

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of)	Supreme Court
)	No. SC S54714
JAMES H. BOLDT,)	
)	Appellate Court
Respondent on Review,)	No. CA A126175
)	
and)	Jackson County Circuit
)	Court No. 98-2318-D(3)
LIA BOLDT,)	
)	
Petitioner on Review.)	
_____)	

BRIEF OF AMICUS CURIAE, DOCTORS OPPOSING CIRCUMCISION,
IN SUPPORT OF THE PETITION FOR REVIEW

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INDEX TO BRIEF OF AMICUS CURIAE
DOCTORS OPPOSING CIRCUMCISION

SHORT INTRODUCTION TO THIS PARTY *AMICUS CURIAE* 1

RELIEF PRAYED FOR 2

FACTS 3

PROCEDURAL HISTORY 3

ARGUMENT 4

 I. LINKING CUSTODY ISSUES WITH MEDICALLY UNNECESSARY
 ‘RELIGIOUS SURGERY’ ENTANGLES THE CHILD
 MISHA/JIMMY’S INDEPENDENT RIGHT TO BODILY HEALTH
 AND SAFETY WITH THE SEPARATE ISSUE OF WHO IS HIS
 BETTER CUSTODIAN 4

 II. MISHA/JIMMY IS A PERSON, IN HIS OWN RIGHT, SEPARATE AND
 DISTINCT FROM HIS PARENTS, AND ENTITLED TO PROTECTION
 UNDER NATURAL, OREGON STATE, WASHINGTON STATE,
 FEDERAL, AND INTERNATIONAL LAW 6

 III. THE *INTERNATIONAL COVENANT ON CIVIL AND
 POLITICAL RIGHTS* APPLIES TO MISHA/JIMMY’S CASE 11

 Application of the ICCPR to the Instant Case 12

 Article 7 12

 Article 9 13

 Article 16 13

 Article 24 13

 Article 26 13

 IV. UNITED STATES SUPREME COURT: “PARENTS CANNOT MAKE
 CHILDREN INTO RELIGIOUS MARTYRS.” 13

 V. MISHA/JIMMY HAS A FUNDAMENTAL RIGHT TO RETAIN HIS
 RELIGION-OF-ORIGIN, THE RUSSIAN ORTHODOX CHURCH, A
 CHRISTIAN DENOMINATION WHICH HAS REJECTED
 CIRCUMCISION FOR THOUSANDS OF YEARS 17

 VI. THE BODILY INTEGRITY AND SAFETY NEEDS OF A CHILD
 SHOULD ALWAYS REMAIN PARAMOUNT TO A PARENT’S
 RELIGIOUS FREEDOM 19

 VII. MISHA/JIMMY CANNOT CONSENT EVEN IF URGED
 TO YIELD UNDER PARENTAL PRESSURE 19

 VIII. JUDAISM DOES NOT UNIVERSALLY REQUIRE CIRCUMCISION
 22

 IX. ALL BRANCHES OF JUDAISM AND JEWISH LAW FORBID FORCED
 CONVERSIONS; TRUE CONVERSIONS INVOLVE A LENGTHY
 PROCESS 23

X. CIRCUMCISION BY A MEDICAL PROFESSIONAL NEVER SATISFIES THE RELIGIOUS REQUIREMENTS OF JEWISH LAW UNLESS THE PHYSICIAN IS ALSO A TRAINED AND OBSERVANT RELIGIOUS *MOHEL* 24

XI. IS THIS CIRCUMCISION MOTIVATED SOLELY BY RELIGIOUS BELIEF? 25

XII. THE NATURE OF THE PART PROPOSED TO BE AMPUTATED BY CIRCUMCISION 28

XIII. CIRCUMCISION POSES UNAVOIDABLE PHYSICAL RISKS TO THE CHILD MISHA/JIMMY 32

XIV. CIRCUMCISION ALSO POSES SUBSTANTIAL PSYCHOLOGICAL RISKS TO THE CHILD MISHA/JIMMY 36

XV. NO COMPELLING MEDICAL REASON FOR MISHA/JIMMY’S CIRCUMCISION HAS BEEN SUGGESTED 39

XVI. NO MEDICAL SOCIETY IN THE WORLD RECOMMENDS NON-THERAPEUTIC CIRCUMCISION AS APPROPRIATE OR NECESSARY "MEDICAL CARE" 40

XVII. CIRCUMCISED CHILDREN ARE NOW A MINORITY ON THE U.S. WEST COAST 41

XVIII. MISHA/JIMMY IS PROTECTED BY WASHINGTON CONSTITUTIONAL LAW 42

XIX. SUMMATION 44

XX. CONCLUSION AND PRAYER FOR RELIEF 46

INDEX TO CITATIONS

Statutes & Rules Cited

U.S. Const. amend. 14, §1 9, 45-47

18 U.S.C. §116 1, 9, 45, 47

28 U.S.C. §1738 4

Oregon Const. art. 1, § 1 6

Oregon Const. art. 1, §20 9, 47

Oregon Const., art. 1, §10 47

Oregon Const., art. 1, §3 48

Oregon Const, article 1 45

ORS 107.137	44
ORS 107.425	44
ORS 109.175	11
ORS 163.207	1, 9, 45, 47
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**BRIEF OF AMICUS CURIAE
DOCTORS OPPOSING CIRCUMCISION**

SHORT INTRODUCTION TO THIS PARTY *AMICUS CURIAE*

Doctors Opposing Circumcision was established as a non-profit 501c(3) educational organization in 1995 by Dr. George C. Denniston, MD, MPH (Harvard), then a Clinical Professor of Family Medicine at the University of Washington School of Medicine, Seattle. D.O.C. now has both lay and medical professional members of many different specialties across the US, as well as Europe, the UK, and Australasia.

The Board of Directors of D.O.C. includes three licensed physicians, a lay bioethicist, a registered nurse, and a practicing attorney. (Though not normally relevant, we mention in this specific case that our Executive Vice-President is Jewish, as is a significant percentage of our members worldwide.)

D.O.C. members do *NOT*, of course, oppose necessary therapeutic procedures beneficial to minors. D.O.C. members, however, urge strict caution and scrupulous bioethical inquiry for all non-therapeutic, unnecessary, and merely religious/social surgeries proposed for children or those who cannot give consent, and who may come to regret the choice of those with proxy consent power over them.

Such surgeries include female circumcision (also called female genital cutting, or FGC, now illegal in the U.S.,¹ Oregon,² and most First-World countries); non-urgent, premature, or precipitous gender assignment of the intersexed; unnecessary or cosmetic genital ‘normalization’ surgeries on those with harmless anatomical variations; non-therapeutic male circumcision; cosmetic genital piercings of children; and other

¹ 18 U.S.C. §116.

² ORS 163.207

unnecessary surgical modifications of children's genitalia which lack scientific and bioethical justification.

Members of the D.O.C. Board of Directors, and contributing physicians writing under the D.O.C. aegis, have over 50 publications in mainstream lay and medical journals worldwide on the science and bioethics of non-therapeutic genital surgeries on minors, as well as some nine books on the subject in print.³

Doctors Opposing Circumcision has no personal, financial, or other stake in the outcome of this specific case, and we offer our brief as *Amicus Curiae*, along with our medical and bioethical expertise, in hope of advising this honorable Court. We do so without the promise or expectation of any compensation from anyone, or any party, at any time.

RELIEF PRAYED FOR

We submit this brief in support of the natural and legal rights of the child, Mikhail ("Misha/Jimmy") James Boldt,⁴ to retain his body free from religiously-motivated, non-therapeutic, unnecessary surgical modification. We specifically urge this honorable Court

³ George C. Denniston. *Circumcision and the code of ethics*. 12 Hum Health Care Inter 78 (1996);12(2); Thomas J. Ritter, M.D. & George C. Denniston, M.D., M.P.H. *Doctors Re-examine Circumcision*, Third Millennium Publishing, 1992, ISBN 0-9711878-0-0. Marilyn Milos, RN. & George C. Denniston, M.D., M.P.H, eds. *Sexual Mutilations, a Human Tragedy*, Plenum Press, 1997, ISBN 0-306-44589-7. George C. Denniston, Frederick Mansfield Hodges, & Marilyn Fayre Milos, eds. *Male and Female Circumcision: Medical, Legal, and Ethical Considerations in Pediatric Practice*. New York: Kluwer Academic/Plenum Publishers, 1999. ISBN 0-306-46131-5. George C. Denniston, Frederick Mansfield Hodges, & Marilyn Fayre Milos, Eds. *Understanding Circumcision: A Multi-Disiplinary Approach to a Multi-Dimensional Problem*. New York: Kluwer Academic/Plenum Publishers, 2001. ISBN 0-306-46701-1. George C. Denniston, Frederick Mansfield Hodges, & Marilyn Fayre Milos, Eds. *Circumcision Politics*, Springer Academic Publishing, New York, 2006.

⁴ The mother calls the child "Misha" but the father calls the child "Jimmy". *Father's Brief*, April 10, 2006 at 4. We call him "Misha/Jimmy" in this brief.

to enjoin the medically unnecessary circumcision proposed by the father, or, in the alternative and at a minimum, to remand the case for a hearing on the merits, including those issues best illuminated by live, expert, medical testimony.

We take no position and present no evidence or arguments with regard to who might be the better custodial parent.

FACTS

In the interest of brevity and judicial economy, we defer to the recitation of facts narrated by counsel for the appellants, Attorney Clayton Patrick, Esq., representing Mikhail James Boldt (“Misha/Jimmy”) and his natural mother, Lia Boldt.

