infant; A Reappraisal*, 130 American Journal of Obstetrics and Gynecology at 125 (Jan. 15, 1978).

5. Ronald L. Poland, M.D., *The Question of Routine Neonatal Circumcision*, 322 New England Journal of Medicine, 1312-1315 (May 3, 1990).

6. David Grimes, at 126. See also Ronald Poland, at 1312-1315 (61% of the 1.95 million males born in the United States were circumcised. Most complications were minor and treatable "and have no long term consequences").

7. David Grimes, at 126.

8. William E. Brigman, at 338.

9. See Journal of Family Practice, Sunday, Oct. 1, 1995 (citing the 1971 report of the American Academy of Pediatrics Committee on the Fetus and Newborn, that "there are no valid medical indications for [neonatal] circumci-

sure[10] yet the medical objectives which favor routine circumcision can just as easily be accomplished by good personal hygiene.[11] It has been claimed that cancer of the penis is rarely, if error seen in circumcised men. Also women cohabitative exclusively with circumcised males are less likely to develop cancer of the cervix.

A COVENANT BETWEEN GOD AND THE JEWISH PEOPLE

As a religious rite, however, circumcision is one of the fundamental covenants between God and the Jewish people. According to the Biblical narrative, Abraham was the first person commanded by God to undergo circumcision:[12]

> And God said unto Abraham: And as for thee, thou shalt keep My covenant, thou and thy seed after thee throughout the generations . . . And ye shall circumcise the flesh of your foreskin, and it shall be a token of a covenant between Me and (between) you. And he that is eight days old shall be circumcised among you, every male throughout your generations . . . And the uncircumcised male who doth not circumcised in the flesh of his

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sion." In 1989, the committee modified its position, noting that circumcision had medical advantages and disadvantages); see also American Family Physician, Aug 1, 1995, (routine neonatal circumcision may reduce the risks for penile cancer, and cancer of the cervix in the man's partner); see also David Grimes, "Nevertheless, the American College of Obstetrics and Gynecology whose members perform hundreds of thousands of circumcisions, declined to endorse this position . . . . ." Aids Weekly Plus, July 29, 1996 (reporting on the study conducted by Stephen Moses which found that circumcision reduces HIV susceptibility); Aids Weekly Plus, January 31, 1994 (citing 163(5) Journal of Infectious Diseases, 1404-1408 (Nov. 1993), that uncircumcised men have twice the risk of contracting HIV as do circumcised men).

10. Leonard Snellman & Howard Stang, *Prospective Evaluation of Complications of Dorsal Nerve Block for Neonatal Circumcision*, Pediatrics, May 1, 1995; *The Case Against Medical Circumcision*, British Medical Journal, 5 May 1979, p. 1163-1164, ("overall, between 1% and 2% of boys need circumcision for medical indications").

11. David Grimes at 126.

12. See *Circumcision*, Encyclopedia Judaica, vol. 5, p. 568 ff. (citing classical Rabbinic opinions that circumcision predated Abraham but was not performed in fulfillment of a Divine commandment. Neither the Bible, Talmud, nor the applicable codes of Jewish law propose a health factor for circumcision, although some ancient Jewish writers (notably Philo) proposed a hygienic link).

> foreskin, that soul shall be cut off from his people; he hath broken My covenant.[13]

UNAUTHORIZED CIRCUMCISIONS: WHO IS INJURED AND WHAT IS THE INJURY?

In *Kalina v. General Hospital of City of Syracuse,*[14] Orthodox Jewish parents sued a hospital for circumcising their newborn child against their expressed wishes. The infant was born on September 20, 1958, and his parents promptly informed the hospital that they intended to provide their son with a ritual circumcision in conformity with the Jewish faith. "[N]otwithstanding this affirmative notice, the hospital participated, aided, and assisted in the [circumcision] operation upon the plaintiff's son . . . ."[15]

The parents sued the hospital for the mental pain and anguish they suffered, but the trial court held that the parents were not directly injured by the unauthorized circumcision.[16] The child was the injured party and under applicable New York law, his parents could not recover for pain and suffering in a derivative action.[17] Drawing upon the language in *Palsgraf v. Long Island Railroad Company,*[18] the court stated that "the conduct of the defendants, if a wrong in relation to the son, was not a wrong in relation to the plaintiffs [parents], remote from the event."[19]

The court was correct in applying *Palsgraf* only if the parents' cause of action was limited to emotional injuries they suffered due to the unauthorized circumcision of their child. The *Kalina* court correctly held that mental suffering caused by a

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13. Genesis 17:9-14

14. *Kalina v. Gen. Hosp. of The City of Syracuse*, 31 Misc. 2d 18 (N.Y.Sup. Ct. 1961), *aff'd* 18 A.D.2d 757 (N.Y.App. Div. 4 Dept. 1962), *aff'd* 13 N.Y.2d 1023 (1963).

15. 18 A.D.2d at 757.

16. 31 Misc. 2d at 19.

17. *See id.* at 19-20 (noting that the court was not addressing the child's own cause of action. Pain and suffering "are recoverable only by him who is assaulted").

18. *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 341 (1928).

19. 31 Misc. 2d at 19.

child's injuries are recoverable only by the injured child, not his parents. A narrow exception to this recovery rule now exists in New York. An immediate family member who experiences emotional distress resulting from viewing the death or serious physical injury of a loved one may recover if he is also physically threatened.[20] The Kalinas would not have fit within this exception.

Significantly, the Kalina baby was not "injured" in any medical sense since the parents wanted him to be circumcised anyway.[21] It is also arguable whether the boy sustained any long term ritual or spiritual damages.[22]

The court, however, failed to appreciate that the Kalina parents did in fact sustain separate and distinct damages apart from their son - and each other.[23] On appeal, Justice Halpern was alone[24] In noting that contract theory could be applied between the mother-patient and the hospital. He reasoned that Mrs. Kalina should have been entitled to recover for her own mental suffering as a result of the hospital's breach of that duty owed to her.[25] Based on contract, Justice Halpern concluded that the

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20. *Bovsun v. Sanperi*, 462 N.Y.S.2d 611 (N.Y.App. Div. 2 Dept., 1983), *rev'd* 61 N.Y.2d 219, 228 (1984).

21. The distinction between ritual and medical circumcision is the crucial element of the parent' cause of action in *Kalina*. The pain and suffering they experienced was based upon the fact that the medical circumcision interfered with the required ritual circumcision. *See supra* § B, pages 5ff.

22. *See supra* note 47 and accompanying text. Jewish law requires that *(Hatafat Dam Brit)* be performed in the case of a baby circumcised medically but not ritually. Yoreh Deah (Y.D.) § 264:1. The corrective procedure is ritally significant but symbolic and medically minor. No subsequent stigma attaches to a child who undergoes *Hatafat Dam Brit.*

23. See supra note 10 and accompanying text.

24. *Kalina v. Gen. Hosp. of The City of Syracuse*, 31 Misc. 2d 18 (N.Y.Sup. Ct. 1961), *aff'd* 18 A.D.2d 757 (N.Y.App. Div. 4 Dept. 1962), *aff'd* 13 N.Y.2d 1023 (1963) (the Court of Appeals affirmed without opinion the dismissal of the parents' cause of action, with two judges voting to reverse and deny the hospital's motion to dismiss).

25. The damages in a negligent breach of contract case would be substantially less than in a tort action. *See Noe v. Kaiser Foundation Hosp.*, 248 Or. 420 (Or. 1967) (holding that unauthorized circumcisions do not warrant punitive damages).

parents' contract claim was not derivative; it was "not for the injury to the child but for the *direct injury to the plaintiffs.*"[26]

In *Losquadro v. Winthrop University Hospital,*[27] the New York court addressed the issue of unauthorized circumcisions in a non-ritual circumcision context. The plaintiff-mother sued the hospital where the unauthorized circumcision of her newborn son took place.[28] There is no indication from the reported decision whether Mrs. Losquadro intended on having her son circumcised at all—either ritually or medically. In contrast to *Kalina,* an action for negligence would presumably be stronger if the parents did not wish their son to be circumcised.[29]

Mrs. Losquadro's initial complaint was dismissed by the trial court for the same reasons articulated by the court in *Kalina;* Losquadro could not recover for emotional distress as a result of an injury to her son.[30] Rather than dismiss her action entirely, the trial court allowed the plaintiff to amend her complaint so as to assert that her emotional injuries were the result of a breach of "certain [unspecified] duties" which the hospital and staff owed directly to her.[31]

Losquadro is still being litigated and appealed.[32] Yet the trial court's opinion leaves us with the impression that it tacitly accepts the approach raised by Justice Halpern's thirty five years ago in *Kalina.* While the scope and nature of the injuries were not determined by the *Losquadro* court, parents now seem to have identifiable injuries when their children are circumcised without their consent.

