

CUTTING AWAY RELIGIOUS FREEDOM: THE GLOBAL AND NATIONAL DEBATE SURROUNDING MALE CIRCUMCISION

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I. INTRODUCTION

On June 29, 2008, protestors held signs at San Francisco's Gay Pride Parade that read, "Circumcision violates human rights."¹ Similarly, at the Annual Genital Integrity Rally in Washington D.C., demonstrators marched to the White House holding signs that read, "Don't Snip the Tip!" and "Equal Justice Under Law?"² "Finally Germany is again an imperial power" was the banner held by people in Berlin, Germany where hundreds of Muslims and Jews united September 9, 2012.³ Male Circumcision has received criticism for centuries. Currently, critics of the procedure contend that it is a violation of human rights and is not in the best interest of male children. On the other hand, religious groups and advocates of this procedure assert that there are no medical disadvantages and it is a sacred religious practice that should not be restricted. Legislators worldwide have campaigned to limit or protect this procedure.

This note will examine several pieces of legislation and regulations regarding male circumcision. Specifically, the note will focus on legislation from Germany, Sweden, and the United States. These countries were carefully chosen because their approach and reactions to male circumcision differ. This note will not discuss in detail the arguments made by anti-circumcision advocates con-

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1. Evan Wagstaff, *Measure to Ban Circumcision Qualifies for SF Ballot*, BAY CITIZEN (May 18, 2011, 3:30 PM), <http://www.baycitizen.org/blogs/pulse-of-the-bay/measure-ban-circumcision-qualifies-sf/>.

2. *NCFM Liaison Attends 18th Annual Genital Integrity Awareness Rally - Say No to Circumcision!*, NAT'L COALITION FOR MEN (Apr. 4, 2011), <http://ncfm.org/2011/04/action/the-18th-annual-genital-integrity-awareness-rally-say-no-to-circumcision/>.

3. *German Jews, Muslims Unite to Protest Against Circumcision Ban*, REUTERS (Sept. 9, 2012, 6:11 PM), <http://www.reuters.com/article/2012/09/09/us-germany-circumcision-idUSBRE8880K020120909>.

cerning the amount of pain that is endured. Although these arguments will be mentioned, the purpose of discussing them is simply to provide a context to a complicated and heated debate. Therefore, the purpose of this note is to examine the legal ramifications regarding male circumcision laws.

This note will be divided into three parts. The first part will explore the religious significance behind male circumcision. The second part will discuss the laws and proposals in Germany, Sweden, and the United States. Furthermore, the second section will explain the historical background that perhaps influenced the laws and proposals. It is important to note that the purpose of this article is not to criticize Germany and Sweden's responses to male circumcision, but rather examine whether the events leading up to their perspective circumcision laws mirror reactions to circumcision in the United States. The third part will discuss the potential legal ramifications of the laws and proposals in the United States, the likelihood of enacting proposed legislation, and the effects that such legislation could have on religious organizations if enacted.

In order to determine whether the proposed laws would be legal, in the United States, two tests will be utilized: one test that is applied to the federal government and another that is applied for states. To this point, in order for a regulation on male circumcision to pass on the federal level, the regulation must serve a compelling governmental interest. On the other hand, in order for a restriction on circumcision to pass at the state level, the law must be neutrally applicable. Therefore, the examination of the legal ramifications of a proposal, will receive different treatment depending on whether it is submitted by the federal government or by a state.

Ultimately, this article will argue that male circumcision is at its core a religious sacrament. As such, due to its religious significance, partaking in the ritual should receive protection under the Constitution. Unfortunately, restrictions in the United States are slowly being implemented. If such restrictions and regulations continue to be implemented one worries that the entire significance of the ritual will be regulated and religious freedom will be compromised.

II. RELIGIOUS SIGNIFICANCE OF MALE CIRCUMCISION

A. *Male Circumcision in the Jewish Faith*

Male circumcision is a sacred ritual that is rooted in Judaism and Islam. Jews have practiced this ritual for over two thousand

years.⁴ This deeply sacred ritual represents the male entrance into “the covenant, the community, and the world”⁵ Male circumcision is cited in several biblical tales.⁶ Found in Genesis 17:11-12, Abraham mandated it an obligation for every male, stating, “[E]very male among you shall be circumcised. And ye shall be circumcised in the flesh of your foreskin, and it shall be a token of a covenant betwixt Me and you.”⁷ Failure to observe this command would result in being “cut off” from one’s kind.⁸ This ritual is so important that “rabbis declared that were it not for the blood of this covenant, heaven and earth would not exist.”⁹

As previously mentioned, circumcision represents the entrance into the Jewish community.¹⁰ Mandated by rabbinic legislation, it is the duty of a Jewish father to have his son circumcised.¹¹ Although any Jew is technically permitted to perform this ritual, it is desired that mohels perform male circumcision.¹² It is believed that God wanted the entire child to be sacrificed, but would be pleased by offering a portion: “[t]he rite stems from the notion that the deity desires the sacrifice, of the whole child but is appeased with the offering up of the metonymic portion of the member, and thus spares the life of the child.”¹³

The traditional ritual includes three steps. First, is the cutting of the foreskin (milah), then ripping the membrane with a fingernail (per’ah) and finally sucking blood from the wound (mezizah).¹⁴

4. Leonard B. Glick, *Jewish Circumcision: An Enigma in Historical Perspective*, in UNDERSTANDING CIRCUMCISION: A MULTI-DISCIPLINARY APPROACH TO A MULTI-DIMENSIONAL PROBLEM 19, 20 (George C. Denniston et al. eds., 2001).

5. 4 ENCYCLOPEDIA JUDAICA, *Circumcision* 730, 732 (2d ed. 2007).

6. *Id.* at 730-31.

7. *Id.* According to Chapter 17 of Genesis, God appeared to a man named Abram and offered him an “everlasting covenant,” and changed his name to Abraham. Abraham was to become the “father of multiple nations,” but Abraham had to circumcise himself. If a man is not circumcised, according to the text of the Genesis, he will be “cut off from his kin” and will have broken Lord’s covenant.” Glick, *supra* note 4, at 22.

8. ENCYCLOPEDIA JUDAICA, *supra* note 5, at 731.

9. *Id.* Not only did male circumcision represent the covenant to God, but Professor Glick argues that it represented the divide between Jews and Christians. Glick, *supra* note 4, at 27.

10. ENCYCLOPEDIA JUDAICA, *supra* note 5, at 731.

11. *Id.* (citing Sh. Ar., YD 260:1).

12. A Mohel is a Jewish man trained in the practice of brit milah, the “covenant of circumcision.” Ariela Pelaia, *What is a Mohel?*, ABOUT.COM, <http://judaism.about.com/od/lifeevents/g/mohel.htm> (last visited Mar. 15, 2014).

13. ENCYCLOPEDIA JUDAICA, *supra* note 5, at 732.

14. *Id.* at 733-34.

Under the former mezizah technique, the mohel sucked blood from the circumcised penis with his mouth.¹⁵ Today, the mohel uses a swab or a glass tube to suck the blood rather than his mouth.¹⁶ Nevertheless, traditional mezizah, are typically practiced by orthodox Jews. Although mezizah is not widely practiced there are restrictions on it and therefore it is important to discuss whether or not those restrictions are constitutional.

B. Male Circumcision in Islam

Although Muslims also practice male circumcision, there are several differences between this particular practice in Islam and Judaism. Khitan or Khatan is the term for male circumcision in Arabic.¹⁷ Unlike Judaism, where male circumcision is found in the bible, male circumcision is not mentioned in the Qur'an, rather it is discussed in the Sunnah.¹⁸ This ritual dates back to the time of the Prophet Muhammad and was carried out by many Arabian tribes.¹⁹ According to tradition, Prophet Muhammad was born without foreskin and therefore, his disciples were circumcised to symbolize their connection with the Prophet.²⁰ In fact, a king of the Byzantium Heraclius announced Prophet Muhammad as the "leader of the circumcised people."²¹ Other reports of male circumcision during this period of time are found in the quotes of Abu Huraya, a follower of Muhammad.²² Abu Huraya was quoted as saying that the practice of circumcision is part of "fitrah."²³ Ahmad Ibn Hanbal, a Muslim scholar, also stated that this act was "a law for men."²⁴

15. *Id.*

16. *Id.*

17. *Khitan*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/print/topic/316661?citation=undefined> (last visited May 14, 2014).