PROCEDURAL HISTORY

We also join counsel for the appellants in his recitation of the procedural history, except to note that this case has apparently been decided, twice, without appropriate due process on the constitutional issues or the medical merits. A proper hearing on the merits would have included live medical testimony illuminating the science and bioethics of imposing a non-therapeutic surgery on a 12-year-old boy for putatively religious reasons. If the case is remanded, we would provide such testimony to assist the Courts of Oregon, and we would do so without compensation.

Our international physicians’ non-profit has closely examined, for over 12 years, the scientific and ethical issues presented by non-therapeutic genital surgeries to children. Thus we believe a remand for such expert medical and ethical testimony is crucial in the instant case if this honorable Court does not elect to overturn the order (without opinion) of the trial court, and the affirmance (without opinion), of the Court of Appeals.

We advocate respect for the independent constitutional and human rights of the

child Mikhail (“Misha/Jimmy”) James Boldt, for the following enumerated reasons, stated and defended as briefly as we could summon:

ARGUMENT

I. LINKING CUSTODY ISSUES WITH MEDICALLY UNNECESSARY ‘RELIGIOUS SURGERY’ ENTANGLES THE CHILD MISHA/JIMMY’S INDEPENDENT RIGHT TO BODILY HEALTH AND SAFETY WITH THE SEPARATE ISSUE OF WHO IS HIS BETTER CUSTODIAN.

We understand that the Federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738, vests jurisdiction in the Courts of Oregon even against the rights of this child to the protection of Washington state law⁵ for its resident citizens.⁶ But unfortunately the original decision of the Oregon trial court judge, which gives over-broad discretion to the custodial parent, unnecessarily obscures the more fundamental rights of the child to an intact body free of unnecessary surgical risk. The Trial Court declared:

"I am still of the opinion that the decision of whether or not a child has elective surgery, which this appears to be, is a call that should be made and is reserved to the custodial parent."⁷

It is important to note that even elective (i.e., non-emergency) surgery must be: **1) wholly therapeutic; 2) medically necessary; 3) beneficial to the *child-patient* in proportion to its risks, pain, and loss; and 4), intended solely for the physical benefit of the *child-patient* and for no other person or reason.** Parental authority to request or

⁵ Misha/Jimmy’s rights in Washington include: “Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state...” Washington Const., art. 1, § 11, cl. 1.

⁶ *Henry v Keppel*, 326 Or 166, 951 P2d 135 (1997)

⁷ *Father’s Brief*, August 10, 2005, at 5, quoting *Supplemental Judgment Conditioning Petitioner’s Continued Custody of Minor Child to Stay Circumcision Procedure*. August 19, 2004.

impose unnecessary elective surgery on children, (and the physician's duty to the child *qua* patient) cannot proceed without the strictest bioethical qualification and scrutiny.

Thus the trial Court failed to address the child's independent rights to the security of his own body, and granted to the custodial father rights that an extended history of human rights law and U.S. Supreme Court decisions have long since carefully abridged in favor of the child. Perhaps that was due to a misconception of the trial Court that male circumcision is a simple, painless medical procedure, of proven worth, like an immunization.

As licensed physicians we know more clearly than anyone that such an assumption is not true in the slightest, especially not for a teenaged patient. Worldwide, most advanced cultures reject circumcision, of either gender, as risky, disfiguring, and medically unnecessary.

The issue of the fitness of the father to retain custody and the issue of whether the child should be converted and circumcised, strike us as important –but independent– issues which must be analyzed in isolation. The mere grant of custody, for good or for ill –to either parent– should not divest the child of important rights to which he has been accorded and is entitled under state, federal, and international law. Nor should it divert this honorable Court's attention from those rights.

Were the natural *mother* (or even the child himself) to accede to the father's request to have Misha/Jimmy circumcised, we physicians would continue to support the child's independent rights, and we trust and hope the Courts of Oregon would carefully consider these as well.

II. MISHA/JIMMY IS A PERSON, IN HIS OWN RIGHT, SEPARATE AND DISTINCT FROM HIS PARENTS, AND ENTITLED TO PROTECTION UNDER NATURAL, OREGON STATE, WASHINGTON STATE, FEDERAL, AND INTERNATIONAL LAW.

Mikhail (Misha/Jimmy) James Boldt, (hereinafter ‘Misha/Jimmy’) is a minor who is legally incompetent. Nevertheless, Misha/Jimmy is a person with rights of his own. As a minor he deserves special protection under Oregon,⁸ and international law.⁹ Misha/Jimmy has an unalienable right to protection and security of his person,¹⁰ and the Courts of the State of Oregon have a corresponding obligation to protect his rights independent from and even despite the wishes of a parent who might endanger the child unnecessarily.¹¹

Misha/Jimmy’s status as a minor does not deprive him of the general rights enjoyed by all. Among these is the right to bodily integrity derived from the common law of England.¹² According to Blackstone: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and

⁸ Oregon Const. art. 1, § 1: “Natural rights inherent in people. We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their **peace, safety, and happiness.**” (Emphasis added).

⁹ UN *Universal Declaration of Human Rights*, art. 25 (1948). Available at: <http://www.unhchr.ch/udhr/lang/eng.htm> Accessed February 11, 2007; UN *Declaration of the Rights of the Child* (1959), principles 8-10 Available at: <http://www.unhchr.ch/html/menu3/b/25.htm> Accessed February 11, 2007; UN *Covenant on Civil and Political Rights* (1968), art 24, §1 Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm Accessed February 11, 2007; UN *Convention on the Rights of the Child* 1989, preamble. Available at: <http://www.unhchr.ch/html/menu3/b/k2crc.htm> Accessed February 11, 2007.

¹⁰ *International Covenant on Civil and Political Rights* (1966) (hereinafter “ICCPR”), arts. 9 & 24.

¹¹ *Reno v. ACLU*, 521 U.S. 844 (1997); *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹² Blackstone’s *Commentaries on the Laws of England*, Book one, Chap. 1, Page 125 (1765-9).

his reputation."¹³

The right to bodily integrity was affirmed by the U.S. Supreme Court in 1891,¹⁴ and reaffirmed in 1992.¹⁵ The right to bodily integrity is known as the right to ‘security of the person’ in international law and is guaranteed by Article 3 of the *Universal Declaration of Human Rights* (1948),¹⁶ and Article 9 of the *International Convention on Civil and Political Rights* (ICCPR).¹⁷ As a resident of Washington, Misha/Jimmy has a right or immunity against having his person disturbed or molested in the name of religion.¹⁸

Misha/Jimmy also enjoys a right of privacy.^{19 20} The constitutional right of privacy is the right to be left alone; it inures to the individual and not to the family.²¹ Thus Misha/Jimmy enjoys a right even against unnecessary intrusions by his own family members.

While his parents have certain rights over him, the rights of the parents, of ancient origin, derive from their obligations to the child, and are intended for the child’s benefit and safety. According to Blackstone, parental duties toward children:

¹³ Sir William Blackstone. *Commentary on the Laws of England*. (1765-9).

¹⁴ *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891).

¹⁵ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). URL: <http://laws.findlaw.com/us/505/833.html> Accessed February 20, 2007.

¹⁶ *Universal Declaration of Human Rights* (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). URL: <http://www.unhchr.ch/udhr/lang/eng.htm>

¹⁷ General Assembly resolution 2200A (XXI) of 16 December 1966.

¹⁸ Washington Const. art. 1, §11.

¹⁹ Ross Povenmire. *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States*. 7 Am Univ J Gend Soc Policy Law 87 (1998-1999). Available at: <http://www.cirp.org/library/legal/povenmire/> Accessed February 10, 2007.

²⁰ ICCPR, art. 17.

²¹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Available at: <http://laws.findlaw.com/us/405/438.html> Accessed February 10, 2007.

"principally consist in three particulars ; their maintenance, their protection, and their education."²²

In a landmark British case, Lord Scarman observed:

"The principle of the law * * * is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."²³

(Or phrased another way, the parents' derivative rights vis-à-vis the child are forfeit the instant the child's best interests are no longer observed or parental protection of the child has been effectively abandoned.)²⁴

Misha/Jimmy should also enjoy the right to protection of his genital organs from non-therapeutic surgical alteration. Povenmire writes:

"For female infants, the right to the integrity of the genital organs is protected against surgical "mutilation" by federal law and United Nations resolutions. Under the law, the right of bodily integrity is deemed so fundamental that it displaces any consideration of the parents' cultural or religious beliefs. Unfortunately, no similar recognition has been extended to male infants in the United States. The failure of the law to provide equal protection to males can find no "exceedingly persuasive" justification, and is unconstitutional."²⁵

Parties who seek to defend gender-based distinctions must demonstrate an

²² Sir William Blackstone's *Commentary on the Laws of England*, Book 1, Chapter 16, p . 4 3 4 . (1 7 6 5 - 1 7 6 9) . A v a i l a b l e a t : <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch16.htm>

²³ Per Lord Scarman. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 at 420, citing Blackstone's *Commentary*. Available at: <http://www.swarb.co.uk/c/hl/1985gillick.shtml> Accessed February 10, 2007.

²⁴ Philosopher Joel Feinberg notes that children have an ethical right to an 'open future,' one whose options have not been foreclosed by parental choices that were unnecessary or harmful. *The Right to an Open Future*, (in *Whose Child? Children's Rights. Parental Authority and State Power*, Rowman and Littlefield, Totowa, New Jersey, 1980)

²⁵ Ross Povenmire. *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States*. 7 Am Univ J Gend Soc Policy Law 87 (1998-1999). Available at: <http://www.cirp.org/library/legal/povenmire/> Accessed February 10, 2007.