RITUAL CIRCUMCISION: MORE THAN SURGERY

Apart from the contract issues raised in *Kalina,* Justice

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26. 18 A.D.2d at 760 (emphasis added).

27. *Losquadro v. Winthrop Univ. Hosp.,* 628 N.Y.S.2d 770 (N.Y.App. Div. 2 Dept., 1995).

28. I was informed by plaintiff's law firm that the infant was also pursuing an independent cause of action.

29. *See supra* note 21 and accompanying text.

30. *Losquadro.*

31. *But see Vargas v. Zoe Rosal-Arcillas,* 108 Misc. 2d 881 (N.Y.Sup. 1981) (court rejected plaintiff's attempt to characterize unauthorized circumcision as battery rather than medical malpractice).

32. I learned this from the plaintiff's law firm.

Halpern recognized that ritual circumcision is a fundamental tenet of the Jewish faith.[33] Bris Milah—which means "covenant of circumcision" in Hebrew—is an elaborate religious ceremony. The medical act of removing the foreskin is surrounded by rituals that dramatize the infant's inclusion into the covenant of Abraham.[34] The child receives his name during the concluding benedictions that follow the circumcision.

NON RITUAL CIRCUMCISION: VIOLATION OF RELIGIOUS BELIEFS

Justice Halpern maintained that the Kalina own religious beliefs were violated when the hospital circumcised their son against their expressed wishes in a manner inconsistent with their faith. The majority was evidently unpersuaded. It is possible that the court feared that allowing recovery in tort for the violation of a religious conviction—fundamental as it may be to Jews—would open the floodgates of actions based on violations to religious beliefs.[35] And courts are profoundly ill-equipped to adjudicate the scope of such injuries and the resulting damages.[36]

JEWISH RELIGIOUS REQUIREMENTS

Still, even Justice Halpern did not fully appreciate the extent of the parents' injury. The father was not merely distressed that his son was circumcised against his wishes and in violation of Jewish law. Rather, Mr. Kalina sustained his own cognizable

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33. *Kalina v. Gen. Hosp. of The City of Syracuse*, 31 Misc. 2d 18 (N.Y.Sup. Ct. 1961), *aff'd* 18 A.D.2d 757, 760 (N.Y.App. Div. 4 Dept. 1962), *aff'd* 13 N.Y.2d 1023 (1963).

34. Y.D. § 265:1 (indicating that the traditional blessing recited after the circumcision is: Blessed art Thou, Lord our God, King of the Universe, Who has sanctified us with His commandments and commanded us to bring [this boy] into the covenant of Abraham our patriarch).

35. *Kalina v. Gen. Hosp. of The City of Syracuse*, 31 Misc. 2d 18 (N.Y.Sup. Ct. 1961), *aff'd* 18 A.D.2d 757, 761 (N.Y.App. Div. 4 Dept. 1962), *aff'd* 13 N.Y.2d 1023 (1963). See penultimate paragraph of the dissenting opinion there.

36. *See generally* Daniel G. Ashburn, *Appealing to A Higher Authority?: Jewish Law in American Judicial Opinions.* 71 U. Det. Mercy L. Rev. 295. For example, courts have faced great difficulty in constructing, interpreting, and enforcing kosher laws and New York's Get (Jewish Divorce) law (N.Y. Dom. Rel. Law § 253).

damages.[37] He was deprived of a specific parental obligation to circumcise his son as required by the *Halacha* (Jewish law). The injury he sustained was not merely a violation of a broad religious principle given to Abraham in Biblical times. It was a transgression directly upon Mr. Kalina.[38]

The Jewish laws of circumcision are found in the Shulchan Aruch,[39] Yoreh Deah (Y.D.) §§ 260-266. Sections 260-261 introduce the laws of circumcision by stating that the father is personally obligated to perform his son's bris.[40] The code emphasizes that circumcision is of greater importance than all other positive, ritual obligations.[41]

Unlike the medical circumcision, a *bris* is not ritually valid unless the corona is completely exposed.[42] Furthermore, healing that results in adhesions that obscure the majority of the corona render an otherwise valid bris retroactively invalid.[43] Any surgical instrument may technically be used[44] but the bris is not valid unless bleeding occurs as part of the ceremony.[45] Since modern

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37. Y.D. § 260-261. The obligation to circumcise a child rests on the father, not the mother. *See also* note 46 and accompanying text.

38. There was likely no privity of contract directly between Mr. Kalina and the hospital. Nevertheless, the hospital was aware of the parents' desire to ritually circumcise their son. They acted negligently with regard to the child and could therefore be held liable for this foreseeable injury to the father.

39. Shulchan Aruch is the authoritative Code of Jewish law. *See generally Halakhah*, Encyclopedia Judaica, vol. 7, p. 1156-1166. See also David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law*, 3-18, New York University Press (1968).

40. The law is based on a Talmudic discussion in Tractate Kiddushin 29a which in turn was based on the Biblical story of Abraham's circumcision of his son, Isaac (Gen. 21:4).

41. The Talmud, Tractate Shabbat 133a, states that circumcision takes place on the Sabbath even though the act would otherwise conflict with the Sabbath day restrictions). *See also* Tractate Sanhedrin, 99a (an uncircumcised Jew could not partake of the Pascal sacrifice. According to the medieval commentator Rashi, a Jew who forgoes circumcision has no portion in the World to Come.

42. *See* Y.D. § 264:3-6 (a bris is valid *B'de-eved* (de facto) if the majority of the corona is exposed).

43. *See also* Talmud Tractate Yebamoth 71b.

44. Y.D. § 264:2.

45. Y.D. § 264:3.

surgical clamps seek to eliminate the bleeding, these instruments may render the bris invalid.

Only if he is incapable of performing the circumcision himself may the father appoint a Mohel to act as his agent.[46] Just as in American jurisprudence, the agent's act binds the principle—in this case the Mohel fulfills the father's obligation. Because of the aforementioned, there is some ambiguity in the authoritative Jewish legal code regarding the status of a bris that was performed by a either non-Jewish or irreligious Jewish circumcision. Y.D. § 264:1 states that there is no need to re-circumcise[47] that child, but adds that a small drop of blood should be drawn from the area in a ritual manner.

The code also emphasizes that a circumcision must be performed during the daytime.[48] It states that a child who was circumcised in the evening hours must be ritually re-circumcised while a child who was circumcised before the eighth day but during the day need not be ritually re-circumcised.

THE MOHEL

While many mohalim are rabbis, they need not be.[49] In fact, there is an important distinction between the two professions. Unlike the Rabbi, who acts for the benefit of the community at large, the Mohel acts as an agent for a particular man. Therefore, the Rabbi must have independent ordination[50] while the Mohel

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46. *See* Talmud Tractate Pesahim 7a-7b (arguing that the blessing recited by the Mohel indicates that he is acting as an agent for the father.) The professional Mohel developed because the vast majority of fathers were/are untrained and incapable of performing the surgery and rituals themselves.

47. Re-circumcision in this context refers to the ritual of *(Hatafat Dam Brit),* drawing a small amount blood from the crown of the penis. The procedure is minor and has ritual rather than medical significance. *Hatafat Dam Brit* is also part of the conversion process of a male who has been medically circumcised. Rambam Hilchot Milah 1:7.

48. Y.D. § 262:1.

49. *See infra* note 91.

50. In the Rabbinic context, ordination is called Smicha, which gives the rabbi the right to adjudicate matters of Jewish law. Similarly, the Ritual Slaughterer (Shochet), who acts for the community at large, must have independent ordination (called Kaballah) which attests to his proficiency of the laws

does not.[51]

Y.D. § 261 states that a child may not be circumcised against the wishes of his father before the prescribed time has lapsed,[52] and that a child who has not been circumcised by his father becomes personally obligated in the commandment of circumcision at his majority.[53] Until that time, the responsibility of circumcision rests squarely on the father.[54]

CONSEQUENCES OF HOSPITAL'S UNAUTHORIZED ACTS

In *Kalina,* The hospital neither (medically) injured the child nor deprived him of any religious obligation incumbent upon him.[55] The hospital did, however, deprive Mr. Kalina of a fundamental duty as a Jewish father. As Justice Halpern noted, it also inflicted emotional pain on Mrs. Kalina as a result of its breach of contract. Having been forewarned by the parents not to circumcise their child, the hospital should have been found liable in tort for their breach of that duty.

THE MOHEL AND HOSPITAL PRIVILEGES

PARENTS RIGHTS

Because *Bris Milah* is a religious rite, hospitals must protect

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and skills necessary to ritually slaughter an animal. No such ordination or certification is required of mohalim.

