

PAPER

Ancient rites and new laws: how should we regulate religious circumcision of minors?

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ABSTRACT

The ancient practice of *metzitzah b'peh*, direct oral suction, is still practiced by ultra-Orthodox Jews as part of the religious rite of male newborn circumcision. Between 2000 and 2011, 11 children have died in New York and New Jersey, following infection by herpes simplex virus, presumably from infected practitioners. The City responded by requiring signed parental consent before oral suction, with parents being warned of the dangers of the practice. This essay argues that informed consent is not an appropriate response to this problem. An outright ban would a better response to a practice that is dangerous to children, but might prove unconstitutional under New York State law.

Male newborn circumcision has been much in the news of late. In Germany, after considerable controversy, Parliament enshrined into law the right of parents to have their sons circumcised¹; in Denmark, the prime minister initiated an investigation into whether circumcision violates the health code.² A Swedish law requires that a medical doctor or anaesthesia nurse accompany registered circumcisers and that anaesthesia be applied before the procedure.³ In a number of countries, medical associations are equivocal about the practice,¹ but in the USA, the American Academy of Pediatrics (AAP) recently gave modest approval to the practice, while reaffirming the importance of each family making its own decision, based on 'the health benefits and risks in light of their own religious, cultural, and personal preferences ...'⁴

In New York City, a particularly dramatic brouhaha has erupted over the practice of *metzitzah b'peh*, in which a *mohel* (Jewish ritual circumciser) completes the circumcision procedure by taking the baby's penis into his mouth, and orally suctioning out blood. In this essay, I argue that the City's response of required parental consent is poorly thought out, but the arguments for an outright ban are more complicated than they first appear.

METZITZAH B'PEH

To perform *metzitzah b'peh*, the *mohel* repeatedly takes wine in his mouth and applies his lips to the wound, spitting the mixture of blood and wine into a receptacle. This was originally done to care for the wound, as a crude form of antiseptis. The Babylonian Talmud declares that, for the sake of the infant, the *mohel* must perform this act, 'so as not to bring on risk'.ⁱⁱ However, if the *mohel* has herpes simplex virus (HSV-1), as do a majority of adults in the US, the newborn, with its immature immune system, is at risk of contracting the disease. According to the New York City Department of Health and Mental Hygiene (NYCDH), 11 infants in the state have contracted the virus in this manner since 2004; two suffered permanent brain damage and two died. Two New Jersey babies have also died from this practice. The NYCDH also received 'multiple complaints' from parents who were not aware that direct oral suction was going to be part of their baby's circumcision. The Department has produced a brochure for hospitals to give to Jewish parents, 'Before the Bris', warning against the practice, and telling parents that the use of a sterile pipette appears to be safe.⁵

Metzitzah b'peh 'remains commonplace' among the more than 250 000 ultra-Orthodox Jews in the New York area.⁶ The Centers for Disease Control estimated that 3564 newborn boys a year in New York have circumcisions that include the procedure, which puts them at more than triple the normal risk of contracting HSV-1.⁷ Agudath Israel (AI), an organisation representing ultra-Orthodox Jews, has reacted with intransigence, claiming that the state health departments cannot prove that the babies were infected by *mohels* without a DNA comparison of the virus, and that newborns who contracted the disease did so by other means, for example, by sharing pacifiers with older siblings. AI argues that, given the large number of babies who undergo the procedure, the small number who contract the virus proves the procedure's safety.⁸ Most *mohels*, even among the Orthodox, use a sterile pipette, avoiding direct oral-genital contact. In 2005, the Rabbinical Council of America, the main

ⁱThe Canadian Paediatric Society has not revised its 1996 statement recommending against 'routine' newborn circumcision. In a 2010 statement, the Royal Dutch Medical Association (KNMG) adopted a 'powerful policy of deterrence', based on medical and human rights considerations. The 2010 statement of the Royal Australasian College of Physicians does not recommend 'routine' circumcision, but defers to parental decision making.

ⁱⁱR. Papa said: If a surgeon does not suck [the WOUND], it is dangerous and he is dismissed. It is obvious? Since we desecrate the Sabbath for it, it is dangerous? You might say that this blood is stored up; therefore, he informs us that it is the result of a wound, and it is like a bandage and cummin: just as when one does not apply a bandage and cummin there is danger, so here too if one does not do it there is danger. Babylonian Talmud Shabbat 133b.