"exceedingly persuasive justification" for that action.²⁶ Courts must provide "heightened scrutiny" of gender-based discrimination.²⁷ Misha/Jimmy is not disqualified from equal protection because of his male gender.²⁸ Misha/Jimmy is a natural-born citizen of the United States and enjoys the privileges and immunities of citizens of the United States, including the right to the equal protection of the law.²⁹ U.S. Federal law and Oregon state law already protect the genital integrity of females.³⁰

Misha/Jimmy also has a right to equal protection under international instruments which also prohibit discrimination on the basis of gender.³¹ Misha/Jimmy, therefore, has an equal right³² to have his genital integrity protected by law.

Even the *slightest* non-therapeutic incision on the genitalia of a female, no matter how benign or symbolic or motivated by religious impulse, is now a federal and Oregon state felony. Meanwhile, *all* non-therapeutic modifications upon the genitalia of a male child are tolerated, no matter how unnecessary, extensive, or mutilating. This legal disparity is manifestly a failure of equal protection, if not a failure of fundamental human rights.

²⁶ *United States v. Virginia*, 518 U.S. 515 (1996). Available at: <http://laws.findlaw.com/us/518/515.html> Accessed February 14, 2007.

²⁷ *Reed v. Reed*, 404 U.S. 71 (1971). Available at: <http://laws.findlaw.com/us/404/71.htm> Accessed February 15, 2007.

²⁸ *Mississippi University for Women v. Hogan*, 452 U.S. 718 (1982). Available at: <http://laws.findlaw.com/us/458/718.html> Accessed February 15, 2007.

²⁹ U.S. Const. amend. 14, §1; ICCPR, §26.

³⁰ 18 U.S.C. §116, ORS 163.207.

³¹ UN Universal Declaration of Human Rights 1948, art. 2; UN Declaration of the Rights of the Child (1959), Principle 1; UN Covenant on Civil and Political Rights (1966) art. 3; UN Convention on the Rights of the Child (1989), art. 2. (Hereinafter "UNCRC")

³² Oregon Const. art. 1, §20 provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Indeed, a movement has arisen among medical ethicists to expand the U.S. federal anti-FGC law to make it gender-neutral, thereby protecting all children, including boys, from non-therapeutic, genital modification practices.³³ Overseas, Finland and South Africa have already taken steps to do so.³⁴

Misha/Jimmy has various rights under the *UN Convention on the Rights of the Child* 1989 (UNCRC),³⁵ which is generally accepted international law, despite the lack of ratification by the United States,³⁶ including the right to freedom from "traditional practices prejudicial to the health of children,"³⁷ and the right to "freedom from torture or other cruel, inhuman or degrading treatment or punishment."³⁸

Misha/Jimmy has a right to express his views in matters affecting him.³⁹ Misha/Jimmy is entitled to have his views considered in judicial proceedings regarding

³³ See website of MGM Bill.org at <http://www.mgmbill.org/>

³⁴ A Finnish court has determined that the circumcision of male infants is unlawful under the human rights provisions of the Finnish Constitution (2002). The Parliament of South Africa made the medically unnecessary circumcision of boys unlawful under the Children's Act 2005.

³⁵ International law is not often cited in U.S. Courts. The United States has signed but Congress has taken no action either to ratify or reject the UNCCR The UNCCR is now generally accepted U.S. law as it has been adopted by all nations save two, one being Somalia, which is in anarchy and has no functioning government; and the other being the United States. The United States, however, has pledged itself to support "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" *Charter of the United Nations* (1945), art. 55. The United States, however, ratified the *International Covenant on Civil and Political Rights* (1966) in 1992. It is the "law of the land."

³⁶ J. Steven Svoboda. *Routine Infant Circumcision: Examining the Human Rights and Constitutional Issues*. In: Marilyn Fayre Milos, George C. Denniston, editors. *Sexual Mutilations: A Human Tragedy*. New York: Plenum Press, 1997: pp. 205-215.

³⁷ UNCRC, art. 24, §3

³⁸ UNCRC, art. 37, §1

³⁹ UNCRC, art. 12, §1

him.⁴⁰ Misha/Jimmy has a right to recognition as a person before the law.⁴¹ And Misha/Jimmy has a right to have his best interests and welfare promoted in the proceedings of this honorable Court.⁴²

Moreover, as physicians we know a major and ongoing tenet of pediatric bioethics is steadfast observance of the rights of the vulnerable pediatric patient to bodily integrity when parents request a medically unnecessary or contraindicated procedure.⁴³

As we review this case, none of Misha/Jimmy's numerous human rights to bodily integrity —natural, bioethical, state, federal, or international— have yet been given adequate consideration, on the merits, accompanied by live medical testimony, in the Courts of Oregon.⁴⁴

III. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS APPLIES TO MISHA/JIMMY'S CASE

Certain provisions of the *International Covenant on Civil and Political Rights* (1966) (ICCPR) (See Appendix A, App-1) are directly applicable to Misha/Jimmy's case. The ICCPR is a relatively new feature of American law. Because of the ratification by

⁴⁰ UNCRC, art. 12, §2

⁴¹ ICCPR, art. 16.

⁴² ORS 109.175, UNCRC, Article 3, §1.

⁴³ American Academy of Pediatrics Committee on Bioethics. *Informed consent, parental permission, and assent in pediatric practice*. 95 *Pediatrics* 314 (1995); S. K. Hellsten. *Rationalising circumcision: from tradition to fashion, from public health to individual freedom—critical notes on cultural persistence of the practice of genital mutilation*. 2004 *J Med Ethics* 248 (2004); Marie Fox & Michael Thomson. *Short changed? The law and ethics of male circumcision*. 13 *Int J Children's Rights* 161 (2005).

⁴⁴ Some Shiite Muslim sects slash their children's foreheads on the anniversary ("Ashura") of the beheading, by rival Sunnis, of Imam Hussein, a Shiite martyr of the year 680. Theirs is a deeply held religious belief that their children must participate, annually, in the suffering of the martyred Hussein, by three cuts which cause blood to cascade down the child's face. Would Oregon law permit this practice as a protected exercise of religious belief, even if it was performed in a physician's office instead of at the child's home or at a mosque?

the United States Senate, the ICCPR is now our “law of the land.”⁴⁵ It stands parallel to, complementary to, and supportive of the Bill of Rights of the United States Constitution and the Bills of Rights of the several states. The rights, privileges, and immunities described by the ICCPR are legally equivalent, therefore, to previously enunciated constitutional rights, privileges, and immunities of the American people.

The United States Supreme Court cited the ICCPR in its landmark 2005 decision to overturn the death penalty for juveniles.⁴⁶ The ICCPR also has been cited by the United States Supreme Court in its landmark decision to require the current administration to adhere to accepted standards of international law.⁴⁷ The integration and acceptance of the ICCPR into United States law is now beyond doubt. Moreover, it stands solidly in the tradition of Anglo-American law.

Application of the ICCPR to the Instant Case

The ICCPR treaty provides certain rights that are directly applicable to male circumcision and to Misha/Jimmy’s case in particular.

Article 7 provides a right to freedom from “torture or cruel, inhuman or degrading treatment or punishment.” As reported *in extenso* elsewhere and later herein, male circumcision excises, painfully, a highly specialized structure with documented physiological advantages. The amputation of this organ places a lifelong

⁴⁵ U. S. Const., art. IV, § 1.

⁴⁶ *Roper v. Simmons*, 543 U.S. 551 (2005). The court, in effect, overturned the Article 6 reservation taken by the United States Senate in 1992 with regard to the juvenile death penalty.

⁴⁷ *Hamdan v Rumsfeld*. 548 U.S. ___, 126 S.Ct. 2749 (2006). Justice Stevens, who delivered the opinion of the court, cited the ICCPR in footnote 66. The court ruled in the matter of the Guantanamo prisoners that the executive branch must comply with international law as expressed in the Geneva conventions.

burden on the individual. Certainly involuntary, coerced or cajoled male circumcision on a minor, lacking urgent medical necessity, is cruel, inhuman, or degrading treatment.

Article 9 provides a right to “security of the person.” The excision and amputation of a healthy and sensitive body part before he can meaningfully consent to its loss would be an obvious violation of Misha/Jimmy’s right to the security of his person.

Article 16 provides the “right to recognition everywhere as a person before the law.” Misha/Jimmy has not yet been recognized as a separate person with rights of his own, while his father’s rights as custodial parent have been given wide latitude. This article speaks to that problem.

Article 24 provides a right to “to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” Thus both this honorable Court and inferior courts owe a duty to Misha/Jimmy to protect him during his minority, especially if a custodial parent abdicates that responsibility.

Article 26 declares that “all persons are equal before the law” and provides a right without discrimination to the “equal protection of the law.” It further provides that there may be no discrimination on the basis of gender.

IV. UNITED STATES SUPREME COURT: “PARENTS CANNOT MAKE CHILDREN INTO RELIGIOUS MARTYRS.”

Even in the absence of a specific, overriding, plenary provision in U.S. law protecting the natural appearance, structure and function of the genitalia of male children, we observe that the instant case should be guided by a landmark decision of the United States Supreme Court and with more than usual urgency.