51. See Y.D. § 264:1 ("All are fit to circumcise . . . .").

52. Unless a health concern arises, the milah generally takes place on the eighth day of life.

53. Age 13. Y.D. § 261:1.

54. *See* Y.D. § 261:1 (the legal obligation to circumcise the infant shifts to the Jewish court in the case of a father who is unwilling or unable to carry out this commandment). Furthermore, a Mohel must reduce or eliminate his fee if the father cannot afford it.

55. Even though the child was not injured, the father was denied his religious obligation to perform the circumcision himself or to appoint a Mohel as his agent.

the right of the parents seeking it for their children.[56] In *Oliner v. Lenox Hill Hospital,* the petitioner—parents of a newborn Jewish baby boy—sought an affirmative injunction to force the hospital to allow them to have a Mohel circumcise their son on the premises. The hospital maintained that its by-laws prohibited "the performance of a surgical procedure by one whom it has not admitted to hospital privileges . . . ."[57] The hospital conceded that no mohalim had been afforded such privileges out of fear of potential liability.

The parents offered to waive any future liability claim against the hospital but the hospital still refused to permit a Mohel to use the facilities. Alternatively, the parents offered to arrange for the *bris* to be performed off-premises if the infant could be returned to the hospital's nursery afterwards. The hospital would only agree to return the child to the pediatric ward, citing an unspecified danger in reintroducing the infant to the newborn nursery. The father brought suit under N.Y. Pub. Health Law § 2803-c(3)(a):

> Every patient's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed, and the facility shall encourage and assist in the fullest possible exercise of these rights.

He successfully argued that obtaining a bris milah fell within the meaning of the statute. The court, noting that other hospitals "have certified 'Mohels' and investigated their qualifications,"[58] held that the father could choose from among those certified mohalim and have the bris in the hospital. Furthermore, the hospital had to provide proper accommodations for the ritual ceremony as well as the medical procedure.[59]

HOSPITAL RIGHTS

Under *Oliner,* a hospital cannot interfere with the parents'

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56. *See Oliner v. Lenox Hill Hosp.,* 106 Misc. 2d 107, 108 (N.Y.Sup. 1980) (interpreting N.Y. Pub. Health § 2803-c(3)(a) to require a hospital to facilitate parents in obtaining an on-premises bris for infant son).

57. *Id.* at 108.

58. *Id.* at 109.

59. *See Id.* (requiring the hospital to provide adequate space for the requisite quorum of adult male Jews).

religious right to circumcise their son. Still, a hospital need not be at the mercy of the parents' choice of A Mohel. A hospital apparently violates no civil or religious rights by denying a particular Mohel privileges as long other mohalim are permitted to use the facility. In *Zlotowitz v. Jewish Hospital,*[60] the petitioner was a Mohel who was denied privileges at the hospital. The court rejected the Mohel's Constitutional claim, holding that he was not discriminated against on the basis of race, creed or color.[61] The hospital permitted other mohalim to use the facility; this particular Mohel was simply not on the approved list.

PARENTS V. HOSPITAL

The practical effect of *Zlotowitz* is that N.Y. Pub. Health Law § 2803-c(3)(a) does not give parents absolute control over the hospital in choosing a Mohel. A hospital could presumably circumvent a Jewish couple's desire to bring in a Mohel of choice simply by having its own Mohel on staff. Yet from the parents' perspective, the hospital would be interfering with their religious freedom as expressed in their choice of a Mohel.

The *Zlotowitz* decision was based on the plaintiff-Mohel's claim that his civil rights were violated by the hospital. Had the child's parents brought suit under § 2803-c(3)(a) rather than the Mohel, the court may have been constrained to rule differently. The parents who wanted Zlotowitz to circumcise their son could have brought their own action, maintaining that § 2803-c(3)(a) compels the hospital to accommodate their Mohel of choice. The parents would apparently have had standing for such a suit. The hospital was interfering with their religious right (or desire) to obtain a Mohel of their choice, consistent with the Jewish laws on agency and mohalim.[62]

It is clear from the decision that the *Oliner* court was

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60. *Zlotowitz v. Jewish Hosp.*, 193 Misc. 124, 125 (N.Y.Sup. 1948), *aff'd* 277 A.D. 974 (N.Y.App. Div. 1 Dept. 1950).

61. *Id.* at 125.

62. *See supra* note 46 and accompanying text. From a religious perspective, it is rather presumptuous for the hospital to limit who the father may appoint as his agent in the fulfillment of a religious obligation. On a civil level, however, the hospital is providing the parents with a suitable mechanism by which they can fulfill their religious convictions while maintaining control over who utilizes the medical facility.

persuaded in part by the hospital's complete lock out of mohalim. The *Zlotowitz* court was equally motivated in part by Jewish hospital's policy of admitting certain mohalim. It would be too speculative to presume how the court would have weighed the parents religious rights against the hospital's good faith effort to accommodate Jews seeking a Mohel.

HOSPITAL LIABILITY: EFFECT OF OLINER AND ZAKHARTCHENKO

The written decision in *Oliner* ignored the hospital's liability concern as well as petitioner's offer to waive any claim against the hospital. Assuming, then, that the liability waiver was not part of the court's decision, the question begs to be asked: What *would have been* the legal consequences to the hospital had the circumcision been performed negligently?

There was good reason to fear that a Mohel's negligently performed bris could subject a hospital to vicarious liability. Thirteen years after *Oliner,* the New York courts were faced with this very scenario. In *Zakhartchenko v. Weinberger,*[63] parents sued Bedford Medical Family Medical Center in connection with a negligently performed circumcision by a non-staff Mohel. The hospital sought summary judgment, maintaining that the plaintiff-parents arranged for the bris milah and that the hospital merely provided the necessary space.[64]

The plaintiff, however, contended that the bris milah was performed under the supervision of a staff surgeon, despite the fact that the Mohel submitted an affidavit exonerating the hospital.[65] Because of this material issue of fact, the court properly denied the hospital's motion for summary judgment and held that a trial was necessary to determine whether the plaintiff had an expectation that the hospital was involved in the bris milah (and thus potentially liable). Notwithstanding the fact that the Mohel was an independent contractor, the court noted that the expectation of "sterile instruments in a sterile environment"

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63. *Zakhartchenko v. Weinberger,* 159 Misc. 2d 411 (N.Y.Sup. 1993).

64. *See id.* at 412 (defendant-hospital asserted that no doctor-patient relationship existed with regard to the bris milah. The Mohel provided his own equipment, and the hospital received no fee from the procedure).

65. *Id.*

could give rise to a hospital-patient relationship between the hospital and the plaintiffs.[66]

For our purposes, two issues emerge from *Zakhartchenko*. Firstly, a hospital can potentially be held liable for a negligently performed bris milah if its participation gives rise to a reasonable expectation that hospital personnel are involved in the procedure. Yet under *Oliner*, the hospital had no choice but to become involved in the bris milah. The *Oliner* court further held that the hospital retained the right and corresponding obligation to insure that proper precautions are taken.[67]

The law that emerges from the two cases places a heavy burden on the hospital. To limit the potential liability from a negligently performed bris milah, a hospital would have to juggle its oversight responsibly under *Oliner* without creating any expectation of involvement under *Zakhartchenko*. I suggest that this is an impossible balancing act, condemning hospitals in similar circumstances to potential liability for the Mohel's negligence.

A POSSIBLE COMPROMISE

A public policy argument can be made for the seemingly illogical consequences of *Oliner* and *Zakhartchenko*. Since the Mohel is most often not a physician, he cannot obtain medical malpractice insurance.[68] Absent legislation requiring that a Mohel carry sufficient liability insurance (and corresponding legislating enabling him to obtain that coverage from the insurance industry), the hospital remains the only insured party.

Nevertheless, the *Oliner* decision should not be construed by subsequent courts so as to give parents of an injured child a deep pocket (the hospital) when their Mohel of choice acts negligently. The only reasonable way for a hospital to comply with N.Y. Pub.

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66. *Id.*

67. *See Oliner* at 109 (hospital could require participants to wear surgical gowns, stay away from child, etc.).

68. This statement is based on my own failed attempt at procuring malpractice liability coverage during my ten years as a Mohel. I have spoken with scores of insurance agents with no success. I have also spoken with numerous other mohalim who have likewise been unsuccessful in obtaining liability insurance.

Health Law § 2803-c(3)(a) while not simultaneously subjecting itself to liability is to require the parents to waive any future liability claim against the hospital, as the Oliner parents offered to do. Compelling the hospital to facilitate the parents' religious desires should be coupled with relieving the hospital of any potential liability resulting from a negligently performed bris milah.

If the hospital merely supplies a room and requires certain medically reasonable precautions (and supervision), as the law requires, the plaintiff-parents should be estopped from asserting a liability action against the hospital. Of course, a different situation would arise if the Mohel is part of the hospital staff, or if the hospital assumes a substantial role in the bris milah. In these and similar cases, the hospital may create the kind of expectation of involvement that the *Zakhartchenko* court noted, and liability should extend to it as a result of these affirmative actions. Thus, the hospital that wishes to limit a parent's choice of a Mohel by having its own staff Mohel justifiably subjects itself to liability when the bris milah is negligently performed.