18. *Circumcision of Boys*, BBC, <http://www.bbc.co.uk/religion/religions/islam/islamethics/malecircumcision.shtml> (last updated Aug. 13, 2009).

19. Massoume Price, *Ritual of Circumcision*, IRAN CHAMBER SOC'Y (Dec. 2001), http://www.iranchamber.com/culture/articles/rituals_of_circumcision.php.

20. *Id.*

21. *Id.*

22. *Id.*

23. Male circumcision is in a list of practices known as "fitrah," which means natural way or instinct. *Id.*

24. Price, *supra* note 19. The Sunnah explains that Muhammad stated that circumcision was "a law for men and preservation of honor for women." *Circumcision of Boys*, *supra* note 18. Furthermore, Dr. Bashir Quershi, the author of *Transcultural Medicine*, noted:

Therefore, even though male circumcision is not in the Qur'an, it has a deep history in Islam, and it is viewed as an introduction to the Muslim faith as well as an indicator of belonging.²⁵ Unlike in the Jewish faith, Islamic circumcisions do not require the procedure to be done at a fixed age.²⁶ Some Muslims have their children circumcised seven days after the child's birth, while others postpone the procedure until after the Muslim boy recites the whole Qur'an from start to finish.²⁷ For example, in Malaysia, boys typically undergo the procedure between the ages of ten and twelve.²⁸ Furthermore, there is no equivalent Jewish model in Islam.²⁹ Male circumcisions are usually done in a clinic or hospital, and the person performing the circumcision does not have to be Muslim, rather he or she must be medically trained.³⁰

Male circumcision, in Islam, is also known as tahara, which means "purity," because circumcisions are also performed for cleanliness, rather than religious purposes.³¹ Some Muslims believe that removal of the foreskin makes it easier for the penis to remain clean and prevent urine from getting trapped.³²

C. *Early Prohibition on Male Circumcision*

The first prohibition against circumcision was enacted under Antiochus Epiphanies; historical records indicate, "Mothers who had their son circumcised during this era suffered torture and

Every Muslim is expected to follow the way and the life of Prophet Muhammad. Therefore, all Muslims – devout, liberals or scholars – observe this ritual. Muslim are obliged to follow not only Allah's message in the Holy Qur'an but also what the Prophet said or did, as proof of their dedication to Islam.

Id.

25. *Circumcision of Boys*, *supra* note 18.

26. *Id.*

27. *Id.*

28. *Id.* See also *Traditional Muslim Male Circumcision: Performed by Arabs, Turkish, Malaysian, and Others of this faith*, CIRCLIST.COM, <http://www.circlist.com/rites/moslem.html> (last visited Mar. 15, 2014) [hereinafter *Traditional Muslim Male Circumcision*]. Hence, it is also seen as an introduction into puberty. *Id.* Nevertheless, it is important to note that Muslim families have shifted away from having their sons undergo this operation during puberty and opt to have their sons receive the surgery at birth. *Id.*

29. *Circumcision of Boys*, *supra* note 18.

30. *Traditional Muslim Male Circumcision*, *supra* note 28.

31. *Id.*

32. *Circumcision of Boys*, *supra* note 18.

death.”³³ Even more, there are accounts that two women who had their sons circumcised were “led around the city with their infants bound to their breasts and then cast headlong from the wall.”³⁴

The rise of Christianity also resulted in this ritual as marking the difference between Judaism and Christianity.³⁵ Jewish rabbis held that circumcision was the “Lord’s supreme gift to the Jewish people, that nothing was more pleasing to him,” while Christians maintained that this practice was “not only worthless, but disgusting.”³⁶

Nevertheless, this notion changed during the nineteenth century.³⁷ During the mid-nineteenth century thousands of European Jews migrated to the United States.³⁸ Throughout this period of time Jews living in the United States were not harassed for circumcising their sons and therefore did not conceal this religious practice.³⁹ Rabbis focused on “reforming certain abuses” and “preventing as far as possible any ill effects from the operation.”⁴⁰ Consequently, the rabbis accomplished a great deal from these reforms because circumcision shifted from being solely a religious practice to a medically sanctioned procedure.⁴¹ Eventually, English doctors began introducing circumcision as a routine procedure.⁴² Soon enough, this religious sacrament transformed into a procedure that many believed bestowed medical benefits.

III. HISTORY OF MALE CIRCUMCISION IN GERMANY, SWEDEN AND THE UNITED STATES

A. *Male Circumcision in German*

Germany has a long history of debate regarding male circumcision. Although Germany enacted a bill that would protect this procedure, it is unlikely that the fight against male circumcision will subside in this region. During the late fifteenth to eighteenth cen-

33. ENCYCLOPEDIA JUDAICA, *supra* note 5, at 731.

34. *Id.*

35. *Id.*

36. Glick, *supra* note 4, at 21.

37. Sarah E. Waldeck, *Using Circumcision to Understand Social Norms as Multipliers*, 72 U. CIN. L. REV. 455, 470 (2003).

38. Glick, *supra* note 4, at 37.

39. *Id.* at 21.

40. *Id.* at 44.

41. *Id.* at 21.

42. *Id.*

tury Jews were “accused of kidnapping young boys, ritually crucifying them, and extracting their blood for therapeutic use.”⁴³ Subsequently, Jews were being associated with “knives and blood, and physical assault on the genitals of innocent children and perhaps even unwary men.”⁴⁴

Germany became the largest home to Western European Jews, and during the mid-nineteenth century many German Jews desired to redefine their religious practices.⁴⁵ Included in this redefinition was rejecting any doctrine tied to segregation from non-Jews.⁴⁶ Nevertheless, it was not until 1843 that tensions collided when the Frankfurt Health Department declared that anyone who sought to perform male circumcision must have medical knowledge and surgical skill.⁴⁷ Jews found this to be an intrusion on the rights of rabbis.⁴⁸ Subsequently, the Senate explained that the ordinance was simply intended to “ensure medical safety, not to challenge Jewish religious regulations.”⁴⁹ Not surprisingly, the rate of male circumcision is low compared to the United States.⁵⁰ The German Health Interview and Examination Survey for Children and Adolescents reported that 10.9% of boys aged 0-17 had been circumcised.⁵¹

History seems to have repeated itself and today Germany has become a haven for tension between those that support circumcision and those that do not. In June of 2012, a German court held

43. Glick, *supra* note 4, at 33.

44. *Id.* at 34. An example of the misconception about male circumcision in Europe during this period occurred in 1475. A young man disappeared and was later found dead. His father accused local Jews, even though evidence pointed to a Swiss man, of killing his son. The Jews were tortured until they confessed that Jews needed blood. Following the confessions the men were executed. *Id.* at 33.

45. *Id.* at 38. This period of innovations became known as “Reform Judaism.” *Id.*

46. *Id.*

47. *Id.* at 40.

48. Glick, *supra* note 4, at 41. Rabbi Trier appealed to Frankfurt Senate that circumcision was essential to the identity of a Jewish male. *Id.* at 40.

49. *Id.* at 41.

50. In the United States it has been reported that about 58% of newborns are circumcised each year. Maria Owens et al., *Trends in Circumcision for Male Newborns in U.S. Hospitals: 1979–2010*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/data/hestat/circumcision_2013/circumcision_2013.htm (last updated Aug. 22, 2013).