The United States Supreme Court has held:

“Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” *Prince v. Massachusetts*, 321 U.S. 158 (1944)

*Prince v. Massachusetts*⁴⁸ was a case about children selling religious literature in public, a religious practice forbidden by a local ordinance whose legislative purpose was child safety in the streets. As the case discusses in considerable detail the balance to be struck between the state’s duty to protect a child from a potentially harmful religious *practice* and the parents’ constitutional right to the unfettered practice of religious *belief*, it bears a very close reading by this honorable Court.

Misha/Jimmy’s situation fits squarely within the holding in *Prince*, and the danger to Misha/Jimmy from this particular religious *practice* is more likely and more palpable than safety concerns for a child selling religious tracts door-to-door.

Prince began a line of cases that has never overturned its underlying principle: the right of the child-citizen to be protected, by the state, from the physical dangers of religious *practices*, even those posed by the constitutionally protected religious *beliefs* of a parent.

The father seeks leave of this court to physically diminish Misha/Jimmy by the amputation / excision of part of the child’s penis without medical necessity, solely as a religious *practice*. He cites *Meyer v. Nebraska*,⁴⁹ *Pierce v. Society of Sisters*,⁵⁰ *Troxel v. Granville*⁵¹ and similar cases to support his position that government should not

⁴⁸ *Prince v. Massachusetts* is in accord with the protection of the ICCPR, art. 18, §3.

⁴⁹ *Meyer v. Nebraska*, 262 U. S. 390 (1923).

⁵⁰ *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

⁵¹ *Troxel v. Granville*, 530 U. S. 57 (2000).

interfere.⁵² These cases, however, are inapposite because they do not address situations in which a parent wishes to physically diminish a healthy child as a religious *practice* as opposed to a protected *religious belief* which would not hazard the child. These cases only address the right of parents to rear their children. They assume the family will protect a child from potential or actual physical injury.

Misha/Jimmy's family, however, is severed one part from the other, and cannot function as a normal family, with one parent acting as a check on the excesses of the other. In such cases the intervention of government under the doctrine of *parens patriae* is necessary to protect the child.

The father argues in his brief to the Court of Appeals that *Wisconsin v. Yoder*⁵³ (a case where the Amish gained the right to decline to educate their children to the age mandated by state law) gives him the right to circumcise his child for religious reasons.⁵⁴ However, the father grossly misstates the holding in that case. *Yoder* applies only to education, a matter of belief, not to the health or safety of the child's body impacted by a religious *practice*.

The *Yoder* Court carefully limited *Yoder* to cases in which no physical or mental risk was involved:

“This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”⁵⁵

And the *Yoder* Court reaffirmed the underlying principle of *Prince*:

⁵² Father's Brief, April 10, 1966 at 28-33.

⁵³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁵⁴ Father's Brief, April 10, 2006, at 33.

⁵⁵ *Wisconsin v. Yoder*, op. cit.

“To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”⁵⁶

And clearly the power of the parent in the case of involuntary circumcision, where a physical injury occurs unavoidably, in every instance,⁵⁷ ought to be severely limited.

Brigman comments specifically on *Yoder*'s application to circumcision cases:

"Equally important, the *Yoder* Court notes that the state may interfere with parental discretion 'if it appears that parental decisions will jeopardize the health and safety of the child, or have the potential for significant social burdens.' [foot omitted] Although the example which the Court uses to illustrate its point involves a life threatening denial of a transfusion, the inclusion of 'significant social burdens' in the definition broadens it considerably. To the extent that circumcision has potential for creating such social burdens, then it seems susceptible to state interference; moreover, circumcision can jeopardize the health, safety or even life of the child,

* * * * *

"Such a conclusion, and a resultant avoidance of a determination of children's rights, is not possible with regard to circumcision. Once a child is subjected to circumcision, painfully and medically unwarranted disfigurement is inevitable, affecting every child on whose behalf the choice is made. Moreover, the loss of education can be at least partially remedied at a later point. Circumcision is irreversible. These factors distinguish circumcision from the denial of education involved in *Yoder* and make the case inapplicable as a precedent. *Prince v. Massachusetts* is the controlling precedent, and parents who impose the unnecessary pain and suffering of circumcision can be made answerable to state law."⁵⁸

The instant case concerns the child Misha/Jimmy's right to retain the healthy genitalia of his birth (with which at his age Misha/Jimmy has doubtless become comfortable and familiar) and to avoid a painful and unnecessary genital amputation

⁵⁶ *Wisconsin v. Yoder*, op. cit

⁵⁷ John R. Taylor, A. P. Lockwood, A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 Br J Urol 291 (1996). Appendix G; App-46.

⁵⁸ William E. Brigman. *Circumcision as Child Abuse: The Legal and Constitutional Issues*. 23 J Fam Law 337 (1985).

/disfigurement which puts him at risk of surgical mishap or infection.

Thus it is the most striking example we have yet seen where the courts should scrupulously defend, as an important guiding principle, the paramount right of the child to the safety and security of his body, and act to protect him from a potentially harmful religious *practice*. Religious *belief* ought to be respected; however, a religious *practice* which risks a child's health and security must not be permitted to preempt the fundamental rights of the child.

V. MISHA/JIMMY HAS A FUNDAMENTAL RIGHT TO RETAIN HIS RELIGION-OF-ORIGIN, THE RUSSIAN ORTHODOX CHURCH, A CHRISTIAN DENOMINATION WHICH HAS REJECTED CIRCUMCISION FOR THOUSANDS OF YEARS.

Misha/Jimmy's mother, (and initially his father), raised their son in the Russian Orthodox religion, a Christian denomination to which the mother and her family belonged, and which categorically rejects circumcision.⁵⁹ Misha/Jimmy is essentially being removed from his religion of origin by the father and his allies. Surely the child has a right to stand clear of a religious tug-of-war. Of necessity, children receive religious education from their parents. But here, where the parents cannot agree on the religion the child should follow, the best result is to let the older child choose on his own.⁶⁰

Feinberg observes: "When parents choose to take their child to religious observances and enroll him in a Sunday School, they are exercising *their* religious rights,

⁵⁹ Christians rejected circumcision as a requirement at the Council at Jerusalem in the first century AD (reported in Acts 15).

⁶⁰ This is Misha/Jimmy's right under the Oregon Const., art. 1, § 2, which provides: All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences. It is also Misha/Jimmy's right under the ICCPR, art. 18.

not (or not yet) those of the child.”⁶¹

Article 18 (3) of the *International Covenant on Civil and Political Rights* (1966) is of special interest in Misha/Jimmy’s Case, and as it addresses issues of religious rights, we quote it here in full:

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (emphasis ours)

This article provides that everyone has a right to choose his or her religion, and that includes Misha/Jimmy. The parents of Misha/Jimmy have a right to provide religious and moral education to Misha/Jimmy, and to maintain their own beliefs. But Article 18 (3) itself limits that right to those beliefs which do not offend ‘public safety, order, health’ that is, Misha/Jimmy’s fundamental rights and freedoms to a healthy, safe, intact body free of unnecessary surgical risk endangered by religious *practice*. And ultimately, the choice to adopt a religion is Misha/Jimmy’s alone.

While religious *belief* is constitutionally protected behavior, a religious *practice* flowing from that belief should not expose the child to an unnecessary, non-therapeutic surgery.

Surely a parent has no natural or legal right to coerce or cajole his son to do so against the child’s best interests or wishes. And we submit that Misha/Jimmy does not have the power to allow his body to be altered, as a religious *practice*, to accommodate his father’s (protected) religious *beliefs*.

⁶¹ Feinberg, J. *The Right to an Open Future*, in *Whose Child? Children’s Right, Parental Authority and State Power*, Rowman and Littlefield, Totowa, New Jersey, 1980, p. 124 et seq.

VI. THE BODILY INTEGRITY AND SAFETY NEEDS OF A CHILD SHOULD ALWAYS REMAIN PARAMOUNT TO A PARENT'S RELIGIOUS FREEDOM. AND WHILE RELIGIOUS BELIEFS MUST BE RESPECTED, RELIGIOUS PRACTICES THAT MIGHT HARM THE CHILD ARE SUBJECT TO LEGITIMATE REGULATION OR PROSCRIPTION.

The U.S. Supreme Court, quoting a New York case of the same era, also said, in

Prince v. Massachusetts:

“The right to practice religion freely does not include liberty to expose the community or the child [p167] to communicable disease or the latter to ill health or death. *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243. [n13] The catalogue need not be lengthened. It is sufficient to show * * * that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, and that this includes, to some extent, matters of conscience and religious conviction.” *Prince v. Massachusetts*, 321 U.S. 158 at 167 (1944).

Furthermore, laws enacted for the protection of children are laws of general application, to which religious *practice* must yield.⁶² Justice Scalia, quoting Chief Justice

Waite of another era, notes:

"Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this 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."⁶³ (emphasis ours)

VII. MISHA/JIMMY CANNOT CONSENT EVEN IF URGED TO YIELD UNDER PARENTAL PRESSURE

Actually, the legally incompetent child Misha/Jimmy could not consent to circumcision even if he wished to, just as he cannot get a tattoo in Oregon, even a Star

⁶² *Employment Division of Oregon v. Smith*. 494 U.S. 872 (1990); reaffirmed *City of Boerne v. Flores*, 521 U.S. 507 (1995).

⁶³ Justice Scalia. In *Employment Division, op cit.* quoting Chief Justice Waite in *Reynolds v. United States*, 98 U.S. 145 (1878).

of David at his father's request—or for that matter, the double-bar Cross of Lorraine of the Russian Orthodox Church at the request of his mother, even if he carries a notarized note from each of them.

