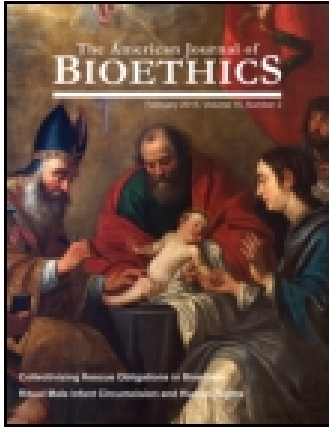


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Growing World Consensus to Leave Circumcision Decision to the Affected Individual

J. Steven Svoboda, Attorneys for the Rights of the Child

Jacobs and Arora (2015) offer an impassioned defense of infant male circumcision, yet their article falls short of being very convincing. The authors employ a highly selective reading of the relevant medical evidence; they advance an anemic conception of human rights; and they fail to take seriously growing international support for the legal protection of children—regardless of sex or gender—from medically unnecessary genital alterations.

Circumcision occupies an anomalous place in contemporary medical practice. In contrast to most other surgeries performed on minors, it is carried out without a diagnosis, on a healthy child, before the child can raise an objection. Indeed, it is primarily a religious/cultural rite, which has long been in search of a “medical” (and hence secularly defensible) justification (Hodges 1997). In their attempt to vindicate this embattled practice, Jacobs and Arora make frequent empirical assertions, often without citations or without acknowledgement of the contentious nature of their claims. Some of their claims are simply erroneous. For example, they state that circumcision resembles ear piercing more than amputation. Yet ear piercing does not remove any functional tissue (and may be reversible, if the hole closes up), whereas circumcision is by definition the amputation of the prepuce.

The authors’ claims about “health benefits” are no less problematic. Although they cite in passing Frisch and colleagues (2013)—who noted that circumcision’s only arguable health benefit before sexual debut is partial protection against urinary-tract infections (which can be treated without recourse to surgery)—they ignore the main insight of this article and appeal instead to a controversial technical report by the American Academy of Pediatrics (AAP). However, the AAP report has been dismissed as “scientifically untenable” by a majority of qualified experts (for further discussion see Earp and Darby 2014). Notwithstanding this controversy, Jacobs and Arora contend that because “the totality of current medical knowledge reasonably supports the conclusion that the health benefits *may* outweigh the medical risks,” nonmaleficence arguments fail. But whatever may be, may not be, and the authors’ selective referencing prevents readers from reaching their own conclusions on these contested points.

What about legal considerations? In this domain, a growing literature highlights the importance of protecting children from the removal of healthy body parts when it is not medically required. Several national medical associations including the Royal Dutch Medical Association (KNMG) have concluded that male circumcision constitutes a human rights violation and should be legally restricted in most cases—and at the very least, strictly regulated (KNMG 2010). In July 2013, the United Nations (UN) Committee on the Rights of the Child, which reviews the compliance of nation states with the Convention on the Rights of the Child (CRC), issued a report in which it “expressed concern about reported short and long-term complications arising from some traditional male circumcision practices” (United Nations Committee on the Rights of the Child 2013). In October 2013, the Council of Europe affirmed the right of all children to physical integrity, and expressed opposition to several practices including male circumcision, female genital cutting (FGC), and “early childhood medical interventions in the case of intersexual children” (Council of Europe 2013).

Case law in the United States, as in other peer nations, makes clear that the right to practice one’s religion stops at another’s skin (see Merkel and Putzke 2013). In *Prince v. Massachusetts* (1944), the U.S. Supreme Court held that while adults have the right to become martyrs themselves, no one has the right to make a martyr of his or her children. To allow for one’s perceived religious duty to excuse a crime would be to “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself” (*Reynolds v. US* 1878).

With respect to international human rights law, Jacobs and Arora are technically correct in stating, “No United Nations convention explicitly indicates that infant circumcision is impermissible.” But this is to miss the point. It is not an explicit indication, but rather the underlying *reasoning* of such conventions, that poses a problem for infant male circumcision. For example, FGC—while (similarly) not explicitly named in the Universal Declaration of Human Rights nor in any other core UN conventions—is widely agreed to be forbidden on the basis of well

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established human rights principles. These same principles, consistently applied, forbid nontherapeutic circumcision of boys (Earp and Darby 2014).

Against this view, Jacobs and Arora suggest that circumcision has “minimal consequences” and therefore fails to qualify as an issue of “special importance.” But circumcision is far from minimal: Whatever else it may do, it removes an entire genital structure, amounting to dozens of square centimeters of sensitive tissue in the adult organ. The authors’ assertion also lacks basis in the law. As international human rights courts have held, the forcible excision of any healthy body part constitutes cruel and inhuman treatment—even if the procedure involves the painless removal of regenerative tissue (*Tarhan v. Turkey* 2012).

Is a proposed human right inapplicable if controversial, as the authors seem to propose? If that were true, then no right could be universal. To the contrary, customary law is a human rights doctrine that evolved precisely so that a country such as the United States (the only country with a functioning government not to ratify the CRC) may not avoid the application of widely recognized human rights doctrines (Paust 1990).