51. P. Kamtsiuris et al., *Inanspruchnahme medizinischer Leistungen*, 50 BUNDESGESUNDHEITSBLATT- GESUNDHEITSFORSCHUNG-GESUNDHEITSSCHUTZ 836 (2007), available at <http://link.springer.com/article/10.1007%2Fs00103-007-0247-1>.

that male circumcision performed on a Muslim boy caused the child bodily harm.⁵² The court, located in the city of Cologne held that “involuntary religious circumcision should be made illegal because it could inflict serious bodily harm.”⁵³ As a result, and understandably so, German Jews and Muslims erupted with rage and fear, as the Central Council of Muslims in Germany said that this ruling was “a blatant and inadmissible inference.”⁵⁴ Rabbi Ar-yeh Goldberg, a well-known mohel in Germany, stated that this ruling is “fatal to the freedom of religion” and that it went against the European Union’s convention on human rights.⁵⁵ The President of the German Central Council of Jews exclaimed that a possible ban on male circumcision would make Jewish life, “practically impossible.”⁵⁶ On the other hand, the Cologne court ruling sparked applause from organizations that oppose male circumcision. The German Medical Association advised that doctors stop performing circumcision for non-medical reasons.⁵⁷ Furthermore, German media aired psychotherapists pronouncing circumcision as having a traumatic effect on young boys.⁵⁸

The thought that Germany may legalize male circumcision echoed to many the oppression Jews faced during World War II. In fact, following the terror of Hitler, the philosopher Emil Fackenheim, a survivor of Sachsenhausen concentration camp, added to the 613th commandments of the Hebrew Scriptures a new 614th commandment.⁵⁹ This commandment stated, “[T]hou must not grant Hitler posthumous victories.”⁶⁰ Therefore, the new mitzvah

52. *German Court Bans Male Circumcision, Sparks Outrage Among Jews, Muslims*, NBCNEWS.COM (June 27, 2012, 6:32 PM), http://worldnews.nbcnews.com/_news/2012/06/27/12446284-german-court-bans-male-circumcision-sparks-outrage-among-jews-muslims?lite.

53. *Id.*

54. *Id.*

55. *Id.*

56. Peter Martino, *Germans Do Not Favor Male Circumcision*, JEWISHPRESS.COM (July 24, 2012), <http://www.jewishpress.com/indepth/analysis/germany-debates-male-circumcision/2012/07/24/>.

57. *Id.*

58. *Id.*

59. Giles Fraser, *This German Circumcision Ban is an Affront to Jewish and Muslim Identity*, GUARDIAN, July 17, 2012, <http://www.guardian.co.uk/commentisfree/belief/2012/jul/17/german-circumcision-affront-jewish-muslim-identity>.

60. *Id.*

stressed that to abandon one's Jewish identity was to do Hitler's work.⁶¹

B. Legislation in Germany

The German government understood the implications this court ruling would have on religious organizations and promised to re-legalize circumcision.⁶² Subsequently, the Germany Cabinet approved a law that would allow this procedure under medical supervision.⁶³ This new law allows parents to have their sons circumcised by a trained practitioner.⁶⁴ In addition, once a boy reaches the age of six months, a doctor must perform the procedure.⁶⁵

C. History of Male Circumcision in Sweden

Before delving into Sweden's circumcision law, it is important to understand the history of circumcision in Sweden. The native Swedish population does not practice and has never practiced male circumcision.⁶⁶ Furthermore, Jews and Muslims combined account for only three percent of Sweden's total population.⁶⁷ Unsurprisingly then, the number of boys that are circumcised is low, approximately 100 boys born to Jewish parents and 3,000 boys born to Muslim parents.⁶⁸

A largely Protestant country, many Swedish natives have claimed that ritual male circumcision, without consent by the mi-

61. *Id.* Hence, abandoning male circumcision would represent abandoning one's Jewish identity.

62. *Germany to Allow Religious Circumcisions*, HERALD SUN, Sept. 26, 2010, <http://www.heraldsun.com.au/news/breaking-news/germany-to-allow-religious-circumcisions/story-e6frf7k6-1226482109835>.

63. Patrick Donahue, *German Circumcision Rule Approved by Cabinet After Global Outcry*, BLOOMBERG NEWS (Oct. 10, 2012, 11:33 AM), <http://www.bloomberg.com/news/2012-10-10/german-circumcision-rule-approved-by-cabinet-after-global-outcry.html>.

64. *Id.*

65. *Germany Oks Bill to Protect Male Circumcision*, ZEE NEWS.COM, http://zeenews.india.com/news/world/germany-oks-bill-to-protect-male-circumcision_816471.html (last updated Dec. 13, 2012).

66. Yngve Hofvander, *Circumcision of Boys in Sweden: Proposal of Government in Regulation*, in UNDERSTANDING CIRCUMCISION: A MULTI-DISCIPLINARY APPROACH TO A MULTI-DIMENSIONAL PROBLEM 147 (George C. Denniston et al. eds., 2001).

67. Johanna Schiratzki, *Banning God's Law in the Name of The Holy Body - The Nordic Position On Ritual Male Circumcision*, 5 FAM. L. 35, 47 (2009).

68. Hofvander, *supra* note 66, at 147.

nor boy, is inconsistent with the best interests of the child.⁶⁹ Jews and Muslims who live in Sweden, on the other hand, argue that banning or severely restricting this practice would be “an infringement limiting children’s ability to partake in religious tradition as important for religious identity as baptism is for Christianity.”⁷⁰

The debate in Sweden was largely sparked by a single Supreme Court decision that held that ritual circumcision is not punishable as assault when it is performed on a minor boy with parental consent.⁷¹ Following this case, anti-circumcision advocates, such as the Swedish Save the Children organization, led a campaign to eliminate male circumcision.⁷² This campaign also “urged Jews and Muslims to ‘change their religion.’”⁷³

D. Swedish Legislation: 2001 Lag. Om omskarelse

Sweden passed a law on male circumcision in 2001, Lag. (2001:499) om omskarelse.⁷⁴ This act held that male circumcisions that are performed on minor males must be performed by a licensed doctor.⁷⁵ In addition, the law requires that the procedure must be performed with pain relief.⁷⁶ Further, the National Board of Health and Welfare must certify the person performing the circumcision.⁷⁷ In response to these mandates, the World Jewish Congress expressed strong discontent, finding that the Swedish act is “the first legal restriction on Jewish religious practice in Europe since the Nazi era.”⁷⁸ Since many Swedish doctors are opposed to this procedure the Jewish community in Sweden fears that the mandate will create obstacles for those who wish to have

69. Schiratzki, *supra* note 67, at 36. It is important to note that Johanna Schiratzki does not specifically state that Sweden believes that male circumcision is not in the best interest of children, but includes Sweden within the Nordic states. “Representative of, foremost, the Protestant majority claim that ritual male circumcision . . . is inconsistent with the best interests of the child.” *Id.*

70. *Id.*

71. *Id.* at 37.

72. *Id.* at 39.

73. *Id.*

74. LAG. OM OMSKARELSE (SFS 2001: 499) (Swed.).

75. *Id.* at § 4-5.

76. *Id.* at § 4.

77. Schiratzki, *supra* note 67, at 37.

78. *Id.* at 36. See also *Jews Protest Swedish Circumcision Restriction*, REUTERS (June 7, 2001), http://www.canadiancrc.com/newspaper_articles/Jews_Protest_Swedish_Circumcision_Restriction_07JUN01.aspx.

this procedure performed on their sons.⁷⁹ Others also worry that this law will end completely circumcisions in Sweden.⁸⁰

E. History of Male Circumcision in the United States

Male circumcision has gained a great deal of attention in the past couple decades in the United States where this procedure has become a routine practice in the United States, rather than solely a religious practice. Therefore, unlike Sweden, a country that does not routinely engage in this procedure, it is important to understand why the United States embraced this procedure and how it became popular.

The movement toward promoting male circumcision on newborns began at the end of the nineteenth century.⁸¹ The major event that initiated the acceptance and implementation of this practice occurred in 1870.⁸² In 1870, Lewis Sayre, an orthopedic surgeon and the President of the American Medical Association was summoned to examine a five-year-old boy who was unable to walk because his legs would not straighten.⁸³ Doctor Sayre discovered that the boy suffered from a genital irritation and “recommended circumcision as a means of relieving the irritated and imprisoned penis.”⁸⁴ The young boy was circumcised and cured, resulting in Sayre promoting circumcision.⁸⁵ Sayre issued a paper at an American Medical Association meeting that emphasized the medical benefits of male circumcision.⁸⁶ Subsequently, doctors began promoting male circumcision as a precautionary measure in order to prevent many serious diseases.⁸⁷

During the late 1800s, the role of hospitals and medical care by physicians was increasing.⁸⁸ Upper and middle class individuals were no longer giving birth in their homes with the assistance of midwives but, rather, delivering in a hospital became an indicator

79. Waldeck, *supra* note 37, at 521.

80. *Id.*

81. George P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL'Y & L. 497, 526 (2002). *See also* Waldeck, *supra* note 37, at 470-72.

