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Why the Circumcision Judgment looks so weird to American Eyes

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The Cologne *Landgericht* decision proclaiming religious circumcision to be a form of illegal assault will apparently soon be superseded by legislation permitting the practice under certain conditions. Nevertheless, the mere fact that the decision came about – coupled with its endorsement by many members of the German criminal-law community and the fact that approximately half of Germans want to see religious circumcision punished by law – points at a continuing controversy. Circumcision also presents an interesting cross-cultural case study, since it is not expressly regulated in either the United States or (yet) in Germany. An enlightening 2002 analysis by Geoffrey P. Miller shows that all U.S. published U.S. court cases about male circumcision involve botched operations or problems with obtaining parents' consent. It appears that no U.S. court has yet addressed a situation in which a doctor has been criminally prosecuted for competently performing a circumcision with the consent of the child's guardians.

Even were such a case to emerge, it's difficult to imagine a similar outcome. Following the First Amendment's explicit ban on 'established' churches, the Supreme Court has limited government interference in private religious rituals. A line of Supreme Court cases has called for the government to display a 'wholesome neutrality' toward all religions, and to avoid unnecessary 'entanglement' of church and state. Accordingly, the Supreme Court has forbade American government entities from pronouncing on internal church administration, drawing government administrative boundaries to accommodate religious sects, or banning controversial religious practices under the pretext of public safety. This basic suspicion of intermingling secular administration and religion is widespread among legal officials. The average District Attorney, presented with a case in which a third party complained about a properly-performed circumcision, would almost certainly use her discretion not to prosecute.

The second (somewhat related) strand of jurisprudence emphasizes family autonomy. In a landmark 1972 case, *Wisconsin v. Yoder*, the Court upheld the right of Old Order Amish families to withdraw their children from formal education at the age of 16, observing that though there is no explicit guarantee of family autonomy in the Constitution, 'the values of parental direction of the religious upbringingand education of their children in their early and formative years have a high place in our society.' The state, for example, may not ban parents from sending their children to private religious schools or even educating them at home, as long as curricular standards are met. The fundamental Constitutional principle of American family law, repeated in case after case, is to presume that "natural bonds of affection lead parents to act in the best interests of their children". When the parental autonomy is bound up with religious practice, the rationale for judicial circumspection becomes even clearer.

And indeed, the decision of the Cologne court demonstrates the problems that occur when courts intrude in this area. Considering its worldwide resonance, the decision itself is astoundingly brief, just a few paragraphs long. At one point, the court accuses the doctor (and, by implication, the boy's parents) of infringing the boy's right to choose his own religious affiliation. Yet the mere fact that a child is circumcised doesn't irrevocably commit him to Islam, as the 55% of American males who are circumcised can attest. Second, the court can hardly have thought through its proposed right for children to freely choose their reli-

gion. Both of Germany's established religions provide for elaborate public rituals in which children are brought into their parents' or community's faith long before they are of age to make binding legal commitments under German law. Granted, these induction ceremonies don't involve circumcision, but the court did not bother to limit its principle only to these cases. Like many legal commentators, the court also confidently proclaimed circumcision to be against the child's best interests without ever suggesting why the child's parents, who obviously had different views, should be ignored.

These problems help explain the different reactions to the decision among German and foreign observers. Christian Germans (whether devout or nominal) are rarely circumcised. This is in stark contrast to the United States, where routine circumcision was adopted during the late 19th century on hygiene grounds (including the prevention of masturbation) which would now be considered dubious. Yet the practice remains well-accepted: The American Pediatric Association recently concluded that "scientific evidence demonstrates potential medical benefits of newborn male circumcision" and explicitly noted that it is "legitimate for parents to take into account cultural, religious, and ethnic traditions, in addition to the medical factors, when making this decision." By contrast, circumcision in Germany has only been customary among two religious minorities, one of which was decimated during the Third Reich, and the other which only arrived in significant numbers in the last 40 years. The generally positive reaction to the decision among Germany's socially conservative legal culture shows a lasting undercurrent of suspicion against customs and beliefs that have "non-European" roots – and of the parents who wish to pass them on to their children.