We do not believe that even if he gave consent during private testimony *in camera*, out of hearing of his parents, that such a consent to circumcision would be sufficient. Coming from a child, it is certainly not sufficient in modern bioethics, and no ethical physician would rely on it.

Philosopher Joel Feinberg⁶⁴ makes the following sage observation about the rights of children whose autonomy as adults-to-be is a right of the child held in trust by parents and state authority:

“... if the violation of a child's autonomy right-in-trust cannot always be established by checking the child's present interests, *a fortiori* it cannot be established by checking the child's present desires or preferences. It is the adult he is to become who must exercise the choice, more exactly, the adult he will become if his basic options are kept open and his growth ‘natural’ or unforced, In any case, that adult does not exist yet, and perhaps he never will. But the child is *potentially* that adult, and it is that adult who is the person whose autonomy must be protected, now (and in advance).”

Thus there are good public policy reasons, both in medicine and law, behind the sensible prohibition against bodily modifications performed on – or requested by – minors: For one thing, a child's true *lifetime* wishes in the matter cannot be ascertained while he is so young, even by the child himself. For another, he may come to regret a youthful impulse of his own, even an understandable impulse to yield to the wishes of his caregivers, from whom he can hardly extricate himself at his age. And finally such legal

⁶⁴ Feinberg, J. *The Right to an Open Future*, in *Whose Child? Children's Right, Parental Authority and State Power*, Rowman and Littlefield, Totowa, New Jersey, 1980, p. 124 et seq.

protections for minors exist in part because we cannot know whether a parent is misguided or misinformed, and in the sway of that influence, has engineered a child's acquiescence by bribery, intimidation, threat, punishment, or ruse.

Thus even the stated wishes of a child to allow a non-therapeutic, irreversible bodily modification or surgical procedure to himself, even one the custodial parent endorses or urges, should not override the public policy behind forbidding these to the father (and to physicians) and disallowing a healthy child to so choose himself.

Without such legal protection for children like Misha/Jimmy, (an interest and burden the Courts of the State of Oregon are obliged to shoulder) we submit there would be renegade parents who would physically alter their child and see no harm in the practice.⁶⁵

It is embarrassing for we physicians to admit, but it may not be difficult to find a colleague in Washington state who would perform, for a fee, a non-therapeutic amputation procedure on a 12- or 13 year-old against the child's will, or where the possibility exists that the child has been cajoled or herded into acquiescence. Indeed, it appears to us that such a physician has already been recruited.⁶⁶

For reasons of protection even from his own family, Misha/Jimmy should be shielded from a hasty or ill-conceived decision about non-therapeutic surgery until he reaches the age of majority.

Even if the child appears to support his father's wishes, this adds nothing useful

⁶⁵ We recall, for instance, the case of the Vancouver, WA, father, now imprisoned for assault, who attempted to circumcise his son with a hunting knife. *State v Baxter*, Clark County Super Ct (2004).

⁶⁶ Dr. Michael Ellen of Olympia, WA, Father's Brief, April 10, 2006 at p.10-11.

or ethical or conclusive or revealing to the analysis. The child's acquiescence does not legitimize, or legalize the father's preference. The mere *possibility* the child has been campaigned or browbeaten should only add additional doubt to the situation. That doubt can best be resolved by protecting the child until he is an adult, the alternative with the least potential for permanent harm to the child (and the adult he will become), and no risk whatsoever to his guardians.

VIII. JUDAISM DOES NOT UNIVERSALLY REQUIRE CIRCUMCISION.

If the father's claimed commitment to Judaism, rather than the child's individual human rights, is to be the deciding factor, we note there are Jewish congregations in the Northwest which will accept Misha/Jimmy 'as is,' including permitting a *Bar Mitzvah*, if he wishes to convert on his own.

There are also celebrants who will perform a *Brit Shalom* ("Covenant of Peace"), a non-cutting, well-established, spiritual alternative to circumcision, (called in the Jewish tradition *brit milah*, or "covenant of cutting"). One of our board members keeps a list of *Brit Shalom* celebrants in Oregon and Washington state. He lists three celebrants in the immediate region and in California, eight.⁶⁷

Brit Shalom allows adherents of Judaism to respect the historic *traditions* of their religion, without necessarily endorsing what many modern Jews view as an obsolete and potentially harmful religious *practice*.

Thus, even if the Court is inclined to prefer the father's religious rights of belief over the child's rights to an intact body, the father cannot claim that his son's

⁶⁷ Brit Shalom Celebrants. Available at: <http://www.circumstitions.com/Jewish-shalom.html> Accessed February 24, 2007.

circumcision is the *sine qua non* of his (the father's) conversion to Judaism, nor of the son's. Alternatives that favor leaving the child intact until he is of age, or even longer, are accepted, and available, in the Jewish community.

IX. ALL BRANCHES OF JUDAISM AND JEWISH LAW FORBID FORCED CONVERSIONS; TRUE CONVERSIONS INVOLVE A LENGTHY PROCESS.

Orthodox and conservative rabbis (the father claims to have selected the conservative branch of Judaism) require that the convert-applicant be denied conversion twice, to be accepted for consideration only on the third try, and granted conversion only after dedicated study and special ceremony. Forced or 'arranged' conversions cannot logically exist. Conversion requires instruction in Hebrew and is not to be undertaken lightly. In the instant case, only the father's 2004 affidavit exists to establish his religious *bona fides*, and he refers to a lay congregation lacking a rabbi. Much more testimony and documentation is needed, most especially if the child's fate hinges on the father's proper conversion.

The father's conversion would have initially required two prior denials, permission from three rabbis, instruction, examination, convincing statement of personal intent and desire, evidence of understanding, and then immersion. Finally, the entire process must be attested to in documents signed by the three attending rabbis.

Conversion requires the continuing presence of these three rabbis, acting as a court of inquiry and certification. They are required to ask the prospective convert why he or she wants to enter Judaism, and to decide on the merits of the answer.

Finally, Jewish law requires immersion in a ritual bath (*mikveh*), with appropriate recitation of prayers, witnessed by the three rabbis, who make certain that the head of the convert goes fully under the water, and who assist the convert with recitation of the

required prayers. All three rabbis will recite Amen ("Oh-mayn" in its Hebrew form) at appropriate times. Again none of these steps are optional; they are all mandatory. A conversion must be documented — a formal statement, declaring that the convert is a "son of Abraham" who has undergone the required rituals, is then signed by three rabbis.

Those are the requirements of the *Halacha*, or Jewish Law, and in a proper, *bona fide*, conversion, there will be substantial, documented, written evidence that the required procedure was observed.⁶⁸

The father's affidavit does not describe circumstances that suggest he has undergone an appropriate or approved conversion,⁶⁹ nor has he submitted to the Court the written documents which would accompany such a proper conversion.

X. CIRCUMCISION BY A MEDICAL PROFESSIONAL NEVER SATISFIES THE RELIGIOUS REQUIREMENTS OF JEWISH LAW UNLESS THE PHYSICIAN IS ALSO A TRAINED AND OBSERVANT RELIGIOUS *MOHEL*.

The father contemplates having Misha/Jimmy circumcised by Dr. Michael Ellen, M.D., of Olympia, Washington.⁷⁰ A circumcision performed by a physician in a secular medical setting would not satisfy the ritual requirements of Conservative or Orthodox Judaism unless the physician has also undergone the religious training of a *Mohel* (the Jewish ritual circumciser). Amputation of the foreskin is not sufficient and has no religious significance whatsoever by itself. The prescribed prayers and rituals must be performed as well. If Dr. Ellen is not trained and approved as a ritual circumciser, then

⁶⁸ Our thanks to Professor Leonard B. Glick, M.D., Ph.D, Author of *Marked in Your Flesh: Circumcision from Ancient Judea to Modern America*, Oxford University Press, 2005, an anthropologist /historian of Jewish law and tradition, for this explication of the *Halacha*.

⁶⁹ Curiously, the father has not insisted that Misha/Jimmy's older half-brother, Jacob, convert to Judaism and he has not done so. Father's Brief, April 10, 2006 at 8.

⁷⁰ *Affidavit of James Boldt*, June 8, 2004, at 6; Father's Brief, April 10, 2006 at 10-11.

the proposed circumcision could not possibly satisfy the ritual requirements of Conservative or Orthodox Judaism and would be meaningless.⁷¹

We know of NO evidence presented to suggest Dr. Ellen is so trained and has been accorded the role of *Mohel* in affiliation with an identified Conservative or Orthodox synagogue and by the proper authorities of the governing body of that synagogue. Without further evidence and inquiry, this court would have good reason to doubt the father's sincerity.

XI. IS THIS CIRCUMCISION MOTIVATED SOLELY BY RELIGIOUS BELIEF?

In America it is considered impolite to question the depth or sincerity of another's religious beliefs. However, our physicians' organization and this honorable Court would be naïve if we did not inquire into the circumstances of the father's recent interest in Judaism occurring as it does within a custody dispute. Moreover, the child has an older half-brother, Jacob, who has not converted to Judaism.⁷² Why this sudden emphasis on converting the younger Misha/Jimmy and not the older half-brother Jacob? And why is no conversion required for the father's live-in domestic partner? Why the double standard? Why did the rabbis who would have been required to advise the father not insist on these additional requirements?