82. Miller, *supra* note 81, at 526.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 527-29.

87. Waldeck, *supra* note 37, at 471.

88. *Id.*

of wealth and prestige.⁸⁹ This led to an increase in circumcision to male infants at hospitals. As researchers were discovering and identifying bacteria that caused harm to the body, they concluded that the penis was a susceptible source of contamination.⁹⁰ Thus, circumcision was seen as making the penis cleaner and in general, the boy healthier.⁹¹

In 1971, the American Academy of Pediatrics issued a statement that did not endorse neonatal circumcision.⁹² This conclusion was again released in 1975 and 1983.⁹³ It was not until 1989, a time period that signaled the introduction of urinary tract infections and sexually transmitted diseases, did the AAP release a more neutral statement regarding circumcision.⁹⁴ Additionally, in 1999 the AAP created a task force to release a statement regarding neonatal circumcisions.⁹⁵ The task force concluded that “the data is not sufficient to recommend routine neonatal circumcision” nor discourage it.⁹⁶ In 2012, the AAP released another statement that issued “new guidelines saying that health benefits of infant circumcision outweigh the risk of surgery.”⁹⁷ Compared to the statement in 1999, which was neutral, this statement supported the procedure.⁹⁸

Intact for America, an anti-circumcision organization, criticized AAP’s response as one-sided, stating, “[T]he AAP stacked its circumcision Task Force with pro-circumcision doctors and activists, and apparently is afraid to let its members learn the truth about the unnecessary, unethical, and risky surgery that U.S. doctors

89. *Id.*

90. *Id.*

91. *Id.* Another reason that male circumcision gained popularity during this time was because of the belief that those with uncircumcised penises were more likely to masturbate because they had to retract the foreskin to clean under it. It is important to realize that during this time, the Victorian era, there was a fear of masturbation. *Id.*

92. Waldeck, *supra* note 37, at 474.

93. *Id.*

94. *Id.*

95. *Id.* at 475.

96. *Id.*

97. Julie Steenhuisen, *Benefits of Circumcision Outweigh Risks, U.S. Pediatrics Group Says*, REUTERS (Aug. 27, 2012, 12:06 AM), <http://www.reuters.com/article/2012/08/27/us-usa-circumcision-idUSBRE87Q02720120827>.

98. *Id.* Dr. Andrew Freedman who chaired the AAP’s circumcision board stated, “[W]e’re saying if a family thinks it is in the child’s best interest, the benefits are enough to help them do that.” *Id.*

perform more than a million times a year on baby boys who cannot consent.”⁹⁹

Another criticism to male circumcision came from a group, called intactivists, who sought to ban this practice, in San Francisco. Lloyd Schofield and other intactivists sought to make it “unlawful to circumcise, excise, cut, or mutilate the whole or any part of the foreskin, testicles, or penis’ of anyone 17 or younger in San Francisco.”¹⁰⁰ In order to achieve this goal, Schofield proposed that an anti-circumcision act appear on the November 2011 ballot. Had the law passed it would make it a misdemeanor crime to circumcise a male under the age of eighteen, regardless of the reasons behind the procedure.¹⁰¹ Schofield’s group was able to submit 12,000 signatures, which was more than enough signatures required, to add the proposal to the ballot.¹⁰² As a result, the Jewish Community Counsel, the Anti-Defamation League, and other pro-circumcision groups sued to remove the measure from the ballot.¹⁰³ Subsequently, a Superior Court judge in San Francisco held that the proposal be removed entirely from the ballot holding that “the measure is pre-empted by a state law concerning medical procedures, and said the option of narrowing the proposal to only target circumcisions done for religious reasons would not work either since that would violate the free exercise clause of the First Amendment of the U.S. Constitution.”¹⁰⁴

99. *Intact America Calls on American Academy of Pediatrics to Rescind Pro-Circumcision Report that Violates Ethics, Human Rights of Baby Boys*, SAN FRANCISCO CHRONICLE, Oct. 20, 2012, <http://www.sfgate.com/business/prweb/article/Intact-America-Calls-on-American-Academy-of-3966543.php>.

100. Madison Park, *‘Intactivists’ to San Francisco: Ban Circumcision*, CNN (Nov. 19, 2010, 12:40 PM), <http://www.cnn.com/2010/HEALTH/11/19/male.circumcision.sf/index.html>.

101. Gabrielle Saveri, *San Francisco May Vote on Banning Male Circumcision*, REUTERS (Apr. 27, 2011, 1:20 PM), <http://www.reuters.com/article/2011/04/27/us-circumcision-ban-idUSTRE73Q0JJ20110427>. Penalties for violating this ban could include a year in jail and a \$1000 fine. However, the proposal would make exceptions for boys who need a circumcision for health reasons. *Id.*

102. *Id.*

103. Madison Park, *San Francisco Judge Removes Circumcision Ban from Ballot*, CNN HEALTH (July 28, 2011, 7:34 PM), <http://www.cnn.com/2011/HEALTH/07/28/circumcision.ban.voting/index.html>.

104. Dan McMenamin, *Judge Rules That Circumcision Ban Proposal Must Be Removed From SF Ballot*, SAN FRANCISCO APPEAL (July 28, 2011, 12:12 PM), <http://sfappeal.com/news/2011/07/judge-rules-that-circumcision-ban-proposal-must-be-removed-from-sf-ballot.php>. The measure was subsequently removed from the ballot. *Id.*

F. Male Genital Mutilation Bill

On January 23, 2012, a group of intactivists located in the San Diego area resubmitted the the Male Genital Mutilation bill (MGM Bill).¹⁰⁵ This federal bill prohibits “premature forcible retraction of the foreskin and the cutting of ambiguous or hermaphroditic genitalia.”¹⁰⁶ The purpose of this bill is to rewrite the U.S. Female Genital Mutilation Act of 1996 to include male circumcision and protect boys from “genital mutilation (commonly referred to as circumcision).”¹⁰⁷ On January 11, 2014, the MGM Bill was resubmitted to Congress.¹⁰⁸ It has been submitted to every member of Congress eleven times.¹⁰⁹ The director of MGMbill.org’s Indianapolis Office, Jeff Cowsert, stated, “[I]nfant circumcision needs to be banned so that men can make their own choices about their own bodies when they are mature adults.”¹¹⁰

105. *A Bill to End Male Genital Mutilation in the U.S.*, MGBILL.ORG, <http://mgmbill.org/> (Last visited Mar. 15, 2014).

106. *Id.* The first section of the bill defined genital mutilation as:

116. GENITAL MUTILATION

(a) Except as provided in subsection (b), whoever knowingly circumcises, excises, cuts, or mutilates the whole or any part of the labia majora, labia minora, clitoris, vulva, breasts, nipples, foreskin, glans, testicles, penis, ambiguous genitalia, hermaphroditic genitalia, or genital organs of another person who has not attained the age of 18 years or on any nonconsenting adult; whoever prematurely and forcibly retracts the penile or clitoral prepuce of another person who has not attained the age of 18 years or on any nonconsenting adult, except to the extent that the prepuce has already separated from the glans; whoever knowingly assists with or facilitates any of these acts; or whoever arranges, plans, aids, abets, counsels, facilitates, or procures a genital mutilation operation on another person outside the United States who has not attained the age of 18 years or on any nonconsenting adult outside the United States shall be fined under this title or imprisoned not more than 14 years, or both.

Id.

107. *Id.* This bill has been submitted to Congress eleven times. Furthermore, state officers have submitted state MGM Bill proposals to all members of various U.S. State legislatures. *Id.*

108. MGM Bill, *supra* note 105.

109. *Id.*

110. *American Effort to Ban Circumcision of Minors Kicks into High Gear*, PRWEB (Jan. 15, 2013), <http://www.sfgate.com/business/prweb/article/American-Effort-to-Ban-Circumcision-of-Minors-4196184.php>.