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union of Modern Orthodox rabbis, issued a statement urging the abandonment of direct suction,⁹ although they have joined AI's objections to the Health Department's informed consent policy.¹⁰

On 6 June 2012, the NYCDH issued a statement 'strongly advising' against direct oral-genital suction. Shortly thereafter, the New York State Board of Health voted to require signed parental consent before the procedure is undertaken. The consent 'provide[s] information about the risks involved, including possible infection with HSV and its potentially serious consequences, such as brain damage and death. Knowing the risks posed by direct oral suction, a parent or legal guardian can then make an informed choice about whether it should be performed as part of the circumcision'.¹¹ The Board was motivated to take this step by the risks involved, and also by numerous complaints from parents who had not known that *metzitzah b'peh* would be part of their son's bris until it was too late to object.¹²

Some rabbis have noted that signing the form does not impinge on the religious ritual; others have promised civil disobedience, regarding a required consent form as the beginning of a slippery slope towards criminalisation of all religious circumcision. The *New York Post* reported that some 200 rabbis have signed a statement alleging that the health department 'printed and spread lies ... in order to justify their evil decree. It is clear to us that there is not even an iota of blame or danger in this ancient and holy custom'.¹³ Shamefully, some local politicians have been expressing support for the intransigent position.¹⁴

On 10 January 2013, Judge Naomi Reice Buchwald of the US District Court for the Southern District of New York upheld the consent requirement against a suit initiated by AI, a group of mohels, and others.¹² Plaintiffs had argued that the City violated the *mohelim's* free speech rights by forcing them to convey government beliefs with which they disagreed. They had also argued that the City violated the *mohelim's* right to the free exercise of religion by targeting only ritual circumcision. (Of course, only ritual circumcisions involve oral-genital contact, which is never a feature of secular circumcision.) It is worth noting that, although free exercise protections were arguably weakened by *Employment Division v. Smith*, in 1990, in which the US Supreme Court upheld 'neutral' laws that happened to burden religion, the New York State Constitution requires the more rigorous balancing test, by which the state must show that a law burdening religion is the least restrictive means to fulfil a compelling state interest. Here, the state interest is obvious enough: protecting the health and lives of newborns. But it is not clear that requiring informed consent fulfils that interest, as parents can still go ahead with the procedure.

Looking at this issue from legal, ethical, and pragmatic perspectives, it is clear that informed consent is the wrong response, if the goal is to protect infants by eradicating the procedure. Many commentators, even those quite sympathetic to the claims of religion, have called for an outright ban. However, arguments for a legal ban are not as clear-cut as they might at first seem.

INFORMED CONSENT

I believe that, from every perspective, informed consent is the wrong path to take in response to this problem. First, although we often speak of parental 'consent' to medical procedures on children, a more thoughtful analysis shows that parents can give *permission*, but not *consent*.¹⁵ As a competent adult, I can consent to all sorts of dangerous and 'unreasonable' activities. As a parent, however, my permission derives from the

presumption that I have my children's welfare at heart and am likely to know what is best for them. If oral suction puts infants at unreasonable risk, it ought to be made illegal.

Pragmatically, requiring informed consent is unlikely to deter parents due to temporal pressures. Jewish ritual circumcisions must take place on the 8th day of life (unless the child is not healthy). If the *mohel* shows up with his instruments and the required form, what are the parents to do? If they read the paper carefully and decide against *metzitzah b'peh*, they have only until sundown to find another *mohel*. For this reason, the 'Before the Bris' brochure seems more efficacious, if it gets to the right population.

CIRCUMCISION AND THE LAW

Calling this proposed document 'informed consent', gives a medical cast to a procedure that is anything but. In fact, ritual circumcision, even without direct oral suction, occupies a very strange place in American law and life, and is difficult to define. It is a religious ritual that includes a common secular medical procedure; is often performed by *mohels* who are also physicians; is minor surgery performed in the home; can legally be performed by anybody and has absolutely no regulation (in contrast to a web of regulations covering, eg, who may manicure nails and shampoo hair). If one then adds *metzitzah b'peh*, one has the spectacle of a man taking into his mouth the genitals of a baby, with no legal consequence. This is extraordinary deference to religious practice.

Contrast this deference with the federal law prohibiting the tiniest nick on the genitals of a female minor (in the absence of a medical reason) even when performed by a physician in sterile conditions, and which specifically bars giving any weight to religious motivation.¹⁶ This was the practice that physicians at Seattle's Harborview Hospital intended to offer to the Somali immigrant mothers in their neighbourhood, as an alternative to the common practice of taking young girls back to Africa for a severe form of female genital alteration, or having it performed illegally in the USA by ritual circumcisers on kitchen tables. The physicians working with the Somali community had good reason to hope that their plan would work, but those hopes foundered upon 'Schroeder's law', sponsored by Congresswoman Pat Schroeder to halt 'female genital mutilation'.¹⁶ This law shows a complete lack of respect for the religious and cultural traditions of those who practice female genital alteration, and bans all forms of the practice even without a showing of harm.