MOHALIM DAMAGES VULNERABILITY

Parents, though, have no effective remedy for a negligently performed bris milah if the hospital can defend a Zakhartchenko-type suit by either parental waiver or estoppel.[69] As previously noted, mohalim do not generally carry malpractice insurance. I presume that the multimillion dollar damages awarded in successful litigation of bris milah malpractice cases are significantly more than the average, uninsured Mohel can pay without insurance coverage.[70] At least one Mohel has resorted to bankruptcy after a large judgment was returned against him.[71] I suspect that most mohalim are judgment proof, or more accurately, judgment-unenforceable.

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69. *See infra* note 99 and accompanying text.

70. *See* Massachusetts Lawyer Weekly, Feb. 6, 1995 (a $2.3 million medical malpractice award for negligent circumcision was among the twenty largest settlements of 1994); New York Law Journal, Nov. 29, 1995 ($1.2 million settlement for boy amputation of penis during ritual circumcision); *Felice v. Valleylab* (La. Ct. App.) ($2.75 million award for loss of tip of penis during circumcision).

71. New York Law Journal, Nov. 29, 1995, at 8.

A judgment against an uninsured Mohel is worthless insofar as damages are uncollectable. Thus, permitting recovery and actually obtaining it from the Mohel are two entirely different things. The legislature could require mohalim to obtain adequate insurance, but it is unlikely to do so since physicians and other health care personnel have no similar obligation.[72] Still, the state could—and should—make it possible for a Mohel to obtain liability insurance as he sees fit, just as it enables physicians to obtain insurance. For the public's safety and benefit, the same insurance policy should apply for the ritual circumcisor as it does to other health care providers. In choosing a Mohel, parents then could use liability coverage (or lack of coverage) as a factor. Clearly, the Mohel is a health care provider to the extent that he performs a medical circumcision as part of the ritual bris milah.

BRIS NOT A MEDICAL PROCEDURE

Kalina, Oliner, and *Zakhartchenko* have significant legal implications for hospitals, but their practical applications are rather limited. While neonatal medical circumcisions are generally performed by obstetricians in the hospital, the overwhelming majority of ritual circumcisions take place outside the hospital, either in the home or the synagogue.[73] Apart from the discussion on hospital liability, *Zakhartchenko* raised a second, and perhaps more significant issue, regarding the Mohel. The court held that the bris was not a medical procedure under the New York case law:

> A religious ritual, such as circumcision, anciently practiced and reasonably conducted, is not subject to governmental restricts so long as it is consistent with the peace or safety of this state (see Art 1 § 3 N.Y. State Constitution). Therefore, while circumcision performed by a physician would be the practice of medicine, a circumcision performed as a ritual by a qualified person

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72. *See* Abraham Abromovsky, *Depraved Indifference and the Incompetent Doctor*, New York Law Journal, Nov. 8, 1995 (". . . uninsured doctors, unlike uninsured drivers, are legal in New York").

73. *See supra* note 8 (neonatal circumcisions are usually performed within the first two days following birth). Bris milah, however, takes place on the eighth day of life.

> (a Mohel in the case) does not constitute the practice of the profession of medicine within the meaning of the Education Law. Nevertheless, the principles of negligence still apply.[74]

In *Oliner,* the court held that the public health law superseded the hospital by-laws that prohibited "the performance of a surgical procedure by one whom it has not admitted to hospital privileges . . . ."[75] The *Zakhartchenko* holding renders Lenox Hill Hospital's argument altogether meaningless. Unlike a medical circumcision performed by a licensed physician, a ritual circumcision does not constitute an act of surgery. The hospital by-law simply wouldn't apply.

JUDAISM: BRIS A RITUAL COVENANT

Judaism treats the Bris Milah first and foremost as the ritual Covenant of Abraham[76] and the medical circumcision does not in itself accomplish this spiritual goal. *Oliner* and *Zakhartchenko* teach us that New York law likewise treats a bris milah primarily as a ritual rather than a medical act.

A LICENSE TO PRACTICE RITUAL CIRCUMCISION NOT REQUIRED

An interesting anomaly exists regarding the state's treatment of ritual circumcision. When performed by a licensed physician, the procedure constitutes the practice of medicine. However, when it is performed as a "religious ritual by a qualified person," circumcision is characterized as a ritual activity outside the scope of the statute.[77]

Section 6521 of New York's Education Law furnishes the statutory definition of the practice of medicine:

> The practice of the profession of medicine is defined as

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74. *Zakhartchenko v. Weinberger,* 159 Misc. 2d at 413.

75. *See supra,* note 57 and accompanying text.

76. *See supra* section entitled A Convenent Between God and the Jewish People.

77. N.Y.Educ. Law § 6521 (1985); *Zakhartchenko v. Weinberger,* 159 Misc. 2d at 413.

> diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition.

It is a class E felony to practice medicine as defined above without first obtaining a license.[78] The underlying purpose of state regulation and licensing of health care professionals is "to promote the public health and welfare and to prevent the spread of contagious diseases by insuring clean and sanitary methods, procedures, and surroundings."[79] Because of this substantial public need, states utilize their inherent police powers to regulate and license health related occupations.[80]

Based on the broad definition of medicine in the New York statute, the state regulates such practices as podiatry,[81] acupuncture,[82] and hair replacements.[83] Certainly, the act of removing the foreskin from an infant's penis also constitutes surgery within the plain meaning of this statute. For this reason, circumcision is regulated when performed for non-ritual purposes and it is listed under the International Classification of Diseases as a distinct medical procedure.[84] No similar code exists for ritual circumcision.[85]

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78. N.Y.Educ. Law § 6512(1).

79. 39A C.J.S. § 39. A strong case can be made for applying this rationale to ritual circumcisions. *See* Rabbi Alfred A. Cohen, *Brit Milah and The Specter of Aids*, The Journal of Halacha and Contemporary Society, 93-115 (Spring 1989) (suggesting that the traditional method of extracting blood may pose health risks to both the Mohel and infant).

80. *People v. Mulford,* 140 A.D. 716 (4 Dept. 1910), *aff'd* 202 N.Y. 624 (1910).

81. *People v. Hickey*, 157 Misc. 592, 283 N.Y.S. 968 (N.Y.Sp.Sess., Dec. 13, 1935), *aff'd* 249 A.D. 611, 292 N.Y.S. 177 (N.Y.App. Div. 1 Dept., 1936), *dismissal denied* 279 N.Y. 788, 18 N.E.2d 870 (1939), *aff'd* 280 N.Y. 559, 20 N.E.2d 14 (1939).

82. *People v. Amber*, 76 Misc. 2d 267, 349 N.Y.S.2d 604 (N.Y.Sup., 1973).

83. *People v. Rubin*, 113 Misc. 2d 117 (1981).

84. ICD-9-CM 64.0.

85. As a result, insurance companies generally do not reimburse parents for a ritual circumcision performed by a non-physician Mohel. Phone interview with Mr. Oscar Perez, Claims Officer of Group Health Insurance Co. (Nov. 1996).

RITUAL CIRCUMCISION PROTECTED BY CONSTITUTION

It would be reasonable for the legislature and courts to consider a Mohel's performance of ritual circumcision as the practice of medicine. Obviously, the rationale behind licensing health care professionals applies equally in the context of ritual circumcisions and mohalim. The court exempted bris milah from the unauthorized practice of medicine because it believed that governmental regulation would interfere with New York State's Constitutional protection of religious rituals from "governmental restrictions."[86] Courts have held that such governmental restrictions violate the state constitutional provision of religious liberty.[87] These state constitutional protections apply so long as the religious tenets are practiced in good faith;[88] clearly, bris milah falls within this good faith requirement.

Some states, such as Delaware,[89] Minnesota,[90] Montana,[91] and Wisconsin[92] exempt the practice of ritual circumcision by statute. New York accomplished the exemption through the judiciary. The opinions of *Oliner* and *Zakhartchenko* place the bris milah beyond the scope of N.Y. Educ. Law § 6521. A non-physician Mohel performing a bris is therefore not criminally liable for the unauthorized practice of medicine.

STANDARD OF CARE FOR MOHALIM: MOHEL'S CIVIL LIABILITY NOT AFFECTED

Lest any confusion arise, the *Zakhartchenko* court explicitly

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86. N.Y. Const. Art I, § 3.

87. *Zakhartchenko* at 413.

