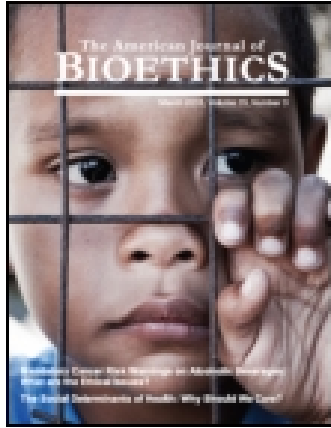


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Response to Open Peer Commentaries on “Ritual Male Infant Circumcision and Human Rights”

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Correspondence

Response to Open Peer Commentaries on “Ritual Male Infant Circumcision and Human Rights”

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The authors thank the commentators for their thoughtful remarks. We have arranged our responses to the commentators thematically; within each section we start first with general comments before discussing particular statements by individual commentators.

MEDICAL BENEFIT AND HEALTH RISKS

We first address the benefits and harms of circumcision. We have reviewed the literature, and believe we have formed opinions based on the best scientific evidence, taking into account the scientific quality of the papers. We do not rehash this evidence, but note that our citations all are to primary sources and review articles published in prestigious peer-reviewed journals. Furthermore, the recent draft recommendations from the Centers for Disease Control and Prevention (CDC 2014) agree with the overall medical benefit of male infant circumcision. We also appreciate Dr. Bester’s citation of literature that appeared after the submission of our article (Bester 2015). In contrast, Svoboda cites an article written by two nonscientists for a popular magazine as evidence that claims for benefits of circumcision are “scientifically untenable” (Svoboda 2015).

Earp points out the problems of studying sexual sensation and enjoyment. He correctly states that adults are not directly comparable to neonates (Earp 2015). However, he is wrong about the actual difference. Adult circumcision is much more extensive, and the genitalia of children (especially infants) heal more rapidly. In either case, cornification of the skin of the penile head is likely to be complete well before 24 months. Therefore, the randomized African trials are valid, though imperfect, measures of sexuality. Also valid—though less reliable—are large, well-constructed case-control trials (Laumann, Masi, and Zuckerman 1997). Such data are more valid than Earp’s suppositions regarding the effects of prepuce loss. Sexually

sensitive skin unquestionably is removed during circumcision. It does not follow that this causes a loss of function or of satisfaction, or that remaining skin cannot compensate. That is an empirical issue that has been demonstrated in the literature, as we have cited.

We are curious about Earp’s claim that thousands of men have attempted foreskin restoration. Rather than supplying an original reference to this, Earp cites his own unpublished nonempirical working paper (Earp 2015). This, in turn, links to a Wikipedia article and an *Amarillo* [Texas] *Globe-News* article that primarily reports the contents of an interview with two anticircumcision activists (Anonymous 2001). Furthermore, neither of these unreliable sources actually claims that thousands of men have attempted foreskin restoration.

Burgess and Murray state that in the United States anyone, with any instrument, can perform circumcision (Burgess and Murray 2015). This is not true. Indeed, a frequently cited case to the contrary was decided in Burgess’s home state (Baxter 2006). We also reiterate that we limited our discussion in the original article to those procedures performed by trained providers.

AUTONOMY AND HUMAN RIGHTS

There is no worldwide consensus regarding the status, foundation, or content of human rights. Some of our critics err when they limit human rights to protection of individuals. Everyone’s beliefs, values, and needs are strongly influenced by his or her cultural milieu. The very existence of disagreement between, say, Americans and Norwegians regarding the desirability of ritual male infant circumcision illustrates this phenomenon. If people derive their beliefs, values, and needs from nonstate communities and, in turn, derive validation and self-actualization from these communities, then these communities would seem to have

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rights as entities that embody the interests and values of their members.

Some of our critics excessively prioritize autonomy over other rights. The primacy of autonomy is an important heuristic for evaluating the relationship between patients and health care providers. It is not evident, however, to what extent autonomy should be prioritized as a general right. Even in health care, widely accepted laws and ethical opinion both defend autonomy with regard to personal medical decisions but limit autonomy in personal behavior impacting on public health, such as wearing motorcycle helmets, public smoking, or receiving vaccinations. As Bester argues, the evidence is sufficient to view circumcision as a public health intervention (Bester 2015).