We have been asked to intervene previously in cases similar to the one at bar, where a religious motive for circumcision was easily alleged and difficult to disprove. Always the troubling questions re-surface: What is the harm of waiting until the child

⁷¹ Professor Leonard B. Glick, M.D., Ph.D. personal communication.

⁷² The father's enthusiasm for conversion of his family to Judaism seems to apply only to Misha/Jimmy. Jacob, his son by a previous marriage, has not been required to convert. Father's Brief, April 10, 2006, at 8, citing *Affidavit of Jacob Boldt* at 5.

reaches majority (in this case a mere six years or less), to a time when the child can adopt the religious beliefs of one parent or the other, or alternatively, develop his own? Why the big rush toward circumcision, an irreversible, indelible mark of only one religion and one which is anathema to the other?

In a Chicago case decided in mid-2006 (*Schmidt vs. Niznik, Cook County Illinois, NO. 00 D 18272*) a custodial mother, having remarried to a Jewish man, claimed an obviously trivial medical justification to support the circumcision of her nine-year-old son, apparently to accommodate the comfort of her new spouse. The intact (not circumcised) gentile father, from non-circumcising Europe, interposed an objection. Weighing the evidence as too slight to require medical intervention, and declining to rule on the religious issue, Judge Kaplan enjoined the circumcision until the child reaches 18 and could choose for himself.

We believe that was a humane and Solomonic decision. No one lost anything by waiting for the child's assent at majority —importantly— not the child himself.

The instant case of Misha/Jimmy parallels the Chicago case, but the claimed need to circumcise the boy Misha/Jimmy states an even weaker claim. In the case at bar the father has offered no viable medical reason for his son to be circumcised, and none would likely withstand medical scrutiny.⁷³ The father claims mostly that his newly acquired religious identity ought to trump his own son's right to a natural body (and the rights of

⁷³ There is a reference in the father's brief to the boy having 'glandular adhesions,' but these, more properly called a natural connective lamina, are entirely expected and normal, and often do not disappear until age 17 or 18. They are no indication of pathology and do not require medical attention. This is similar to the weak claims made —and discounted— in the Chicago case.

both the natural mother and Misha/Jimmy to their religion of origin).⁷⁴ The father is thus stating a claim to a religious *practice*, a claim which goes impermissibly beyond the constitutional protection of his religious *beliefs*.

In any case, the father's affidavit indicating that he has converted refers to a lay congregation, Congregation B'nai Torah, Olympia, Washington. This congregation does not have a resident rabbi and holds services irregularly. It may be a '*chavurah*'—a 'fellowship' of people who join to conduct services suitable to their tastes. It can hardly be considered representative of the larger Jewish community.

Moreover, the father's allegations of legitimate conversion have not been subject to inquiry, including cross-examination by counsel, testimony of the (required) three converting rabbis, submission for inspection of the required documents of conversion, or separate inquiry by an Oregon Court.

It may be that the father is circumcised and the notion that his younger son must "look like him" is a parallel or contributing motive behind his religious conversion. We at D.O.C. are familiar with the phenomenon—it is called 'adamant-father syndrome.'⁷⁵ Making sense of what happened to one as a child can take the form of insisting one's son undergo the same sacrifice, the same logic used by East African mothers to justify the circumcision of their daughters. It makes perfect psychological sense, even if it reflects dubious bioethics, and in the instance of an older child—and lacking medical necessity—heartlessness bordering on cruelty.

⁷⁴ *Affidavit of James H. Boldt*, June 8, 2004 at.6.

⁷⁵ Gregory J. Boyle, Ronald Goldman, J. Steven Svoboda & Ephrem Fernandez. *Male circumcision: pain, trauma and psychosexual sequelae*. 7 J Health Psychology 329-343 (2002). Available at: <http://www.cirp.org/library/statements/cps2/> Accessed February 10, 2007.

If the reasoning of the U.S. Supreme Court in *Prince*⁷⁶ and its progeny is sound, the father's constitutional right to the free expression of religion should not reach as far as the power to impose an unnecessary surgery, (a regulatable religious *practice* as opposed to a protected *belief*), on a healthy child, regardless of the level of the father's sincerity, if such a thing could be meaningfully measured.

We fully agree with *Prince*. We assert the father's protected religious *beliefs*, even if sincere and in accord with Jewish law (the *Halacha*) do not, cannot, and should not overcome the child's more fundamental natural and human rights to protection from a harmful religious *practice*.

XII. THE NATURE OF THE PART PROPOSED TO BE AMPUTATED BY CIRCUMCISION.

The foreskin, or prepuce, has been traditionally described as a simple fold of skin, purpose and function unknown.⁷⁷ In reality, the prepuce is a complex structure with multiple anatomical and physiological functions only fully explored in recent decades.⁷⁸ Its value as a normal structure of the body has been appreciated in non-Anglophone societies (where circumcision has been historically rejected) for centuries.

The adult prepuce is a folded cylinder of tissue, which unrolled and unfolded will equal approximately 15 square inches in area, the size of a postcard. The folded prepuce forms 50% of the entire covering of the penis. It is composed of skin, mucosa, specialized nerves, blood vessels, and muscle fibers. It is anchored by the abdominal wall at the

⁷⁶ 321 U.S. 158.

⁷⁷ P. L. Williams, R. Warwick, M. Dyson, *et al* (eds): *Gray's Anatomy*, 37th ed, Churchill Livingstone, New York, 1989: 1432.

⁷⁸ Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl. 1 BJU Int 34-44 (1999). Reproduced as Appendix F, App-35. Available at: <http://www.cirp.org/library/anatomy/cold-taylor/>

proximal (outer) end of the glans penis. It is not attached to the shaft of the penis, so it is free to slide back and forth, everting and inverting as it travels back and forth.⁷⁹ The sliding/rolling back and forth is called the *gliding action*.⁸⁰ The flexible foreskin is a protective and adaptive anatomical feature of all mammals and has endured unchanged for an estimated 65 million years.⁸¹

In most males, a frenulum is found on the ventral (lower) side of the penis. The frenulum serves to tether a movable structure to a non-movable structure, and with the penile frenulum, it returns the foreskin to its forward normal protective position.⁸² Most men report that the frenulum is a highly erogenous structure.

The prepuce covers and protects the glans penis and urinary meatus (outer opening). The prepuce protects the sterile urinary tract environment and maintains the moist mucosa.⁸³ Several medical scholars have commented on the uniquely dense innervation (sensitivity) of the prepuce. Winkelmann (1956, Mayo Clinic) wrote, "...it is a region of great sensitivity and possessed of an abundant nerve supply."⁸⁴ Falliers

⁷⁹ S. Lakshmanan & Satya Prakash. *Human prepuce: some aspects of structure and function*. 44 Indian J Surg 134 (1980). Available at: <http://www.cirp.org/library/anatomy/lakshmanan/> Accessed February 10, 2007.

⁸⁰ See id.

⁸¹ Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl. 1 BJU Int 34-44 (1999) Available at: <http://www.cirp.org/library/anatomy/cold-taylor/> Accessed February 10, 2007.

⁸² Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl 1 BJU Int 34-44 (1999). Available at: <http://www.cirp.org/library/anatomy/cold-taylor/> Accessed February 10, 2007.

⁸³ Satya Parkash, Rao Raghuram, K. Venkatesan & S. Ramakrishnan. *Sub-preputial wetness - Its nature*. 18 Ann Nat Med Sci (India) 109 (1982). Available at: <http://www.cirp.org/library/anatomy/prakash/> Accessed February 10, 2007.

⁸⁴ R. K. Winkelmann. *The cutaneous innervation of human newborn prepuce*. 26 J Invest Dermatol 53-67 (1956). Available at: <http://www.cirp.org/library/anatomy/winkelmann2/> Accessed February 10, 2007.

(1970) noted the “sensory pleasure associated with tactile stimulation of the foreskin.”⁸⁵

Moldwin & Valderrama (1989) reported an extensive neuronal network in the prepuce.⁸⁶ Winkelmann (1959) described the prepuce as a specific erogenous zone with nerves arranged near the surface in rete ridges.⁸⁷ Taylor *et al.* (1996) also found nerves near the surface in rete ridges and further described a concentration of nerve endings in a ring of ridged tissue just inside the tip of the prepuce, which they named the *ridged band*.⁸⁸ These nerve endings are stimulated when the stretching of the prepuce deforms the stretch receptors in the nerve endings.

The nerves of the penis, including the preputial nerves, supply sensory input to both the somatosensory and autonomic nervous systems by different routes.⁸⁹ The sensory input to the somatosensory nervous system is supplied through the dorsal (upper) nerve of the penis and the autonomic nervous system is supplied through the parasympathetic nerves, which run adjacent to and through the wall of the membranous urethra.

The prepuce is equipped with an extensive vascular network to bring oxygen to support the substantial innervation⁹⁰ and it provides protective immunological functions

⁸⁵ C. J. Falliers. *Circumcision*. 214 JAMA 2194 (1970). Available at: <http://www.cirp.org/library/general/falliers1/> Accessed February 10, 2007.

⁸⁶ R. M. Moldwin & E. Valderrama. *Immunochemical analysis of nerve distribution patterns within prepuce tissue*. 141 Part 2 J Urol 499A (1989). Available at: <http://www.cirp.org/library/anatomy/moldwin1/> Accessed February 10, 2007.

⁸⁷ R. K. Winkelmann. *The erogenous zones: their nerve supply and significance*. 34 Mayo Clin Proc 39 (1959). Available at: <http://www.cirp.org/library/anatomy/winkelmann/> Accessed February 10, 2007.