G. *HR. 2400 Religious and Parental Rights Defense Act.*

On the other hand, a pro-circumcision bill, H.R. 2400: Religious and Parental Rights Defense Act of 2011 was submitted to Congress in June of 2011.¹¹¹ This bill would prohibit “any state or political division” from adopting or continuing to enforce a law that “prohibits or regulates the circumcision of males who have not attained the age of 18 and whose parent or guardian has consented to the circumcision.”¹¹² U.S. Representative Brad Sherman sponsored the bill along with nine other co-sponsors.¹¹³ Religious and Parental Rights Defense Act of 2011 was referred to the House Committee on Energy and Commerce.¹¹⁴ The committee chair was given the role of determining whether the bill “will move past the committee stage.”¹¹⁵ Nevertheless, it failed to pass the committee.¹¹⁶

H. *Amendment to Article 181 of the New York City Health Code*

Still, legislation has been passed in the United States that restricts this procedure, specifically the New York City provision to the New York City Health code, provision §181.21, which was adopted on September 13, 2012.¹¹⁷ The purpose of this provision is to:

[R]equire written consent from a parent or legal guardian when direct oral suction will be performed during his or her son’s cir-

111. Religious and Parental Rights Defense Act of 2011, H.R. Res. 2400, 112th Cong. (2011), *available at* <http://www.govtrack.us/congress/bills/112/hr2400> [hereinafter Religious Defense Act].

112. *Id.* Section 2 of the bill states, “Congress finds the following: (1) Male circumcision carries significant medical benefits, including lower risk of sexually-transmitted diseases, certain kinds of infection, and overall improved hygiene. (2) Male circumcision is an important part of many world religions, including Judaism and Islam, and observers have safely embraced its practice for generations.” *Id.*

113. *Id.* The bill is sponsored by California Democrat, Brad Sherman, who represented District 27 (currently representing District 30). *Biography*, SHERMAN.HOUSE.GOV, <http://bradsherman.house.gov/about/biography.shtml> (last visited May 14, 2014).

114. Religious Defense Act, *supra* note 111.

115. *Id.*

116. *Id.*

117. Sharon Otterman, *Board Votes to Regulate Circumcision, Citing Risks*, N.Y. TIMES, Sept. 13, 2012, <http://www.nytimes.com/2012/09/14/nyregion/health-board-votes-to-regulate-jewish-circumcision-ritual.html>.

cumcision. The written consent will require that the parent or guardian has been told that the Department advises against direct oral suction because of certain risks associated with the practice, including infection with herpes simplex virus 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. The amendment requires persons performing circumcisions which include direct oral suction to retain copies of signed consent forms for at least one year and to make them available to the Department upon request.¹¹⁸

According to the N.Y.C. Department of Health the reasoning behind this new requirement stems from eleven New York City infants who allegedly contracted herpes from *mezizah*, resulting in two of them dying as a result of irreversible brain damage.¹¹⁹ Haredi Orthodox rabbis in New York claim that the Department of Health is “spreading lies” about this procedure in order to force parents to sign a waiver.¹²⁰ Many of these rabbis have signed a statement alleging, “[I]t is clear to us that there is not even an iota of blame or danger in this ancient and holy custom.”¹²¹ Dr. Daniel Berman, the head of infectious diseases at Westchester Square Hospital, believes that the claims by the Department of Health regarding a link between herpes and *metzitzah b’peh* have not been proven.¹²² As a result, on October 11, 2012, several New York City Orthodox organizations filed a federal lawsuit challenging this law.¹²³ They specifically claim, “[T]he government cannot com-

118. DEP’T OF HEALTH AND MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT TO ARTICLE 181 OF THE NEW YORK CITY HEALTH CODE (Sept. 13, 2012).

119. Katie Moisse, *Rabbis Will Defy Law on Circumcision Ritual*, ABC NEWS-MEDICAL UNIT (Sept. 3, 2012, 1:47 PM), <http://abcnews.go.com/blogs/health/2012/09/03/rabbis-will-defy-law-on-circumcision-ritual/>.

120. Marcy Oster, *N.Y. Rabbis Decry Upcoming Vote on Consent Waiver for Circumcision-Related Rite*, JEWISH TELEGRAPHIC AGENCY (Sept. 3, 2012, 2:40 PM), <http://www.jta.org/news/article/2012/09/03/3105841/rabbis-decry-upcoming-vote-on-consent-waiver-for-circumcision-related-rite>.

121. *Id.*

122. Fred Mogul, *City Health Board Targets Controversial Religious Circumcision Practice*, WNYC NEWS BLOG (Sept. 7, 2012), <http://www.wnyc.org/story/235743-blog-city-health-board-targets-controversial-religious-circumcision-practice/>.

123. Seth Berkman, *Orthodox Sue Over Circumcision Rite Forms: Ask Federal Court to Reverse New York City Decision*, JEWISH DAILY FORWARD (Oct. 11, 2012), <http://forward.com/articles/164123/orthodox-sue-over-circumcision-rite-forms/>.

pel the transmission of messages that the speaker does not want to express—especially when the speaker is operating in an area of heightened First Amendment protection, such as a religious ritual.”¹²⁴ Nevertheless, on January 10, 2013, District Court Judge Naomi Reice Buchwald refused to block this new mandate.¹²⁵ Judge Buchwald found that it is likely that the plaintiff’s claim is without merit and refused to issue a preliminary injunction against the regulation.¹²⁶

Although New York City had mandated this requirement, legislators and officials in other cities are not following it.¹²⁷ New York City monitors the incidence of the herpes strain, known as HSW-1, whereas other major cities such as Chicago, Los Angeles, and San Francisco do not require that herpes cases be reported. In addition, in Maryland, a representative from the state office held that it was not mandated to report neonatal herpes even though “[t]he Department agrees that this is not a safe practice.”¹²⁸

Despite its recent criticism, mezizah is not widely practiced. Perhaps the abandonment of traditional mezuzah for the use of sterile pipettes occurred due to the rise of AIDS awareness in the 1980s and 1990s.¹²⁹ As a result, mohels have become torn as to whether or not legislators should create laws that mandate consent from parents. Rabbi Mendel Altein, who has been a mohel since 1992, battled the question whether he should use a pipette while performing this religious sacrament.¹³⁰ Although he was told that the preferable way was not to use a pipette, he finds that many mohels do use a pipette. Furthermore, Rabbi Mendel stated, “[W]e don’t need a consent form. I think that’s a bit much. But every mohel, as a responsible mohel, should make sure parents are

The plaintiffs in this lawsuit include Agudath Israel, Central Rabbinical Congress of the United States & Canada, Rabbi Samuel Blum, Rabbi Aharon Leiman, and Rabbi Shloime Eichenstein.

124. *Id.*

125. Jonathan Stempel, *Judge Won’t Block New York City Circumcision Law*, REUTERS (Jan. 10, 2013, 11:03 PM) <http://www.reuters.com/article/2013/01/11/us-usa-newyork-circumcision-idUSBRE90A00N20130111>.

126. *Id.* “As enacted, the regulation does no more than ensure that parents can make an informed decision” whether to consent, she added.” *Id.*

127. Seth Berkman, *Circumcision Rite Goes Unregulated Outside New York: Authorities Elsewhere Tight-Lipped about Metzitzah B’Peh*, JEWISH FORWARD (Oct. 19, 2012), <http://forward.com/articles/164193/circumcision-rite-goes-unregulated-outside-new-yor/?p=all>.

128. *Id.*

129. *Id.*

130. *Id.*

aware of it.”¹³¹ Rabbi Atlein, who has been performing circumcisions in Montreal since 1994, informs parents about the risks of mezuzah and uses a tube unless the parents ask him not to.¹³² To him parents who “want a b’peh (direct oral contact), the yeshivah and really religious, we still do a b’phel.”¹³³ Nevertheless, some argue that it is not mainstream and not practiced by all Jews.¹³⁴

III. ANALYSIS

This section will examine whether or not the proposed laws and statutes above would be Constitutional, if enacted in the United States. Although H.R. 2400 died, it is still important to examine why it was not passed. Furthermore, several issues other than freedom of religion have been raised when discussing whether male circumcision should be illegalized. One of the debates includes whether parents have authority to make decisions about their child’s body. This note will not discuss that issue. Rather this note will focus on whether the laws above violate the Free Exercise Clause of the First Amendment.