Two Models of Freedom and Responsibility

Yet there is another factor driving the circumcision controversy: a stronger emphasis on social cohesion. Again, the comparison with the United States is instructive. America is, in many respects, an an outlier in terms of governmentally-enforced social cohesion. There is no national identity card in the United States, and some 10 per cent of the population has no picture identification of any kind. American rules regarding home schooling and religious education are among the most liberal in the world. Unlike every other government in the world, the American state is constitutionally debarred from banning hate speech and propaganda in the name of social harmony. Aside from wartime, compulsory military or civil service has never existed in the United States. And, of course, the American social safety net is designed only to provide transitional, time-limited aid. The possibility that the devout might create self-perpetuating 'parallel societies', a perennial source of anguish in the European media, is largely absent from American public discourse. This is not because such parallel societies do not exist in the USA – quite the contrary is true – but because their existence is not seen as problematic as long as they do not encourage crime or exploitation. (Of course, these libertarian hallmarks coexist with a massive security sector and the highest imprisonment rates in the world – but exploring this paradox is beyond the scope of this post.)

Although the German political order also guarantees its citizens wide-ranging civil freedoms, the approach is subtly different. In an interesting article on the 'German Idea of Freedom' Edward J. Eberle argues that Germany's conception of individual liberty — while robust and deeply-rooted — differs significantly from that found in the United States. In contrast to the freewheeling American conception of individual rights (accompanied by an equally unfettered free market), the German conception of liberty 'take[s] place within a moral structure erected on ethical concepts that include human dignity and its multiple radiations, people acting within the bounds of a social community with its ensuing reciprocal obligations, and a *Sozialstaat*.' Further, the discussion of rights in Germany is coupled with 'duties rooted deeply in the culture and community'.

This conception of 'freedom' conditioned by social integration (which, of course, prevails in many Continental European cultures) enables the state to make claims on its citizens that would be controversial in

Anglo-Saxon countries. German court decisions, for example, permit government officials to reject parents' chosen names for their children on a number of grounds, including that the name might subject the child to ridicule or does not clearly indicate the child's gender. Until recently, military service was compulsory in Germany, although many young men opted out under liberal conscientious-objector laws. Germany also has a registration law, which requires Germans to timely inform their government of any change in address. Germany has comprehensive federal laws regulating everything from the permissible size of huts on garden allotments to the content of vacation contracts, and a sizable contingent of 'order police' (the *Ordnungsamt*) to enforce them. The German legal order does not provide for untrammeled free speech – pro-Nazi rhetoric is illegal, and media which publish insulting or privacy-intruding material may be confiscated and their owners fined.

The flip side of this intrusion is an impressive network of social rights and benefits. Despite recent reforms, German social welfare benefits are still much more generous than their American counterparts — but recipients may also required to submit to intrusive surveillance. Germany has universal health insurance provided by subsidized insurance companies which are run on the principle of 'solidarity'. Germans receive large welfare subsidies for having children, and enjoy some of the most generous family leave policies in the world. Virtually all higher education is provided free of charge (or for nominal tuition) by government-funded universities. All workers are guaranteed several weeks of paid vacation per year. Even welfare recipients can petition for extra money to pay for a child's wedding or a vacation.

To put it simply, the German social bargain permits the state to intrude more deeply into citizens' affairs in certain areas, in return for providing them with an array of services designed to foster personal development and socialize common life-risks. Germans face more subtle pressure to conform to majority social norms, but in return enjoy benefits conferred by that majority itself. This ideology of 'duties rooted deeply in the culture and community' may have influenced the German court's reasoning: Instead of simply endorsing parental autonomy *tout court*, the judges asked whether the parents' choice would bind their child closer to the majority 'culture and community' of Germany. Because it would not, it was that much easier to second-guess. Yet the reaction to the court's decision seems to mark a subtle shift in consensus-minded Germany toward accommodating beliefs and rituals which will always remain outside the mainstream.

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