88. *People v. Wendel*, 68 N.Y.S.2d 267 (1946), *aff'd* 272 A.D. 1067; *People v. Hickey*, 157 Misc. 592, 283 N.Y.S. 968 (N.Y.Sp.Sess., Dec. 13, 1935), *aff'd* 249 A.D. 611, 292 N.Y.S. 177 (N.Y.App. Div. 1 Dept., 1936), *dismissal denied* 279 N.Y. 788, 18 N.E.2d 870 (1939), *aff'd* 280 N.Y. 559, 20 N.E.2d 14 (1939).

89. Del Code Ann. tit. 24 § 1703(e)(4) (1995).

90. Minn. Stat Ann. § 147.09(10) (1995).

91. Mont. Code Ann. § 37-3-103(h) (1993). The Montana statute confuses the Mohel with the rabbi by exempting the practice of "ritual circumcisions by rabbis."

92. Wis. Stat. Ann. § 488.03(2)(g). Wisconsin also statutorily exempted the rabbi rather than the Mohel.

noted that the Mohel is liable for his negligence.[93] There is no inconsistency between a Mohel's exemption from the unauthorized practice of medicine and the imposition of a negligence standard. When licensing is required by statute, the unlicensed practitioner commits a crime against the state, not a per se malpractice act or a tort on the patient. "Failure to obtain a license as required by law gives rise to no remedy if it has caused no injury."[94]

Medical malpractice results from improper treatment, not the mere failure to comply with the licensing provisions.[95] The fact that someone violates the regulatory statute does not necessarily imply that he or she has committed malpractice. The New York's Court of Appeals recognized this fact some fifty years ago:

> . . . [t]he provisions of the Public Health Law prohibiting the practice of medicine without a license granted upon proof of preliminary training . . . are of course intended for the protection of the general public against injury which unskilled and unlearned practitioners might cause.[96]

For this reason, the unlicensed medical practitioner will be held to the standard of care of the "qualified practitioner."[97] Pursuant to the courts' interpretation of N.Y. Const. Art I, § 3, the licensing provision does not apply to a Mohel. Nevertheless, it is still reasonable to hold him to the "standards of skill and care prevailing among those who perform circumcisions."[98] Failure of the state to regulate bris milah and to license mohalim should not and does not affect the injured party's right to recover damages.[99]

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93. *Zakhartchenko*, at 413.

94. *Brown v. Shyne*, 242 N.Y. 176, 181 (1926).

95. *Brown v. Shyne*, 242 N.Y. at 180.

96. *Brown v. Shyne*, 242 N.Y. at 180.

97. *Brown v. Shyne*, 242 N.Y. at 180.

98. *Zakhartchenko* at 413. Based upon the court's citation to *Brown v. Shyne*, it is reasonable to conclude that "those who perform circumcisions" are the obstetricians.

99. While the right to recover is protected, the ability to recover is hampered by the state's hands-off approach in regulating the insurance aspect of bris milah.

MOHEL'S LIABILITY FOR NON-RITUAL CIRCUMCISIONS

The *Zakhartchenko* court held that a circumcision "anciently practiced" and "as a ritual by a qualified person" was not a medical procedure under New York law.[100] Since the court's parameters are rather vague, it is necessary to delineate the boundaries of the ritual and to define who is a qualified person.

OBSTETRICIAN V. MOTEL; MEDICAL PROCEDURE V RITUAL CIRCUMCISION

An obstetrician who circumcised a baby would be performing a medical procedure, and a Mohel who circumcised a Jewish infant would be performing a ritual. Excepting the case of conversion, a Mohel who circumcised a non-Jewish baby would not be performing a ritual. His act would therefore constitute the unlawful practice of medicine under N.Y. Educ. Law § 6521. I have not found a case where a Mohel was prosecuted under these circumstances, but it is nevertheless the current state of the law.[101]

NEGLIGENCE AND LIABILITY—OBSTETRICIAN V. MOHEL

A Jewish obstetrician-Mohel who circumcised a non-Jewish child as a medical procedure would be practicing medicine. If, on the other hand, he circumcised a Jewish baby with the attendant rituals, he would be performing a religious ceremony. Finally, it is uncertain whether the same Jewish obstetrician-Mohel who circumcised a Jewish baby without the attached religious framework would be acting as a physician or a Mohel; he certainly wouldn't be fulfilling the "anciently practiced" requirement. Other than the obvious anomalies, there would be no liability differences between the above three scenarios. The Mohel and physician alike are liable for negligence. The practical difference would be twofold: (a) the physician-Mohel would presumably

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100. *Zakhartchenko*, 159 Misc. 2d at 413.

101. Two reasons may be suggested for the lack of cases on prosecuting a mohel for circumcising a gentile baby. Firstly, the state may not be interested in pursuing such prosecutions. Secondly, Jewish Law itself discourages the Mohel from circumcising a gentile for non-conversion purposes. Rambam Hilchot Milah 3:7.

carry malpractice insurance while the non-medical Mohel would not, and (b) the non-physician mohel risks criminal prosecution when he performs a non-ritual circumcision.

ANCIENTLY PRACTICED CIRCUMCISION: AND NEW YORK LAW V. JEWISH LAW

When the *Zakhartchenko* court applied the "anciently practiced" standard, how much of normative Jewish Law was it adopting as the parameter? For example, Jewish law restricts a person's ability to sue a fellow Jew in the secular courts. Similarly, Jewish law significantly restricts one's ability to sue and recover for medical malpractice.[102] While not referencing these Jewish laws, the court rejected this approach by specifically retaining a cause of action for negligence against a Mohel.

DEFINITION OF ANCIENTLY PRACTICED CIRCUMCISION

The inadequacy of New York's case law definition of bris milah can also be seen when we consider that a large proportion of the Jewish community does not practice the rituals of Judaism "anciently." As a result, the court could find itself in the unenviable position of deciding what is an "anciently practiced" bris milah. Until recently, almost all mohalim were Orthodox. The non-Orthodox movements have recently begun to train their own mohalim. To the Orthodox establishment, the non-Orthodox Mohel would not be a qualified person.[103] Substantively, if non-Orthodox mohalim diverge significantly from the halakhic procedures or ancient ritual norms, would the court seriously declare these circumcisions outside the scope of the N.Y. Educ. Law § 6521 exemption? Almost certainly, the answer would be no. Nevertheless, the language "anciently practiced" would seem to require the court to favor Orthodox bris milah to non-Orthodox bris milah.

WHO IS JEWISH?

Like New York case law, Jewish law also limits the Mohel to

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102. Joseph S. Ozarowski, *Malpractice*, Journal of Halacha and Contemporary Society, p. 111, Fall 1987.

103. See Y.D. 264:1.

the circumcision of Jews or converts to Judaism.[104] I think that the leaders of the various denominations would agree that Reform conversions are not necessarily anciently practiced.[105] Conservative Jewish leaders argue that their conversions are anciently practiced while *Orthodox Jewry* maintains that these conversions are also invalid and do not comply with the ancient standards of Judaism. Therefore, a Mohel who participated in the conversion of a non-Jewish child, officiated by a non-Orthodox tribunal of Rabbis, would not necessarily be fulfilling the "anciently practiced" requirement.

Traditional Judaism defines a Jew as someone who is born of a Jewish mother or who converts according to Jewish law. In stark contradistinction to thousands of years of traditional Jewish law, the Reform movement has adopted a patrilinial descent policy. Thus, the religious status of the newborn child may be in dispute. The child of a Jewish father and a non-Jewish mother is Jewish by Reform standards but not Jewish by Conservative and Orthodox standards.[106] If the courts applied *Zakhartchenko* literally, it could find itself taking sides in the ongoing and often acrimonious battle among the branches of Judaism often termed "Who is a Jew."

A DILEMMA: THE THREE MAJOR BRANCHES OF JUDAISM

Obviously, no one wants the secular courts to interfere with the internal politics and dynamics of the major branches of Judaism. These issues are being raised to demonstrate the impotence of the current state of the law.

CONSTITUTIONAL ISSUES—FREEDOM "OF RELIGION" OR "FROM RELIGION"?

The United States Constitution also explicitly limits the government's ability to regulate religious rituals such as

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104. See supra note 101.

105. Orthodoxy would view this fact negatively while Reform Jewish leaders would consider the changes as natural and proper evolution of the faith and rituals.

106. *See generally* J. Simcha Cohen, *The Conversion of Children Born to Gentile Mothers And Jewish Fathers*, p. 1, Tradition (Winter 1987).

circumcisions.[107] Limiting regulations, however, does not mean that all religious rituals fall outside the watchful eye of the government. Over one hundred twenty five years ago, the Supreme Court noted that the constitutional grant of freedom of religion encompasses religious beliefs but not necessarily religious practices.[108]

RELIGIOUS BELIEFS V. RELIGIOUS PRACTICES

In the landmark case of *Reynolds v. U.S.*, the Supreme Court held that Mormons' absolute freedom to believe in bigamy did not carry a corresponding right to practice it. The distinction between religious belief and practice has been repeatedly affirmed in a wide variety of cases. Interestingly, the *Reynolds* court noted that "polygamy has always been odious among the northern and western nations of Europe."[109] The Supreme Court's rejection of the religious rite of polygamy was undoubtedly influenced by its own value system. To what extent has the court continued to rely on its own values in adjudicating the religious rights of the parties to the action?