The Free Exercise Clause of the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹³⁵ Therefore, individuals have the right to believe whatever religious doctrine they desire.¹³⁶ The government may not, under the First Amendment, punish the expression of religious doctrines even if the government believes it is false.¹³⁷ Furthermore, Congress may not impose special disabilities on the basis of religious views or religious status.¹³⁸ However, Congress may circumvent the First Amendment if the prohibition of exercising religion is not the purpose of the law. Hence, an individual’s religious beliefs may not enable him to disobey an existing constitutional law.¹³⁹ Additionally, a state law

131. *Id.*

132. Berkman, *supra* note 127.

133. *Id.*

134. Lisa Braver Moss, *Metzitzah B’peh Circumcision Ritual Inconsistent with Jewish Principles*, HUFFINGTON POST- RELIGION (June 14, 2012, 5:53 PM), http://www.huffingtonpost.com/lisa-braver-moss/metzitzah-bpeh-circumcision-ritual-inconsistent-with-jewish-principles_b_1598281.html.

135. U.S. CONST. amend. I.

136. *See* *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

137. *See id.* (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

138. *See Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rode Island*, 345 U.S. 67, 69 (1953)).

139. *Id.* at 878-79.

that is neutrally applicable may not be found to violate the First Amendment and one's religious freedom.¹⁴⁰ On the contrary, if the federal government seeks to approve a law that burdens a religion the government must have a compelling interest.

Thus, that raises the question as to what is a compelling governmental interest. The Supreme Court in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal* found that the government failed to meet its burden and did not have a compelling interest in barring a sacramental tea.¹⁴¹ In *Gonzales*, the federal government seized sacramental tea, containing a Schedule 1 substance, from a Brazilian church, Uniao do Vegetal (UDV).¹⁴² The church sued and claimed that the tea was used for religious purposes.¹⁴³ The Supreme Court also disagreed with the government's contention that the Controlled Substances Act does not allow religious exceptions (such as religious exceptions for Native Americans).¹⁴⁴

Another important case in which the Supreme Court addressed religious freedom was *Wisconsin v. Yoder*.¹⁴⁵ Here, the respondents were members of the Old Order Amish religion and lived in Green County, Wisconsin.¹⁴⁶ Under Wisconsin law, children were required to attend public or private school until they reached the age of sixteen. The respondents declined to send their children to public school after the age of fourteen or fifteen because Amish children did not attend high school.¹⁴⁷ Subsequently, the school district held that the respondents violated the "compulsory attendance law."¹⁴⁸ Respondents argued that their religion, Old Order Amish, rejects children attending school beyond the eighth grade because the values that are taught in high school differ from Amish "values

140. In *Employment Division v. Smith*, the Supreme Court listed several cases in which the laws were not found to be neutrally applicable. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to the Amish); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a tax on solicitation as it applied to the dissemination of religious ideas); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing system in which the administrator had discretion to deny a license to causes he deemed non-religious.) *Id.* at 881.

141. 546 U.S. 418 (2006).

142. *Id.* at 423.

143. *Id.*

144. *Id.*

145. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

146. *Id.* at 207.

147. *Id.*

148. *Id.* at 209-10.

and the Amish way of life.”¹⁴⁹ The Supreme Court noted that in order for mandatory attendance to not impose on religious freedom, “it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”¹⁵⁰ The State argued that this compulsion does not restrict the Amish from engaging in their religion because this mandate is outside of the framework of the First Amendment, as education is necessary to prepare citizens to participate in our political system and education prepares individuals to be self-reliant.¹⁵¹ The Court in *Yoder* emphasized that the Amish way of life was deeply religious and not just a “matter of personal preference.”¹⁵² Ultimately, the Court ruled in favor of the respondents and held that states cannot compel individuals to attend school if there is evidence of true and objective religious practices.¹⁵³ Hence, the Supreme Court, utilizing the strict scrutiny test, determined that forcing Amish children to attend school violated the rights of these individuals under the Free Exercise Clause of the First Amendment.¹⁵⁴ Nevertheless, roughly twenty years later the Supreme Court would overrule this holding, applying a different standard of review.

The Supreme Court in *Employment Division v. Smith* addressed the issue of the government regulating a religious ceremony, and subsequently changed the standard of review that shall be applied to states.¹⁵⁵ In *Smith*, two drug rehabilitation counselors, who were both Native American, were fired from their jobs be-

149. *Id.* at 211. For the Amish, “the high school tends to emphasize intellectual and scientific accomplishments, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing a life of ‘goodness,’ rather than a life of intellect” *Id.*

150. *Yoder*, 406 U.S. at 214.

151. *Id.* at 215.

152. *Id.* at 216. Specifically the Court stated, “That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, ‘be not conformed to this world’ This command is fundamental to the Amish faith.” *Id.*

153. *Id.* at 219. Furthermore, the Supreme Court noted, “It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.” *Id.* at 220.

154. *Id.* at 219.

155. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

cause they ingested peyote.¹⁵⁶ The plaintiffs held that the Employment Division of Oregon's Department of Human Resources wrongfully denied them unemployment compensation, while the State argued that the plaintiffs' compensation request was denied because the plaintiffs were discharged from their job for misconduct connected with work.¹⁵⁷

The Supreme Court in *Smith* held that the Free Exercise Clause permits a state to include religious inspired use of peyote in the state's general criminal drug prohibition because:

[T]here being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs or raising of one's children in those beliefs. . . the First Amendment . . . thus permits the State to deny unemployment benefits to persons dismissed from their job because of such religious inspired use . . . religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.¹⁵⁸

Thus, the Supreme Court interpreted the Free Exercise Clause as permitting a state to pass a law that would burden a religion, as long as the law is neutral, generally applicable, and is not passed to ban behavior solely because of its religious motivation.¹⁵⁹ The Supreme Court abandoned the test applied in *Yoder* because "[I]f compelling interest really means what it says many laws will not meet the test . . . Any society adopting such a system would be courting anarchy."¹⁶⁰ Furthermore, the Supreme Court reasoned that simply because we are a diverse nation that values religious protection, "we cannot afford the luxury of deeming presumptively

156. *Id.* at 874. Peyote is a hallucinogenic drug that is used for sacramental purposes at a ceremony of the Church. RICHARD EVANS SCHULTES & ALBERT HOFFMAN, *PLANTS OF THE GODS - THEIR SACRED, HEALING, AND HALLUCINOGENIC POWERS* (2d ed. 1992).

157. *Smith*, 494 U.S at 874-75.

158. *Id.* at 874, 882, 887 n.4.

159. *Id.* However, it is important to note the dissent by Justice Blackmun, Brennan, and Marshall stating:

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Id. at 907.

160. *Id.* at 888.

invalid . . . every regulation of conduct that does not protect an interest of higher order.”¹⁶¹

The Supreme Court in *Smith* emphasized the difference between the freedom to believe and the freedom to act when determining whether there was a violation of religious freedom.¹⁶² The majority opinion stated that “to make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs...contradicts both constitutional tradition and common sense.”¹⁶³ Hence, the *Smith* Court feared that religious beliefs would control the law because it would be very rare for the government’s interest to be compelling, therefore the Court adopted the neutrally applicable test.¹⁶⁴

Following *Smith*, there was an overwhelming fear that states would be able to impose religious regulations that were once unconstitutional.¹⁶⁵ In response, Congress passed the Religious Freedom Restoration Act in 1993.¹⁶⁶ Although this act was found to be unconstitutional as applied to states in *City of Boerne v. Flores*, it is still applicable to the federal government.¹⁶⁷ This act requires

161. *Id.*

162. *Smith*, 494 U.S. at 894. Furthermore, the Court explained:

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’

Id. at 885.

163. *Id.* at 885.

164. *Id.* at 890. The Supreme Court suggested that if the legislation chooses to allow a religious exemption, there is no violation of the Establishment Clause. Specifically, the Court noted:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

165. Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, on the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1693 (2011).

166. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993).