⁸⁸ John R. Taylor, A. P. Lockwood & A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 Br J Urol 291 (1996). Appendix G; App-46. Available at: <http://www.cirp.org/library/anatomy/taylor007>.

⁸⁹ Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl. 1 BJU Int 34-44 (1999). Appendix F, App-35. Available at: <http://www.cirp.org/library/anatomy/cold-taylor/>

⁹⁰ Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl 1 BJU Int 34-44 (1999); Paul Fleiss, Frederick Mansfield Hodges & Robert S. Van Howe. *Immunological*

which help to protect the body from pathogens.⁹¹ These include:

- sphincter action of the preputial orifice functions like a one-way valve, allowing urine to flow out but preventing the entry of contaminants and pathogens.
- an inner prepuce which contains apocrine glands, secreting lysozyme, an enzyme that destroys pathogens by breaking down their cell walls.
- smegma, a natural substance which lubricates and protects the mucosa of the glans penis.
- high vascularity which swiftly conveys phagocytes to fight infection.
- The epidermis of the prepuce contains Langerhans cells which secrete cytokines,⁹² hormone-like low molecular-weight proteins, regulating the intensity and duration of immune responses, as well as Langerin, an immune substance.⁹³

In summary, the foreskin or prepuce is highly specialized tissue composed of muscle, nerves, blood vessels, skin, and mucosa. It protects the glans penis throughout life; it protects against infection; it has sensory functions that help to provide normal human sexual response, and the gliding action facilitates sexual intercourse at adulthood.

Thus circumcision is a permanent and irreversible excision and amputation of

functions of the human prepuce. 74 Sex Trans Inf 364-7 (1998) Appendix E, App-31.

⁹¹Paul Fleiss, Frederick Mansfield Hodges & Robert S. Van Howe. *Immunological functions of the human prepuce.* 74 Sex Trans Inf 364 (1998). Available at: <http://www.cirp.org/library/disease/STD/fleiss3/> Accessed February 10, 2007.

⁹²Christopher J. Cold & John R. Taylor. *The prepuce.* 83 Suppl. 1 BJU Int 34-44 (1999); Paul Fleiss, Frederick Mansfield Hodges & Robert S. Van Howe. *Immunological functions of the human prepuce.* 74 Sex Trans Inf 364-367 (1998). Available at: <http://www.cirp.org/library/disease/STD/fleiss3/> Accessed February 10, 2007.

⁹³ March 4, 2007, online issue of Nature Medicine Accessed March 6, 2007; <http://www.nature.com/nm/journal/vaop/ncurrent/abs/nm1541.html>. doi:10.1038/nm1541 Lot de Witte, Alexey Nabatov. *Langerin is a natural barrier to HIV-1 transmission by Langerhans cells.* Department of Molecular Cell Biology and Immunology, VU University Medical Center Amsterdam, The Netherlands.

functional body parts that, once destroyed, can never be fully restored.

XIII. CIRCUMCISION POSES UNAVOIDABLE PHYSICAL RISKS TO THE CHILD MISHA/JIMMY

No medical necessity for the proposed circumcision has thus far been demonstrated; the child is healthy; the procedure is wholly religious. Indeed the procedure is fraught with dangers to the child, no matter the care taken by the surgeon. Male circumcision is a surgical operation, and as with any other surgery, circumcision has risks, disadvantages, and drawbacks. Even ignoring psychological consequences, circumcision, whether Jewish or medical, though simple to perform, is not a benign procedure for any patient regardless of age.⁹⁴

A substantial and credible body of medical evidence has developed about

⁹⁴ While preparing this brief, the British media reported the death of Amitai Moshe. Amitai was born on January 25, 2007. The presumably healthy boy was circumcised at Golders Green Synagogue in North London on February 1, 2007. He suffered an apparent heart attack and breathing problems only minutes after his circumcision. He was transported from the synagogue directly to hospital where he died on February 9, 2007. The case currently is under investigation by the Metropolitan Police serious crime directorate (Scotland Yard). *The Guardian*, London, February 17, 2007 Available at: <http://www.guardian.co.uk/religion/Story/0,,2015266,00.html> Accessed February 20, 2007.

circumcision's risks,^{95 96} losses,⁹⁷ and pain.^{98 99 100} At the same time, the historical medical rationale and justifications have evaporated. Worldwide research efforts yield **no** medical benefit of any worth, accruing in the short or long term, which would counterbalance the proven risks to the child.^{101 102 103 104 105 106 107 108 109 110 111 112 113 114} The immediate

⁹⁵ George W. Kaplan. *Complications of circumcision*. 10 Urol Clin N Amer 543 (1983) Available at: <http://www.cirp.org/library/complications/kaplan/> Accessed February 10, 2007.

⁹⁶ Nigel Williams & Leela Kapila. *Complications of circumcision*. 80 Br J Surg 1231-1236 (1993). See: Appendix D, App-25. Available at: <http://www.cirp.org/library/complications/williams-kapila/>.

⁹⁷ John R. Taylor, A. P. Lockwood & A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 Br J Urol 291 (1996). Appendix G; App-46. Available at: <http://www.cirp.org/library/anatomy/taylor/>.

⁹⁸ Luther M. Talbert, Earnest N. Kraybill, 7 H. M. Potter. *Adrenal cortical response to circumcision in the neonate*. 46 Obstet Gynecol 208 (1976). Available at: <http://www.cirp.org/library/pain/talbert/> Accessed February 10, 2007.

⁹⁹ Megan R. Gunnar, Robert O. Fisch, Sherry Korsvik, & John M. Donhowe. *The effects of circumcision on serum cortisol and behavior*. 6 Psychoneuroendocrinology 269 (1981) Available at: <http://www.cirp.org/library/pain/gunnar/> Accessed February 10, 2007.

¹⁰⁰ P.S. Williamson & M. L. Williamson. *Physiologic stress reduction by a local anesthetic during newborn circumcision*. 71 Pediatrics 36 (1983). Available at: <http://www.cirp.org/library/pain/williamson/> Accessed February 10, 2007.

¹⁰¹ Douglas Gairdner. *The fate of the foreskin: a study of circumcision*. 2 Br Med J 1433 (1949). Available at: <http://www.cirp.org/library/general/gairdner/> Accessed February 10, 2007.

¹⁰² J. E. Wright. *Non-therapeutic circumcision*. 1 Med J Aust 1083 (1967) Available at: <http://www.cirp.org/library/general/wright4/> Accessed February 10, 2007.

¹⁰³ I. O. W. Leitch. *Circumcision - a continuing enigma*. 6 Aust Paediatr J 59-65 (1970). Available at: <http://www.cirp.org/library/general/leitch1/> Accessed February 10, 2007.

¹⁰⁴ American Academy of Pediatrics, Committee on Fetus and Newborn. *Standards and Recommendation for Hospital Care of Newborn infants*. 5th ed. Evanston, IL: American Academy of Pediatrics, 1971:110.

¹⁰⁵ E. Noel Preston. *Whither the foreskin*. 213 JAMA 1853-8 (1970). Available at: <http://www.cirp.org/library/general/preston/> Accessed February 10, 2007.

¹⁰⁶ Fetus and Newborn Committee. FN 75-01 *Circumcision in the Newborn Period*. 8 CPS News Bull Suppl 1 (1975).

¹⁰⁷ H.C. Thompson, Lowell R. King, E. Knox, et al. *Report of the ad hoc task force on circumcision*. 56 Pediatrics 610 (1975). Available at: <http://www.cirp.org/library/statements/aap/#a1975> Accessed February 10, 2007.

¹⁰⁸ David A. Grimes. *Routine circumcision of the newborn: a reappraisal*. 130 Am J Obstet Gynecol 125 (1978). Available at: <http://www.cirp.org/library/general/grimes/>

complications of circumcision include hemorrhage, infection, major surgical mishap, and other miscellaneous complications, even death.¹¹⁵ Hemorrhage of as little as two ounces of blood has resulted in the death of children.¹¹⁶ Infection, although usually of a minor local nature, can become life-threatening systemic infection and result in death.¹¹⁷ Surgical accident can result in urethral fistula,¹¹⁸ denudation of the penile shaft by

Accessed February 10, 2007.

¹⁰⁹ Fetus and Newborn Committee. *Benefits and risks of circumcision: another view*. 126 *Can Med Assoc J* 1399 (1982). Available at: <http://www.cirp.org/library/statements/cps2/> Available at: <http://www.cirp.org/library/statements/cps2/> Accessed February 10, 2007.

¹¹⁰ Fetus and Newborn Committee, Canadian Paediatric Society. *Neonatal circumcision revisited*. 154 *Can Med Assoc J* 769 (1996). Available at: <http://www.cps.ca/english/statements/FN/fn96-01.htm> Accessed February 14, 2007.

¹¹¹ American Academy of Pediatrics Task Force on Circumcision. *Circumcision Policy Statement*. 103 *Pediatrics* 686 (1999). Available at: <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;103/3/686> Accessed February 14, 2007.

¹¹² Council on Scientific Affairs, American Medical Association. *Neonatal circumcision*. Chicago: American Medical Association, December 1999. Available at: <http://www.ama-assn.org/ama/pub/category/13585.html> Accessed February 14, 2007.

¹¹³ AAFP Commission on Clinical Policies and Research. *Position Paper on Neonatal Circumcision*. Leawood, Kansas: American Academy of Family Physicians, 2002. Available at: <http://www.aafp.org/online/en/home/clinical/clinicalrecs/circumcision.html> Accessed February 14, 2007.