Burgess and Murray misinterpret what we said about human rights (Burgess and Murray 2015). First, they ascribe Amartya Sen's constraints (which we adopted) to us, and call it "curious logic." These constraints are that the rights should be recognized only in important situations, in unambiguous situations, and that they be generally appreciated (Jacobs and Arora 2015). A hypothetical set of laws based on Article 16 of the Universal Declaration of Human Rights shows why this is a reasonable approach.¹ A state requires that a couple getting married purchase an inexpensive license (not important enough to be a human rights violation). The state also specifies 17 years as the legal age of marriage. (However, one person may believe that "full age" under §1 should be 16, while another believes that a person under 18 is incapable of consent, so the law violates §2; this is not unambiguous enough to invoke human rights.) Finally, §3 states that the family is entitled to protection. How does this affect circumcision? Since one-third of the world's boys are circumcised there is insufficient unanimity to use the rubric of human rights to address this.

Svoboda is disingenuous in stating that we misunderstand the nature of human (and other) rights as applied to individuals (Svoboda 2015). All brief statements of a right will be ambiguous, and when many rights are adopted, there will be conflicts between rights. For example, the long series of constitutional libel cases beginning in 1964 balance a right to freedom of speech against a right to protect one's reputation (Sullivan 1964). It should go without saying that if a court declines to uphold A's right so that B's rights are upheld (the point of human rights, according to Svoboda), then it is simultaneously declining to uphold B's rights in order that A's might be upheld (presumably

failing to do what human rights are supposed to do, in Svoboda's view).

Svoboda misstated the court's conclusion in *Tarhan v. Turkey* (Tarhan 2012) as holding that "forcible excision of any healthy body part constitutes cruel and inhuman punishment" (Svoboda 2015.) The relevant facts are that seven people held down a prisoner and cut off his hair and beard. The complainant asserted that this violated Article 3 of the European Convention on Human Rights (ECHR).² The relevant portion of the *Tarhan* opinion reads (Google translation of the original text):

The Court recalls that it has consistently held to fall within the scope of Article 3, a treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case including the nature and context of the treatment, its implementing rules, its duration, its physical or mental effects and, sometimes, the sex, the age and state of health of the person concerned. Moreover, whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will consider whether the goal was to humiliate and debase the person concerned. (*Tarhan v. Turkey* 2012, ¶ 43; emphasis added; internal citations omitted)

This is a far cry from Svoboda's description of the court's justification of its ruling. Svoboda also calls the anticircumcision ruling of a regional German court a "landmark ruling," even though it was an opinion of the lowest court in a three-tier appellate system and was rapidly overturned legislatively (Amsgericht Köln 2012). Most people construe a landmark case as one that governs subsequent law. Finally, his summary of American law, consisting of two cases, the more recent of which is 70 years old, does not accurately describe the status of current American jurisprudence on religious exemptions. Such a description, as applied to circumcision, would have to include at least five additional sources, which we have inadequate space to discuss (Smith 1990; Lukumi 1993; RFRA 1993; City of Boerne 1997; Central Rabbinical Congress 2014).³ Such discussion would lead to a much more nuanced conclusion than Svoboda offers.

CULTURE AND RELIGION

Another problematic assumption is that of viewing a practice such as circumcision in isolation, rather than in a social context. What if someone invented a ritual that placed helmets on children whose bones were still growing and asked them to hit the torso and limbs of other children

1. UDHR, Article 16, reads, in full:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. ECHR, Article 16, reads, in full, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

3. *Central Rabbinical Congress*, a recent federal appellate decision, upheld the legality of circumcision, as did the regulation it overturned. The issue at hand was whether specific written consent was needed for a mohel (Jewish ritual circumciser) to aspirate blood from the infant's penis using his lips.

with their heads as hard as they could? This might seem outrageous, but this bare description is an inadequate narrative for describing the role of football as a male rite of passage in much of the United States. Analyzing infant circumcision in isolation from its cultural context is equally problematic. Opponents presumably either have not considered the likely effects of circumcision on these faith communities, or believe that the destruction of important religious traditions would be warranted if this were the price of abolishing the practice, or have rationalized that circumcision is not as important to these religious cultures their spokesman say it is.