167. 521 U.S. 507 (1997) (“Congress’ power under § 5, however, extends only to ‘enforcing’ the provisions of the Fourteenth Amendment The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Con-

that strict scrutiny be applied when determining if Congress has violated the Free Exercise Clause. Under the strict scrutiny test, the burden must further a compelling government interest. A government interest is compelling when it is more than routine, and does more than simply improve government efficiency.¹⁶⁸ Although this appealed many, academics still proposed that the Supreme Court abandon *Smith* on the basis that it does not protect religious liberties.¹⁶⁹

On the other hand, many advocates of anti-circumcision laws argue that male circumcision should be illegalized because female genital mutilation is illegal. Therefore, according to these anti-circumcision proponents, if male circumcision is not regulated this unregulated procedure would constitute a violation of the Fourteenth Amendment. The Fourteenth Amendment guarantees “equal protection of the laws.”¹⁷⁰ Subsequently, the Supreme Court has expanded the Fourteenth Amendment to include discrimination on the basis of gender and/or sex.¹⁷¹ The standard that has been applied to determining whether there has been a violation of the Fourteenth Amendment is an “important governmental objective” that is “substantially related to the achievement of those objectives.”¹⁷² Additionally, the governmental purpose “may not rely on ‘overbroad’ generalizations to make judgments about people that are likely to . . . perpetuate historical patterns of discrimina-

gress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meanings of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a Constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions’ of the Fourteenth Amendment.”) *Id.* at 519.

168. See *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

169. Hamilton, *supra* note 165. Professor Michael McCornell stated that the Supreme Court’s “use of precedent [in *Smith*] is troubling, bordering on the shocking.” *Id.* at 1693-94. Professor James D. Gordon II even accused the Justices of reaching the result in *Smith* because of their motives, and alleged that “the Court wanted to reach its result in the worst way, and it succeeded” and in doing so “‘depublished’ the free exercise clause.” *Id.* at 1694 (internal quotations omitted). Marci Hamilton, on the other hand, argues that the Court correctly “applied its dominant doctrine and limited the competing strict scrutiny approach to the bare handful of cases where it has been previously employed.” *Id.*

170. U.S. CONST. amend. XIV, § 1.

171. See *Reed v. Reed*, 404 U.S. 71 (1971); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Stanton v. Stanton*, 421 U.S. 7 (1975).

172. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

tion.”¹⁷³ Although this is an important argument to consider, this note will not delve into this argument in great detail because a Fourteenth Amendment analysis focuses on gender rather than freedom of religion.

A. *The Constitutionality of the German Law in the United States*

As discussed above, the law from Germany that will be discussed permits male circumcision, but a trained practitioner must perform the procedure.¹⁷⁴ If such a law were proposed by a state, the *Smith* test would be applied. If this were a federal law, it must also obey the Religious Freedom Restoration Act and its corresponding case law. Under the federal standard, the government would have the burden of showing that this law serves a compelling government interest and that compelling interest is more than customary, and the purpose of the law is not merely to improve government effectiveness.¹⁷⁵

The German law may pass the *Smith* test because it would essentially apply to all male circumcisions. Therefore, this law is arguably neutral on its face because it would apply to both routine and ritual male circumcisions. Furthermore, the state government may have a strong argument, specifically the government's interest in ensuring health and safety.

Under a federal analysis, strict scrutiny would be applied. The government would have the burden of arguing that this regulation does not infringe upon religion and serves a compelling interest. One may argue, however, that this law would infringe upon the way of life for many Jews and Muslims because these religious individuals are being burdened with having to ensure that trained practitioners perform the operation rather than a mohel. In this case, the law only affects religious followers. Furthermore, one could argue that mohels are equally knowledgeable and skilled as a doctor, and therefore the government's argument that doctors performing the procedure serves a governmental interest would likely fail.

173. *United States v. Virginia*, 518 U.S. 515, 541-42 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

174. Frank Jordans, *Germany Approves Bill to Protect Male Circumcision*, HUFFINGTON POST-THE WORLD POST, (Dec. 12, 2012, 11:44 AM), http://www.huffingtonpost.com/2012/12/12/circumcision-germany-approved_n_2286736.html.

175. Religious Freedom Restoration Act of 1993, *supra* note 166.

If a law of this nature was implemented in the United States it is extremely likely that it would face a great deal of opposition, including litigation. Opponents of this law would likely argue that this burden makes it nearly impossible for their sons to be circumcised by mohels. Nevertheless, if mohels are declared to be trained practitioners, even if they do not have medical knowledge or a medical degree, this could alleviate concerns that this religious practice was being targeted.

B. Swedish Male Circumcision Law in the United States

The law on male circumcision passed by Sweden in 2001 does not prohibit male circumcision, but rather regulates it. Therefore, the government must have a compelling interest as to why only licensed doctors are permitted to perform the procedure. Furthermore, the government would have the burden of justifying why only persons certified by the National Board of Health and Welfare are permitted to perform the surgery. It is unlikely that this law would pass strict scrutiny for the same reasons the German law would not be constitutionally sound.

If this law were enacted by a state, it would not pass the *Smith* test. As noted, in order to pass the test the law must be neutral and not religiously motivated.¹⁷⁶ One may argue that this law assumes that doctors are better able to perform the procedure compared to mohels. Therefore, one may argue that this law would not be neutral because it would essentially affect only those who have their sons circumcised by mohels.

On the other hand, the requirement that only persons certified may perform the procedure may be acceptable under the *Smith* test. Proponents of this law may succeed if they argued that this religious ritual is not being eliminated, but rather it is being regulated to ensure that it is safely performed. Additionally, mohels would still be able to perform the operation but would have to be certified by the government. Therefore, this law would not eliminate the ritual but would place restrictions on it. Since the operation is also performed routinely in the United States, and not solely for religious purposes, the law may be neutrally applied to all individuals.¹⁷⁷ However, if anesthesia is included in the law, as it

176. See *Emp't Div. v. Smith*, 494 U.S. 872 (1990). See also Religious Freedom Restoration Act, *supra* note 166.

177. See Waldeck, *supra* note 37, at 520. Professor Waldeck discussed Sweden's mandate that anesthesia be administered. She argues that this requirement

is in Sweden, one could argue that this requirement does violate religious freedoms because it would burden only the religious practice (which does not require or include anesthetics). Nevertheless, in response, the state government could argue that requiring anesthesia is not motivated by religious animus, but instead for health and safety purposes.

If this law were enacted in the United States it would arguably only affect Jews and Muslims. The rate of circumcision in the United States is higher than in Sweden.¹⁷⁸ Hence, it is unlikely that the reaction in the United States would mirror that of Sweden because of the acceptance of male circumcision in the United States. As discussed, Swedish doctors and nurses are opposed to male circumcision and therefore many worry that this requirement would end this ritual.¹⁷⁹ That problem does not exist in the United States, where many doctors perform the operation routinely. However, Jews and Muslims would likely argue that this law restricts this ritual and places an unnecessary burden on them. More importantly, the requirement of anesthesia would likely receive much criticism. Requiring mohels to be approved by the Board of Health would not alter the ritual, whereas requiring anesthesia would change the ritual. Therefore, such a requirement would likely result in an outcry from Jews and Muslims.

C. Analysis of H.R. 2400 Religious and Parental Rights Defense Act of 2011

As stated above, H.R. 2400 Religious and Parental Rights Defense Act of 2011 died, but it is still important to understand why it did not receive enough support to pass. Although its goals were ambitious and commendable, this proposal can be analogized to the MGM Bill. Both bills are extreme because they attempted to

is not an infringement on religious freedoms because it “still arguably demonstrates great deference for religious practice.” *Id.*

178. Fujie Xu, et al., *Prevalence of Circumcision and Herpes Simplex Virus Type 2 Infection in Men in the United States: Data from the National Health and Nutrition Examination Survey (NHANES), 1999-2004* (July 2007). Data from a national survey from 1999 to 2004 shows that the prevalence of male circumcision in the United States was about 79%. *Id.* Different surveys produce different results regarding the percentage of males that undergo male circumcision in the United States. In comparison, the circumcision rate in Sweden is under 20%. See WORLD HEALTH ORGANIZATION, *Information Package on Male Circumcision and HIV Prevention*, in INSERT 2-GLOBAL PREVALENCE OF MALE CIRCUMCISION 2 (Dec. 15, 2007), available at <http://www.who.int/hiv/pub/malecircumcision/infopack/en/>.

179. Waldeck, *supra* note 37, at 521.

illegalize any law that would regulate male circumcision. Under the First Amendment, Congress may not pass any law “respecting an establishment of religion.”¹⁸⁰ Hence, Congress may not pass a law that is religious in nature. This Act specifically states that male circumcision is integral to the Jewish and Muslim faiths. Although it does not restrict a religious practice, the law specifically targets religions, which is prohibited.