Jacobs and Arora also appear to misunderstand the nature of such rights as applied to individuals. They write, “Even if [circumcision] facially violates a *prima facie* human right, the adverse impact of its suppression on parental rights and on freedom of religion (also a human right) far outweighs any harm caused by circumcision.” Yet the very purpose of human rights is to safeguard against the notion that one person’s right can be violated to further someone else’s. Regrettably, this tolerance for nullifying an individual’s rights in order to advance the purported interests of another is evident throughout the target article. For example, there is the authors’ (apparently serious) suggestion that women’s asserted preferences for circumcised men in some subcultures should be given decision-making weight when deciding whether to remove a part of a child’s genitals. Would the authors make a similar proposal to incorporate male views into decisions about nonconsensual female genital cutting in cultures in which the latter is considered aesthetically pleasing?

The suggestion that there is no absolute right to bodily integrity is a red herring. Of course it is permissible to breach an individual’s body envelope, when doing so is medically necessary or is done with informed consent. As Jacobs and Arora (2015) write: “Even amputation and organ removal are considered ethical when medically necessary” (35). Needless to say, however, neither amputation nor organ removal are permitted with *both* the lack of the affected person’s consent *and* a lack of medical necessity, as is the case with circumcision. Ordinarily, such a breach is criminal assault.

It is extraordinary that Jacobs and Arora would accuse human-rights-style opponents of circumcision of unfairly “singling out” the practice. The few authors they cite as objecting to male circumcision on such grounds (chiefly myself and Robert Darby), actually defend a principle of

“genital autonomy” according to which *all* children—including females and intersex children—should be protected from the removal of portions of their genitals prior to their reaching an age when they can appreciate the proposed procedure and can meaningfully consent to it (Svoboda 2013). Circumcision has only been “singled out,” then, in an attempt to bring it into line with existing human rights law concerning other practices.¹ Instead, it is Jacobs and Arora themselves who are selectively defending male circumcision, raising a miscellany of peripheral “analogies”—participation in ice hockey, human growth hormone injections, polydactyly correction, and orthodontia—while inexplicably ignoring the most obvious, direct analogy of nontherapeutic FGC.

In fact, when the authors write, “if a state bans circumcision due to a concern for pain or danger, then the same state should protect all children from all unnecessary procedures and practices that are equally uncomfortable and unsafe,” they prove our point. Since FGC is in fact banned, and since the least damaging forms of FGC (such as ritual “nicking” of the clitoral hood) are simultaneously illegal and less damaging than ritual male circumcision, it follows that boys must also be protected (Earp and Darby 2014).² A right to such protection was correctly noted in the landmark 2012 decision of the Cologne court, holding that boys, just like girls, should be free (upon reaching an appropriate age) to decide about irreversible genital surgery themselves (Merkel and Putzke 2013). ■

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1. Moreover, the specific papers they cite were part of a special issue on infant male circumcision in the *Journal of Medical Ethics*. These papers simply focused on the prescribed topic.
2. The authors themselves raise the example of corporal punishment. They are evidently unaware of the evolving human rights and national statutory standards regarding this particular practice, which have resulted not only in 31 U.S. states banning it, but in more than 100 countries outlawing the practice in schools and 31 countries generally forbidding it (Bitensky 2013).

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The Tolerance of Ritual Male Infant Circumcision

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Jacobs and Arora (2015) argue convincingly for the permissibility of ritual male infant circumcision in general, but they allow for the state to prohibit the practice if it violates local norms. They say that such a ban would be permissible unless it amounts to unethical discrimination. In other words, if male infant circumcision is outlawed, then, as they say, “the same state should protect all children from all unnecessary procedures and practices that are equally uncomfortable and unsafe.” While such an approach has its merits, a more just approach will involve accommodating male circumcision regardless of local norms and customs.

Jacobs and Arora’s proposal to allow local governments to restrict the practice under certain conditions resembles Locke’s principle of neutrality in *A Letter Concerning Toleration*, where Locke states:

Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses. If any man may lawfully take bread or wine, either sitting or kneeling, in his house, the law ought not to abridge him of the same liberty in his religious worship; though in the church the use of bread and wine be very

different, and be there applied to the mysteries of faith, and rites of divine worship. But those things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites. Only the magistrate ought always to be very careful that he do not misuse his authority, to the oppression of any church, under pretense of public good. (Locke 1990, 48–49)

What Locke means is that religious liberties can be restricted by laws of general applicability. If the state prohibits a certain practice for everyone, it need not allow it in religion. On the other hand, if the state allows the practice in the public sphere, then it must allow it in the religious sphere as well.

Martha Nussbaum explains how the principle of Lockean neutrality has been influential in American jurisprudence. For example, in the U.S. Supreme Court case *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the city of Hialeah, FL, attempted to outlaw the ritual slaughter of animals in order to curb animal sacrifices conducted by followers of the Santeria religion. The court overturned the law on the basis of Lockean neutrality because animal killing was still allowed in the food industry (Nussbaum 2012, 72).

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