In *Employment Div., Dept. of Human Resources v. Smith,*[110] the Supreme Court again affirmed *Reynolds* by upholding a state statute prohibiting the sacramental use of a controlled substance. The petitioners were fired and subsequently denied unemployment benefits due to their use of peyote, a drug listed by the state of Oregon as a controlled substance. The petitioners argued that peyote use was consistent with the rituals of their Native American Church.

The Supreme Court did not challenge the sincerity of the petitioner's views, but held that: "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to

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107. U.S. Const., amend I.

108. *Reynolds v. United States* 98 U.S. 145 (1878) (upholding anti-bigamy statute).

109. *Reynolds v. United States* 98 U.S. 145, 164 (1878).

110. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), *reh'g denied* 496 U.S. 913, *on remand* 799 P.2d 148.

regulate."[111] Since drug use constituted misconduct under the Oregon statute, the court found that unemployment benefits were justifiably denied by the state. It seems that our society views the Native American rites with the same odiousness as it treats the Mormon belief of bigamy.

CIRCUMCISION AVAILABLE TO ALL—AN ACCEPTED MEDICAL PROCEDURE

Jews are also a minority in the United States, numbering only 5.8 million.[112] Nevertheless, the Jewish practice of bris milah is more widely tolerated than Mormon or Native American beliefs. This is due in large part to the fact that circumcision is performed by the general population without any religious significance. The bris milah does not conflict with any American cultural norm. Even more generally, we often speak of the "Judeo-Christian ethic" as a unified belief system, and imply that the nation's moral compass is rooted in this singular value scheme.

For the aforementioned sociological reasons, a state will not likely ban routine medical and religious circumcision, though it has been debated by at least one state legislature.[113] It was relatively easy for the *Reynolds* and *Smith* courts to rule that First Amendment rights give way to the general public good because the Mormon church practice of polygamy and the Native American practice of peyote use are not well regarded. How would the Supreme Court view a state statute which severely limited or proscribed altogether ritual circumcision?

STATE REGULATION OF CIRCUMCISION

The practice of medical and ritual circumcision does not carry the same odious stigma of polygamy and drug use, and the American cultural norm is not offended by the procedure.

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111. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878-879 (1990), *reh'g denied* 496 U.S. 913, *on remand* 799 P.2d 148.

112. John W. Bartlett, *Shrinking population of Jews Worldwide Worries Leadership.*

113. *See Suit Says Circumcision Reflects Bias*, The Bismarck Tribune, June 8, 1996 ("[North Dakota] State lawmakers considered including boys in the 1995 bill. But the idea was scratched because of lack of support . . . ").

Similarly, courts are not offended by laws that promote the sanctity of the Christian Sabbath. "A law enacted to preserve the public peace and order on Sunday . . . is therefore valid."[114] Yet circumcision's popularity is declining in the United States[115] and the public's attitude toward it will undoubtedly be adversely affected.

The *Smith* holding could have theoretically formed the basis of a state ban. Were the New York court to have found that a bris performed by a non-physician Mohel was incompatible with public interest, it could have relied on the very same state constitutional provision to regulate or even ban the practice. Such a ban would apparently have been upheld by the Supreme Court under the *Smith* rationale. "If the law applies to all families, as is not motivated by religious prejudice, regardless of whether there is a compelling state interest and whether or not an exemption for Jews would frustrate the state's interest, the law may be upheld under Smith."[116]

The state must balance the individual's religious rights against the public's health and safety interests. It would be easy to construct a facially neutral statute, but the resulting statute would almost certainly meet a serious sub-facial attack.[117] Furthermore, the court would have to conclude that the restriction is justifiable.[118]

MOHELS AND MALPRACTICE

There is not a large body of evidence, however, to substantiate that bris milah poses a societal threat. Few cases of malpractice against a Mohel have been brought. A search of the Westlaw and Lexis data bases reveal only a handful of malpractice suits against a Mohel.

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114. *People v. Moses*, 140 N.Y. 214 (1893); *see also Newendorff v. Duryea* 69 N.Y. 577 (1877).

115. Emily Benedik, *How Circumcision Came Full Circle*, N.Y. Times May 19, 1996 at sec. 4, p. 1.

116. Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 Am. U.L. Rev. 1431, 1473 (1991).

117. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a law which impinges on free exercise must truly be neutral to survive a sub-facial attack).

118. *People v. Woodruff*, 272 A.D.2d 597 (2 Dept. 1966).

There are a few possible explanations for the dearth of lawsuits:

- The vast majority of ritual circumcisions are performed without complications. The procedure is rather simple. Most post-operative complications, such as bleeding and infection, are correctable and do not produce long-term injuries to the infant.
- Cases are quickly settled without having entered the court system.
- For reasons articulated in section II(A)(3) of this paper, parents often do not have an adequate (financial) remedy against the Mohel when a significant injury occurs.

If there were a significant number of cases of Mohel negligence coupled with frustrated parents' inability to recover damages, the state would probably consider regulating the practice of circumcision by a non-physician. That does not seem to be the case though. Regardless of the number and proportion of cases that fall into (c), the state should insure that the infant child and his parents have an enforceable remedy.

RELIGIOUS FREEDOM RESTORATION ACT

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 ("RFRA"). As the statute's name implies, Congress sought to swing the pendulum back in the direction favoring religious liberties:

> The statute codifies the 'compelling interest' and 'least restrictive means' standards, requiring any government (state or federal) that has placed a 'substantial burden' on a person's exercise of religion to establish a compelling interest to justify its action, furthered by the least restrictive means.[119]

Even with the passage of RFRA, a state could almost certainly regulate the practice of ritual circumcision. The compelling interest requirement would be met if the state concluded that the practice posed a considerable health risk to the popula-

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119. Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589, 591 (January 1996).

tion. I doubt that RFRA would permit an outright ban the practice of bris milah performed by a non-physician. The public safety requirement would still have to be measured against the second prong of RFRA, the least restrictive means test. It is fair to say that the state need not resort to the draconian measure of banning ritual circumcisions in order to safeguard its citizens.

PUBLIC HEALTH AND SAFETY REQUIREMENTS

We have already noted that in order to benefit from the constitutional protections of religious freedom, the practitioner must act in good faith according to the tenets of his or her faith.[120] One cannot rely on the protections of religious freedom as a pretext for engaging in non-religious, criminal activities.[121] Good faith alone, however, will not overcome the government's need for securing public health and safety.

New York has held that the freedom of religious profession and worship must still be consistent "*with the peace or safety of this state.*"[122] Federal and State courts have held that religious rights are protected only insofar as they do not violate the public interests. Where religious practices actually conflict with the public interest, they are no longer protected.[123] This is especially true when religious rights converge with health and safety issues.[124]

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120. *People v. Wendel*, 68 N.Y.S.2d 267 (1946), *aff'd* 272 A.D. 1067; *People v. Hickey*, 157 Misc. 592, 283 N.Y.S. 968 (N.Y.Sp.Sess., Dec. 13, 1935), *aff'd* 249 A.D. 611, 292 N.Y.S. 177 (N.Y.App. Div. 1 Dept., 1936), *dismissal denied* 279 N.Y. 788, 18 N.E.2d 870 (1939), *aff'd* 280 N.Y. 559, 20 N.E.2d 14 (1939).

121. *People v. Cole*, 219 N.Y. 98 (1916).

122. N.Y. Const. art I, § 3 (emphasis added). See *In the Matter of Gregory S.*, 85 Misc. 2d 846 (1976) (one cannot defend against a charge of severe medical neglect of a child on the basis of religious conviction which opposes medical intervention); *see also In the Matter of Kevin Sampson*, 65 Misc.2d 658 (1970) (failure to consent to blod transfusion for son constituted neglect despite sincere religious convictions to the contrary).

123. *In the Matter of a Proceeding under Articles 4 and 5A of the Family Court Act Commissioner of Social Services of the City of New York as Assignee of M.I. v. A.I.*, 107 Misc. 2d 663 (1981); *People v. Vogelgesang*, 221 N.Y. 290 (1917).

124. N.Y. Penal Law § 260.05; N.Y. Pub. Health Law § 2502; *People v. Pierson*, 176 N.Y. 201 (1903).

CHILD ABUSE STATUTES

All states have statutes that criminalize child abuse, and parental rights and religious liberties do not supersede these abuse statutes. State legislatures and courts grant parents a great deal of latitude in applying religious practices,[125] but no court would permit a father's ritual slaughter of his first born son even if it was a principle tenet of his faith. A mother may not sexually abuse her child in the name of religious beliefs.