A BAN ON METZITZAH B'PEH?

If *metzitzah b'peh* truly puts children at unreasonable risk of harm, then an outright ban makes more sense than requiring parental 'consent'. The ultra-Orthodox argue that any regulation of this practice impinges on their religious freedom. In this they are correct. But religious freedom is not automatically a winning argument. It must be balanced against other state interests, among which the protection of children is paramount. As the US Supreme Court said in 1944¹⁷ 'neither the rights of religion nor the rights of parenthood are beyond limitation. The right to practice religion freely does not include the right to expose the community or the child to communicable disease or the latter to ill-health or death.' Thus, the American legal system has consistently required parents to educate their children, vaccinate them in the face of an epidemic, and accept life-sustaining blood transfusions.

The question, however, is whether the risk is *unreasonable*. The problem here is the degree of risk. Although various state

laws stipulate safety restraints for children riding in cars and on bicycles, for example, there are many other activities in which parents engage that put their children at risk. Drowning is responsible for more deaths among children ages 1 to 4, in the USA, than any other cause except for birth defects, and most of those drownings occur in home swimming pools.¹⁸ Every year brings reports of children killed when they or their friends discover an improperly secured handgun in the house. The AAP, the same group that recommended against *metzitzah b'peh*, urges paediatricians to counsel parents to remove guns from the home.¹⁹ A parent who smokes in the home greatly increases a child's risk of asthma, Sudden Infant Death Syndrome, and respiratory infections.²⁰ Even where activities are regulated, such as laws regarding pool safety, they are not as safe as simply not having a pool. Every extra mile children travel in cars puts them at increased risk, and yet even the best parent takes a child for a drive for reasons that may be quite trivial and unrelated to family welfare. None of these parental activities carries the same force as the free exercise of religion, and yet parents are free to subject their children to these risks, which apparently are not considered unreasonable.

According to the Centers for Disease Control, the risk of an infant contracting herpes after *metzitzah b'peh* is 1 in 4098,⁷ and only about one-fifth of those babies died (although some sustained irreversible brain damage). How does a death rate of 1/20 000 compare to other risks that we allow parents to take with their children, arguably with less weighty motives? If *metzitzah b'peh* is no riskier than these other common activities, making it illegal does appear to be targeting a religious practice and thus is arguably an unconstitutional barrier to the free exercise of religion.

CONCLUSION

The conflict over *metzitzah b'peh* is at the nexus of four weighty elements: ethics, law, religion and child rearing. Law and ethics each pose the question: when may a parent put a child at risk for the sake of religion or culture? From an ethics perspective, we ask when the *parent* is justified; from a legal perspective, we ask when the *state* is justified in constraining parental freedom to decide what is best for a child. In the context of American jurisprudence, it is important not to be overly deferent to religious motivation, thus offending the Establishment Clause, nor to target religious practice unfairly, thereby offending the Free Exercise Clause. Law and ethics need to be evenhanded and require an empirical investigation into comparative risk. In addition to the examples I mentioned above, we might investigate the degree of risk incurred by children whose parents refuse to vaccinate them, in defiance of medical advice. Most states allow parents to refuse newborn screening, thereby putting their child at a 1 in 15 000 risk of being developmentally disabled from the effects of undiscovered phenylketonuria. The 'genital nick' I referred to above, performed on female children, would pose virtually no risk, when performed by trained personnel in a medical setting. We might usefully engage with the longstanding discussion in research ethics, particularly with respect to children, on what constitutes risks beyond those of daily life.

Metzitzah b'peh seems to arouse much the same feelings of revulsion as does 'female genital mutilation'. It seems bizarre,

primitive and uncomfortably close to both blood-sucking and paedophilia. Many Jews, including those who practice circumcision, have never heard of it. Most Jews are anxious to distance themselves from it. Banning it may be more a visceral reaction than a reasoned response to the degree of risk. But three things seem certain. First, 'parental consent' is not a defensible response. Second, we need a more sophisticated understanding of relative risk, if we are to think rationally about these matters. Third, a robust discussion about *metzitzah b'peh* should reopen a discussion about the current federal ban on all forms of female genital alteration, even those more minor than male circumcision. Respect for free exercise should apply to all.

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