Professor Bock provides some of the philosophical underpinning for the positions at issue in current American law (Bock 2015). Religious neutrality currently is the law of the land (Smith 1990; Lukumi 1993). Religious neutrality, as Bock notes, constitutes a thinner defense of religious practices than accommodation, which formed the basis of pre-Smith case law (Sherbert 1963) and the post-Smith Religious Freedom Restoration Act (RFRA 1993) (subsequently invalidated by the Supreme Court as it applies to the states, but not as it applies to the federal government). Neutrality is more widely acceptable, is the law, and is sufficient to justify infant circumcision.

After deeming it odd that the American Academy of Pediatrics (AAP) used a policy statement to make an empirical claim, Lyons and O'Dwyer approvingly cite three other organizations that did this (Lyons and O'Dwyer 2015). Their comment itself is odd, in that all policies regarding standards of medical treatment rely on conclusions based on empirical research, and such research rarely results in unanimously consistent outcomes. We also note the irony of these authors from northern Europe dismissing an extensive and serious analysis of medical evidence as "culturally biased," in contrast to the supposed objectivity of a contrary perspective from their own part of the world (Frisch et al. 2013; Lyons and O'Dwyer 2015; van Howe 2015). Dr. van Howe calls the "ethno/religious makeup of the [AAP] panel" a challenge to its impartiality.⁴ If this is the case, then the fact that most of those who signed the Firsch letter resided in nations that have long disfavored circumcision is also relevant.⁵ We are all influenced by our cultural milieu, and this cuts both ways. We also would observe that the use of ethno/religious criteria to disqualify people is generally viewed as an inappropriately discriminatory practice.

4. Van Howe does not state which group he is concerned about, but review of the composition of the panel reveals that a few of the eight panelists bear surnames or premarital surnames that frequently are held by Jews. The identity of the group with which van Howe is concerned is no more relevant to our discussion than it should have been to van Howe's.

5. That being said, there is no reason to believe that the Frisch group intended their comment about cultural bias as a dog whistle; unlike the van Howe comment, theirs seems only intended to contrast Americans with Europeans, and to assert the objectivity of the European perspective.

Furthermore, Lyons claims that in Europe (in contrast to the United States), "Human rights discourse is gradually replacing reliance on religious dogma as a moral framework." This is a caricature of the United States. Religious tolerance is not equivalent to reliance on "religious dogma." It allows people the freedom to choose their moral framework. Much of the argument by Lyons simply consists of using tendentious language to characterize our position. What they claim people are doing "to their children" (emphasis added) others believe is being done *for* their children. The question we raise, of course, is whether the state should settle that point for everyone. American law, shaped in a country that always has been culturally diverse, has been quite sensitive to family prerogative (Meyer 1923; Pierce 1925; Troxel 2000), though this prerogative is limited by child safety considerations (Prince 1944). Even if there is a different European perspective on ritual infant circumcision (which, when the rhetoric has been cleared away, is legal in all European nations), that perspective is neither more objective than the American perspective nor intrinsically privileged over it.

Finally, saying that a putatively analogous procedure would be unacceptable if first proposed by contemporary doctors misses the point (Myer 2015). Arguments from tradition are valid, *prima facie*, though they are not very strong. But there is a stronger related argument that criminalization of a traditional practice may place strain both on the tradition itself and on its members. Regardless of whether the procedure is justified in isolation, the value of abolishing it must be weighed against the harm done to the tradition and its members. This is not the case with a practice that is newly proposed, such as Myer's taste removal. And, if that were proposed tomorrow, and rapidly became an indispensable element of a religious community, it likely would command toleration by a majority community that did not practice it.

CONCLUSION

The balance of high-quality medical evidence demonstrates a favorable risk-to-benefit ratio for ritual male infant circumcision. Ritual male infant circumcision also does not violate any universal human rights, is compatible with a Western understanding of human rights, and does allow for the fulfillment of cultural and religious requirements that are important to a child's family, community, and his future self.

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