Both Illinois[126] and Idaho[127] enacted statutes which declare that mutilation of a child in a religious ceremony is not a defense to charges of abuse. Both these states, however, explicitly exempted the right of bris milah.[128]

> Is it because the legislatures of these states made a finding that tattooing the numbers 666 on the scalp of a child is more abuse than is cutting the foreskin away from the infant's penis and sucking the bloom from the wound?[129] Probably not. It is more likely that the Judeo-Christian culture, which recognizes circumcision as an accepted and harmless religious practice, has little trouble viewing other types of bodily mutilations done in connection with worship as ritual abuse.[130]

The author posed an excellent challenge to our notions of what constitutes acceptable and unacceptable ritual practice. There is no widespread ritual practice of carving three sixes in the scalps of children. Most state statutes would therefore consider the practice odious and abusive; Illinois and Idaho

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125. *Fosmire v. Nicoleau*, 144 A.D.2d 8 (2 Dept. 1989), *aff'd* 75 N.Y.2d 218; *Matter of Gregory S.* 85 Misc. 2d 846 (1976).

126. Ill. Rev. Stat. Ch. 38, para. 12-32 (1992).

127. Idaho Code § 18-1506A (1992).

128. I have not found a single case in any state of a bris milah leading to the prosecution of the Mohel or the child's parents for child abuse. I doubt that it has occurred. I believe that while Illinois and Idaho statutorily exempt the bris milah, all states currently accept the notion that ritual circumcision is not a form of child abuse.

129. The author is referring to the practice of *Mezizah B'Peh*. Y.D. § 264:3.

130. Kennith M. Harrison, *Crime and Punishment Symposium: A System in Collapse: Law, Order, And the Consent Defense* 12 St. Louis U. Pub. L.Rev. 477, 501 (1993).

statutes would certainly classify it as abuse under their respective statutes.

CIRCUMCISION AS CHILD ABUSE

At least one legal writer has openly suggested that all routine neonatal circumcisions, including bris milah, should be banned as an act of child abuse.[131] William Brigman based his opinion in part on the idea that "circumcision is medically unwarranted mutilation and disfigurement." So much for the benign nature of circumcision. Brigman argued that the fact that the practice is sincerely performed by Jews should not overcome the element of child abuse inherent in the procedure.[132]

By proscribing all routine circumcisions, the author believed he was averting a religious exemption issue and a neutrality challenge.[133] Unlike the challenge to ritual circumcision that resulted from our analysis of *Smith*, the author suggests that all circumcisions—neonatal medical and ritual alike—constitute abuse.

There is no widespread movement afoot in state legislatures calling for a ban on routine medical or ritual circumcision. It helps the cause of ritual circumcision that the medical community considers it acceptable and even beneficial. Again we see that the societal milieu defines the parameters of ritual acceptability. The legal basis of exempting bris milah seems to flow from an ephemeral appreciation of the act. I suggest that this is simply not a good enough justification for the exemption of bris milah. What is acceptable and tolerated today can easily be maligned tomorrow. The basis of permitting Jewish parents to exercise their religious desires must be adequately distinguished from the unacceptable and abusive behaviors which have been properly subjected to state scrutiny.

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131. *See* William Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J.Fam. L. at 342 (1994-1995).

132. *Id.* at 342.

133. *Id. See also Employment Div. v. Smith*, 496 U.S. 913 (1990) (holding that states may proscribe religious practices without conflicting with the free exercise clause as long as the ban is neutral and not directed solely at the group in question).

FEMALE GENITAL MUTILATION

Other legal writers[134] have suggested that male circumcision should be treated no differently than "female circumcision." The 104th Congress recently outlawed the rite of female genital cutting.[135] Seven states have similarly enacted measures banning the practice of female genital cutting[136] or legislating educational programs designed at eliminating the rite. At least 4 additional states, including New York, have similar measures pending.

As expected, equal protection challenges have already been raises in law suits contending that the state should not differentiate between male and female circumcisions.[137]

Female genital cutting has been portrayed as a barbaric, and abusive act. Because it is not part of the American culture, legislatures and courts can easily regard it as odious and therefore ban its practice, just as polygamy and peyote use were proscribed. Once male circumcision is linked with this unfavorable rite, calls for its banning cannot be too far behind.

CIRCUMCISION V. FEMALE GENITAL MUTILATION

The proponents of an outright ban of male circumcision maintain that if female genital cutting is abuse, so too is male circumcision. In fact, treating the two as gender complementary procedures only invites this equal protection challenge. Yet it is important to recognize that female genital cutting is not the comparable to male circumcision.[138]

They are distinct rites performed for vastly different reasons.

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134. James G. Dwyer, *The children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to children of Religious Objectors*, 74 N.C.L.Rev. 1321, note 160.

135. Omnibus Appropriations Act (1997), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30 1996); H.R. Conf. Rep. No. 863, 104th Cong., 2nd Sess. 1996, 1996 WL 562036 (Leg.Hist.).

136. *See, e.g.*, N.D. Crim. Code 12.1-36-01; (1995); Minn. Stat. Ann. § 609.2245 (1995); Tenn. Code Ann. T.C.A. § 39-13-110 (1996).

137. *See Suit Says Circumcision Reflects Bias*, The Bismarck Tribune, June 8, 1996; Kevin Helliker, *Anxious Parents Question Merits of Circumcision*, Wall Street Journal, May 28, 1996 at A21 (citing the attempt in North Dakota to ban routine male circumcision).

138. *But see* Dwyer, 74 N.C.L. Rev., note 160.

Linking the two is an attempt to portray male circumcision as a barbaric rite. Some of the significant differences can be found in a careful reading of the relevant portions of the federal statute. Sec. 645(a)(1) notes that "the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States." The statute does not assert that female genital cutting is a religious practice or tenet of faith. On the contrary, the statute notes that female cutting is carried out by members of certain faiths for cultural reasons. As a result, it is not protected under the First Amendment of State Constitutional counterparts. "There is no such thing as female circumcision in Islam. Female circumcision is only practiced in a few countries and is very much a cultural thing [as opposed to a ritual requirement of Islam]."[139]

SO-CALLED FEMALE CIRCUMCISION

The federal statute criminalizes female genital mutilation "of any person who has not attained the age of 18." The age requirement is significant. Unlike Jewish ritual circumcision, female genital cutting is usually performed as a pre-pubescent or puberty rite. "In Egypt and elsewhere in Africa and some parts of the Middle East, circumcision is the cruel and unusual punishment for being an adolescent female."[140]

The newly enacted federal statute carefully avoided using the term "female circumcision." Instead, it adopted the phrase "female genital mutilation." This was no accident. Rep. Pat Schroeder (D-Colo.) noted that "you keep trying to explain that this is not circumcision. . . . This is more like Lorena Bobbit."[141]

ANTI MALE CIRCUMCISION PROPONENTS

Proponents of a ban on circumcision fall into 3 broad categories: (a) members of the medical community who sees no benefit

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139. *Islam and Circumcision*, The News & Observer Raleigh, N.C., (October 4, 1996).

140. Charles W. Holmes, *The Plight of Women Around the World Sexuality: Painful, Ritual Procedure Tied to Tradition in Egypt*, The Atlanta Constitution, Sept. 3, 1995.

141. Celia W. Dugger, *Congress Bans Genital Rite*, New York Times, Oct. 12, 1996 at A1.

(and a possible detriment) to routine neonatal circumcisions, (b) members of the legal community who genuinely believe that both medical circumcision and bris milah constitute abuse, and (c) anti-Semites.

Just as there is a wide body of medical and legal literature on the subject of circumcision, there is a plethora of non-medical, non-legal supporters of a ban on male circumcision. A cursory scan of the Internet reveals hundreds of web-pages maintained by anti-circumcisionists. Many of these web sights are overtly anti-Semetic and are linked with unrelated anti-Semitic web pages.

CONGRESSIONAL PHILOSOPHY

Rep. Schroeder noted that Congress delayed for years the passage of legislation banning female genital mutilation because (a) some members simply did not believe that the practice went on; (b) Some feared that it would lead to proposals calling for the abolishment of male circumcision.[142] Her first point implicates the cultural norms of the practice, and her second point raises the serious concern of equal protection.

CONCLUSIONS

Governmental action is necessary in order to remedy the shortcomings of New York's case law on bris milah. New York's approach is rather vague and can lead to unjust results. A parent whose son was negligently circumcised has a largely unenforceable legal remedy against the Mohel since there is no available or required malpractice insurance. While highly unlikely, a Mohel could find himself being prosecuted for practicing medicine without a license if he deviates from the halakhic requirements outlined in the Code of Jewish Law. Finally, the court could become a de facto *Bet Din,*[143] ruling on the validity of Jewish laws and rituals.