Although this law was not passed, it is still crucial to discuss the possible ramifications if it were passed, because similar laws are likely to be proposed in the future. This law essentially protects this religious ritual and calls attention to its religious importance. Jews and Muslims would likely applaud this measure because it protects their sacred ritual, but one fears that such a law would create a larger divide: a divide between religious groups that practice this ritual and individuals who practice the operation for non-religious reasons. It would validate this operation for religious reasons but could disregard those who find this procedure to be beneficial for other reasons. Opponents of such a law would have a strong argument against such a law and this would also create more tension regarding this debate. Additionally, opponents would likely argue that these religious groups should not be given special preference simply because they practice a certain religion. In sum, this law on its face promotes toleration but if such a law were enacted it would likely result in a larger divide and more tension between opponents and proponents of male circumcision.

D. Analysis of MGM Bill

The MGM Bill raises several constitutional issues specifically concerning the First Amendment and the Fourteenth Amendment. As mentioned above, this is a federal bill that would illegalize male circumcision. Although this is a federal bill, the MGM Bill proposals have also been drafted for states to adopt and subsequently sent to forty-six states.¹⁸¹ Therefore, this section will also discuss whether those state bills are constitutionally sound.

Judge Kleinfeld’s dissenting opinion in *Thomas v. Anchorage Equal Rights Commission* questioned the constitutionality of a law that illegalized male circumcision.¹⁸² In his opinion, Judge Kleinfeld stated that even if a law that prohibits male circumcision was

180. U.S. CONST. amend. I.

181. *A Bill to End Male Genital Mutilation in the U.S.*, *supra* note 105.

182. 220 F.3d 1134, 1150 (9th Cir. 2000) (Kleinfeld, J., dissenting).

not anti-religious it would not pass the *Smith* test because “such a law would make it impossible for Jews and Moslems to practice one of their most sacred religious obligations.”¹⁸³

As stated above, advocates of the MGM bill argue that the purpose of the bill “is to protect males from being circumcised against their will, not to prevent them from altering their own genitals if they wish to do so.”¹⁸⁴ Although, these intactivists may have a compelling argument, their proposal would violate the First Amendment. Such a law would completely prohibit religious groups from participating in this crucial ceremony.

Additionally, the intactivists argue that the purpose of this bill is to enable young males to make their own decisions about their bodies and does not stem from anti-religious animus. This argument will not be explored in much detail because it addresses the rights of parents. Nevertheless, as mentioned in *Smith*, a State is not permitted to regulate the communication of a parent’s religious beliefs to their children.¹⁸⁵ Therefore, this would essentially infringe upon a parent’s right to raise their child based on their religious beliefs. However, as mentioned, this argument will not be explored because of the additional complications that arise when discussing the extent of parents’ rights.

The MGM Bill, as mentioned, is a rewrite of the U.S. Female Genital Mutilation Act of 1996.¹⁸⁶ Therefore, it would prevent boys from being subjected to “genital mutilation.” These advocates argue that the 14th Amendment is not violated by this rewrite because the bill now includes both male and female circumcision.¹⁸⁷ The Equal Protection clause of Fourteenth Amendment, which applies to both state and federal governments, protects against discrimination on the basis of sex.¹⁸⁸ Under the Female Genital Mutilation Act a person who “whoever knowingly circumcises . . . the whole or any part of the labia majora or labia minora . . . shall be fined . . . imprisoned.”¹⁸⁹ On the other hand, Congress has not found that male circumcision inflicts physical and mental pain. Although this argument may have some validity, it still stands

183. *Id.*

184. *A Bill to End Male Genital Mutilation in the U.S.*, *supra* note 105.

185. *See* *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

186. *A Bill to End Male Genital Mutilation in the U.S.*, *supra* note 105.

187. *Id.*

188. *See* *Reed v. Reed*, 404 U.S. 71 (1971) (holding that the Fourteenth Amendment prohibits unequal treatment on the basis of sex).

189. Female Genital Mutilation Act, 18 U.S.C § 116 (2013).

that this law would violate the Free Exercise Clause of the First Amendment.

In regard to the validity of the state MGM Bills, one must apply the test from *Smith*, which is whether the regulation is neutral and generally applicable.¹⁹⁰ These bills are not neutral and generally applicable because they infringe upon Jews and Muslims from participating in a sacred ritual. Furthermore, religion aside, it would eliminate an operation that is valued by non-religious individuals. The state bills have a higher chance of being passed because unlike the federal bill, which would have the burden of satisfying a compelling interest, the state bills have a lower standard of review. However, no state has introduced the bill.

The MGM Bill, as mentioned, has been introduced to Congress several times and it is highly unlikely that it would ever be passed because of the outrage and outcry that would result. Furthermore, if a state were to impose such a law the state would be faced with endless litigation and outcry from the public. Arguably, no state would impose such a controversial bill when this procedure is practiced not only religiously but routinely.

E. Analysis of New York City Law

In order to determine whether this mandate is constitutional, one must apply the standard established for states. In order for this mandate to pass *Smith*, the New York City mandate would have to be neutrally applicable and could not represent an attempt to “regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children.”¹⁹¹ It may appear that the mandate is neutral and could be applied generally because on its face, the mandate requires that mohels acquire written consent from the parent or legal guardian. This New York City mandate may not be generally applied to all male circumcisions because this law essentially only affects Jewish communities that practice direct oral suction. Therefore, one may argue that it specifically targets these communities.

This mandate does not prohibit this practice, but rather regulates the procedure by requiring that the parents be informed about potential risks. Thus, this law will likely pass the *Smith* test because the law is neutral and generally applicable, and would not pass solely because of its religious motivation.

190. *Smith*, 494 U.S. 872.

191. *Id.* at 882.

A lawsuit has already been filed denouncing this mandate as unconstitutional. Many opponents of this bill find it to be an infringement upon their religious rights. However, it has not received as much outrage when compared to the events in Germany. Perhaps the reason for its lack of outrage is due to the fact that this practice is not widely used.¹⁹² Furthermore, this mandate does not prohibit *mezizah*, but rather requires consent from parents. Although this does not appear to be a burden to many, one wonders how far will legislators go before male circumcision is regulated to the point that it does infringe upon religious practices?

V. CONCLUSION

Male circumcision has a long history of acceptance and disapproval. However, this deeply held religious ceremony has persevered for thousands of years and continues to be practiced by Jews and Muslims across the world. This note examined the history of male circumcision and its religious significance to Jews and Muslims. Furthermore, it examined the recent attacks and regulations that countries have sought to legalize. In Sweden, Jews fear that their sacred practice will die because of the mandate that only trained practitioners can perform the surgery. In Germany, Jews and Muslims were outraged when a trial court judge declared circumcision a bodily harm while intactivists in the United States seek to completely eliminate this ritual. Notably, legislators from across the world have introduced and passed legislation that restricts this practice.

The United States has undergone a tremendous amount of debate and tension regarding male circumcision. Although the Supreme Court has not addresses whether regulating male circumcision is constitutionally permissible, either federally or by state action, it would not be surprising if the Justices were given the opportunity to examine the constitutionality of male circumcision in the future. Under the *Smith* analysis, one predicts that a state may be able to pass a regulation if the regulation is neutral and applicable to the procedure as a whole. New York City's mandate is an example of a regulation that has received outcry, yet will

192. Waldeck, *supra* note 37, at 520. Processor Waldeck explained that the ritual circumcision has changed; "ritual circumcisions have changed as medical knowledge has evolved. For example, today the procedure is performed in sterile conditions, often with equipment that is similar or identical to what is used by doctors." *Id.*

likely be found permissible by courts. On the other hand, a bill such as the MGM Bill is a prime example of a proposed bill that has failed, and will continue to fail in Congress. Even though in-tactivists argue that male circumcision is painful, it is very unlikely that Congress will be able to formulate a compelling government interest that would pass strict scrutiny. It is also unlikely that Congress or state legislators will attempt to adopt legislation limiting male circumcision, but with increasing opposition one wonders whether legislators will succumb to arguments made by anti-circumcision advocates.