In addition, prevailing cultural norms and attitudes are constantly being rehsaped. The acceptability of routine circumci-

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142. *Id.*

143. A tribunal composed of a panel of rabbis for the purpose of adjudicating matters of law.

sion changes with each passing season. A growing anti-circumcision trend could have an adverse impact on the public perception of medical and ritual circumcisions, which in turn could influence the legislatures and courts. Finally, federal and state constitutional provisions could be interpreted in such a way as to severely limit or even ban circumcisions.

The state government need not resort to the draconian measure of banning ritual circumcision in order to protect its citizenry. Still, New York should do more than it currently does to protect the public. Mohalim are generally well trained and dedicated, but like all professions, there are enough bad ones to warrant state action.

Firstly, New York should adopt a certifying procedure, akin to licensing, to weed out the untrained, poorly trained, or dangerous Mohel. The easiest and perhaps best model is the Delaware statute:

> (e) Nothing contained in this chapter shall prevent:
>
> . . . (4) The practice of ritual circumcision performed pursuant to the requirements or tenets of any religion; provided, however, that a person licensed to practice medicine in this State shall have certified in writing to the Board that in his opinion the practitioner has sufficient knowledge and competence to perform such procedures according to accepted medical standards, and shall not have withdrawn such certification;[144]

Editor's Comment:

CIRCUMCISION

Circumcision apparently offers virtually no health benefits, but men who are circumcised tend to have more varied sex, researchers reported. The researchers found no significant differences between circumcised and uncircumcised men in their likelihoodof contracting sexually transmitted diseases. But their study did find significant differences between circumcised and uncircumcised men in terms of their sexual practices. The difference was greatest for masturbation—ironically, a practice that

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144. Del. Code Ann. tit. 24 § 1703(e)(4) (1995).

circumcision was once thought to limit. It said 47 percent of circumcised men reported masturbating at least once a month compared to 34 percent for their uncircumcised peers. The difference in frequency cannot be explained but it does cast doubt on the Victoria-era notion that circumcision reduces the urge to masturbate. In addition, circumcised men were found to be nearly 1.4 times more likely to engage in heterosexual oral sex than uncircumcised men. They were also more likely to have had homosexual oral sex and heterosexual and intercourse. The study also found circumcised men have a slightly lower risk of sexual dysfunction, especially later in life.

The study was based on an analysis of data collected from a sample of 1,410 men, ages 18 to 59, in the United States. Circumcision rates rached 80 percent in the United States after World War II but peaked in the mid-1960s and have since declined.

There is other evidence that circumcision practically eliminates cancer of the penis. Furthermore, women who have intercourse exclusively with circumcised men do not develop cancer of the cervex. Bacteriologic studies have shown abundant bacteria and viruses in the smegma under the foreskin which are undoubtedly one of the sources of cervical cancer.

CIRCUMCISION AND SENSITIVITY

Many parents agonize over whether to have their newborn sons circumcised. Some parents have clear religious reasons. Other wonder whether any health benefits are worth the pain of the procedure.

Researchers have produced new evidence that baby boys may experience long-lasting sensitivity to pain after circumcision if they are not anesthetized. The researchers studied 87 infant boys who were either not circumcised, circumcised without anesthesia, or circumcised using anesthetic cream. The parents were present, but were not allowed to comfort their sons. Videotapes of the babies when they were vaccinated four or six months later showed the boys who had been circumcised without anesthesia appeared more sensitive to pain than the other children. They cried longer and behaved in other ways that indicated elevated sensitivity, such af furrowing their brows and squeezing their eyes shut.

Circumcision may induce long-lasting changes in infant pain behavior because of alterations in the infant's central neural processing of painful stimuli. They recommend always using anesthesia during circumcisions.

A recent study is reported in the April 12, 1997 issue of *JAMA*, Vol. 277, No. 13, pages 1052-1057, entitled "Circumcision in the United States: Prevalence, Prophylactic Effects and Sexual Practice." The article reviewed the practice of neonatal male circumcision.

A number of recent studies have attempted to assess the value of neonatal circumcision. Several have determined that the procedure has positive effects. For example, an association has been found between circumcision and lower rates of urinary tract infections in infancy, as well as lower rates of certain sexually transmitted diseases (STDs). As a result of these and other findings, the 1989 American Academy of Pediatrics (AAP) Task Force on Circumcision shifted its previous position, acknowledging that circumcision has potential medical benefits that must be weighed against its risks.

Male satisfaction has also been debated. Some believe that circumcision reduces male sensitivity and coital enjoyment while others argue that circumcision may afford greater ejaculatory control. Masters and Johnson reported no clinically significant difference in the tactile sensitivity of the glans. More recent reports suggest the sensitivity of the circumcised glans may in fact be reduced. Such claims of reduced sexual satisfaction for circumcised men have spurred a significant movement against the circumcision of infants and the reversing of circumcision in adult men. A technique of uncircumcising has even been introduced. Nevertheless, little consensus exists regarding the role of the foreskin in sexual performance and satisfaction.

The reported study by E. O. Laumann, C. M. Masi, and E. W. Zuckerman was undertaken to assess the prevalence of circumcision across various social groups and examine the health and sexual outcomes of circumcision. The subjects included 1,410 American men aged 18 to 59 years at the time of the survey. In addition, an oversample of black and Hispanic minority groups is included in comparative analyses. They measured the contraction of sexually transmitted diseases, the experience of sexual dysfunction, and experience with a series of sexual practices. The

investigators found no significant differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases. However, uncircumcised men appear slightly more likely to experience sexual dysfunctions, especially later in life. They also found that circumcised men engage in a more elaborated set of sexual practices. This pattern differs across ethnic groups, suggesting the influence of social factors. They concluded that there was a slight benefit of circumcision but a negligible association with most outcomes.

With respect to STDs, the investigators found no evidence of a prophylactic role for circumcision and a slight tendency in the opposite direction. Indeed, the absence of a foreskin was significantly associated with contraction of bacterial STDs among men who have had many sexual partners in their lifetimes.

The data suggest a benefit of circumcision with respect to sexual dysfunction. Circumcised men were slightly less likely than those who had not been circumcised to experience various sexual difficulties. This difference was significant among the oldest age group.

Regarding sexual practice, results reveal a clear pattern in that circumcised men report a more highly elaborated set of sexual practices. In particular, the association between circumcision status and masturbation frequency was quite strong. Similar results, at a somewhat weaker level, occurred for heterosexual oral sex.

This statute requires only a minimal governmental intervention, but it alleviates many of the difficulties enumerated above. By using the language "pursuant to the requirements or tenets of any religion" instead of "anciently practiced" and "by a qualified person," the Delaware statute preempts any of the intra-religious squabbles which could arise from New York's case law policy. The statute is clearly facially neutral and does not favor one religion, or denomination of Judaism, over another. In fact, unlike the other state statutes which exempt ritual circumcision, Delaware makes no specific reference to Mohels or rabbis.

Most importantly, the Delaware statute requires that the circumcisor be signed off by a qualified physician. Of course, the physician must know the extent of his or her potential liability should the Mohel act negligently. In addition, we would need to

know whether performing a ritual circumcision without complying with the certification process would be a per se criminal act of practicing without a license.

I suggest that the legislature enact a statute which would enable mohalim to obtain appropriate liability insurance. All things being equal, parents would favor an insured Mohel to an uninsured one. Also, market forces being what they are, the costs of such Mohel liability insurance would probably be relatively expensive. Thus, the part time or casual circumcisor would find it difficult to compete, leaving the field with more experienced Mohalim.

Finally, I suggest that in enacting statutes banning the practice of both female genital mutilation and ritual abuse of children, states explicitly distinguish and exclude the practice of male ritual circumcision. It is not enough for the legislatures to remain silent. They must actively assert that male circumcision is neither abusive nor violative of the Equal Protection clause.

Research References

West Group Tort and Personal Injury Library

Russ, Freeman & McQuade, Attorneys Medical Advisor § 14:75 (routine care of baby upon birth).

Ausman & Snyder's Medical Library, §§ 2:42 (obstetrics—routine care), 5:111 (pediatrics —routine care).

Am Jur

61 Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 197 (consent to treatment); 227 (unlicensed practitioner).

Annotations

Liability for medical malpractice in connection with performance of circumcision, 75 A.L.R.4th 710.

KeyCite™/Insta-Cite® Cases referred to herein can be further researched through the KeyCite™ and Insta-Cite® computer-assisted services. Use KeyCite or Insta-Cite to check citations for form, parallel references, and prior and later history. For comprehensive citator information, including citations to other decisions and secondary materials that have mentioned or discussed the cases cited, use KeyCite. ALR and ALR Fed

Annotations referred to herein can be further researched through the Westlaw Find service.