¹¹⁴ Stuart Beasley, Brian Darlow, Jonathan Craig, Des Mulcahy & Grahame Smith. *Position statement on circumcision*. Sydney: Royal Australasian College of Physicians, 2004. Available at: <http://www.racp.edu.au/download.cfm?DownloadFile=A453CFA1-2A57-5487-DF36DF59A1BAF527> Accessed February 27, 2007.

¹¹⁵ Nigel Williams & Leela Kapila. *Complications of circumcision*. 80 *Brit J Surg* 1231-1236 (1993). Appendix D; App-25. Available at: <http://www.cirp.org/library/complications/williams-kapila/>

¹¹⁶ T. E. C. Newell. *Judgement of inquiry into the death of McWillis, Ryleigh Roman Bryan. Burnaby, B.C.*: British Columbia Coroner's Service, Monday, 19 January 2004;

¹¹⁷ Jacqueline M. Scurlock & J. Patrick. *Neonatal meningitis and circumcision*. 1 *Med J Aust* 332-334 (1977); T. G. Cleary & S. Kohl. *Overwhelming infection with group B beta-hemolytic streptococcus associated with circumcision*. 64 *Pediatrics* 301-303 (1979).

¹¹⁸ R. D. Limaye & R. A. Hancock. *Penile urethral fistula as a complication of circumcision*. 72 *J Pediatr* 105-106 (1968). Available at: <http://www.cirp.org/library/complications/limaye/> Accessed February 20, 2007.

removal of excessive skin,¹¹⁹ amputation of part or all of the glans penis,¹²⁰ and total loss of the penis.¹²¹ Impotence and an increase in erectile dysfunction has been reported.¹²²

Pain is the most usual complication during recovery, but there are others, such as dehiscence or separation of the skin at the surgical wound. Even uncomplicated recovery takes about fourteen days.¹²³

We cannot detail here the many unique surgical risks to Misha/Jimmy – hemorrhage, excision of too much tissue, severing of vital nerves and arteries, etc. – too numerous to enumerate, but of which the Court can take judicial notice. There are over 100 different publications on circumcision risks and dangers (including penile reconstruction methods after circumcision accidents) detailed in our medical literature.

One study pegs the complication rate as high as 55%,¹²⁴ a rate depending on how narrowly one defines ‘complication.’ Another study shows that fully 71% of patients develop late-appearing adhesions which then require further medical or surgical

¹¹⁹ Jose R. Sotolongo, Saul Hoffman & Michael E. Gribetz. *Penile denudation injuries after circumcision*. 133 J Urol 102-103 (1985). Available at: <http://www.cirp.org/library/complications/sotolongo1/> Accessed February 20, 2007.

¹²⁰ K. A. Hanash. *Plastic reconstruction of partially amputated penis at circumcision*. 18 Urology 291-293 (1981).

¹²¹ G. Audry, J. Buis J, M. P. Vazquez & M. Gruner. *Amputation of penis after circumcision--penoplasty using expandable prosthesis*. 4 Eur J Pediatr Surg 44-45 (1994).

¹²² Joseph M. Stinson. *Impotence and adult circumcision*. 65 J Nat Med Assoc 161 (1973); John M. Palmer, Daniel Link. *Impotence following anesthesia for elective circumcision*. 241 JAMA 2635 (1979); Kenneth S. Fink, Culley C. Carson, Robert S. DeVellis. *Adult Circumcision Outcomes Study: Effect on Erectile Function, Penile Sensitivity, Sexual Activity and Satisfaction*. 167 J Urol 2113 (2002).

¹²³ D. Mervyn Griffiths, J. D. Atwell, N. V. Freeman. *A prospective survey of the indications and morbidity of circumcision in children*. 11 Eur Urol 184-187 (1985). Available at: <http://www.cirp.org/library/complications/griffiths/> Accessed February 21, 2007.

¹²⁴ Hawa Patel. *The problem of routine infant circumcision*. 95 Can Med Assoc J 576-581(1966).

attention.¹²⁵

[As a physicians' group opposed to genital amputations lacking therapeutic justification, we submit that *all* circumcisions have a 100% complication rate: the child loses something natural and valuable to which he is entitled, but gains only an imaginary religious advantage in the eyes of adults, and no anatomical benefit of his own as bioethics requires.]

Virulent community-acquired methicillin-resistant *Staphylococcus aureus* (CA-MRSA) is another emerging risk factor.¹²⁶ The presence of CA-MRSA in the community and in hospital increase risk factors for all surgical patients well beyond historical norms. There is a significant increase in mortality.¹²⁷ No honest physician could claim a surgical setting totally free of these pathogens, which are both hospital-mutated and community-acquired, and pass back and forth between medical facilities and the public at large. We feel obliged to quote *Prince v. Massachusetts* briefly, once more for emphasis, as *Prince* is remarkably prescient on the risk of infection, some 63 years after this writing:

“The right to practice religion freely does not include liberty to expose the community or the child [p167] to communicable disease or the latter to ill health or death.” (Emphasis ours)

XIV. CIRCUMCISION ALSO POSES SUBSTANTIAL PSYCHOLOGICAL RISKS TO THE CHILD MISHA/JIMMY

There are psychological risks involved as well. Some males resent an unnecessary

¹²⁵ 164 J Urol 495-496 (2000).

¹²⁶ N. Zetola, J. S. Francis, E. L. Nuernberger & W. R. Bishai. *Community-acquired methicillin-resistant Staphylococcus aureus: an emerging threat*. 5 Lancet Infect Dis. 275-286 (2005).

¹²⁷ Sara E. Cosgrove, George Sakoulas, Eli N. Perencevich, Mitchell J. Schwaber, Adolf W. Karchmer, & Yehuda Carmeli. *Comparison of Mortality Associated with Methicillin-Resistant and Methicillin-Susceptible Staphylococcus aureus Bacteremia: A Meta-analysis*. 36 Clinical Infectious Diseases 53-59 (2003).

and involuntary genital diminution all of their lives. Circumcision causes a measurable physical loss¹²⁸ but some men, confronting a *fait accompli* which occurred at their infancy, and under conformist pressure, may choose to deny their loss, and this is commonplace, especially in Anglophone countries.

But beyond the physical risk and loss is the well-understood risk that the older child will develop phobias and fears about his masculinity and a diminished self-image as a result of unnecessary diminution of his genitalia at a critical time in his life.¹²⁹ Modern urologists recognize that surgery to the genitalia suggests castration and mutilation to the child, even when the surgery is *necessary*.¹³⁰ Such patients must be carefully prepared and reassured and cannot be blind-sided, surprised, coerced or cajoled. Where the surgery is unnecessary and the patient healthy, those reassurances cannot logically exist.¹³¹

Psychologist Dr. Ronald Goldman writes:

“Although there are differences between the circumstances and age at the time of loss, the feeling that an important part of the body is missing is common to mastectomy and circumcision (for some men). The feeling of 'not being a whole man' can be especially distressing.”¹³²

¹²⁸ John R. Taylor, A. P. Lockwood & A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 Br J Urol 291-205 (1996). Appendix G; App-46. Available at: <http://www.cirp.org/library/anatomy/taylor/>.

¹²⁹ *Timing of Elective Surgery Genitalia of Males*. 97 Pediatrics 590-594 (1996) Available at: <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;97/4/590> Accessed February 10, 2007;

¹³⁰ David Levy. *Psychic trauma of operations in children*. 69 Am J Dis Child. 7-25 (1945).

¹³¹ C. S. Schneider. *An Analysis of Presurgical Anxiety in Boys and Girls*. Ann Arbor, MI: University of Michigan; 1960. Doctoral dissertation

¹³² Ronald Goldman. *The psychological impact of circumcision*. 83 Supplement BJU International 93-103 (1999). Available at: <http://www.cirp.org/library/psych/goldman1/> Accessed February 10, 2007.

Psychologist Dr. Gocke Cansever writes:

“By weakening the controlling and defensive mechanisms of the ego, and initiating regression, it [circumcision] loosens the previously hidden fears, anxieties, and instinctual impulses, and renders a feeling of reality to them. .. [T]he ego of the child seeks safety in total withdrawal, this isolates and insulates itself from disturbing stimuli.”¹³³

The literature of urology presents numerous examples. An eleven-year-old boy who was circumcised reacted badly to his circumcision and developed dissociative disorder.¹³⁴ Another boy developed castration anxiety.¹³⁵

We cannot predict how sturdy Misha/Jimmy would be in facing his loss within his family, or even during the many years after he becomes emancipated. It does not take a psychiatrist to speculate that there is a risk he might become withdrawn or hostile, having been used as a pawn in a power struggle between his parents, in a very permanent way.

How does one prepare a healthy child for a surgery that he neither needs, nor wants, nor fully understands? What rationale would reassure Misha/Jimmy? Is his father’s religious epiphany sufficient? Will Misha/Jimmy come to regret having relented under parental pressure? Does he even have the right to assent, and may the father depend on the assent of a child?

The circumcision of Misha/Jimmy would likely play a symbolic role in the Boldt

¹³³Gocke Cansever. *Psychological effects of circumcision*. 38 Brit J Med Psychol 321-331 (1965). Available at: <http://www.cirp.org/library/psych/cansever/> Accessed February 10, 2007.

¹³⁴Elmer W. Gerharz, Philip G. Ransley, Christopher R.J. Woodhouse. *Urinary retention, erectile dysfunction and penile anaesthesia after circumcision: a mixed dissociative (conversion) disorder*. 37 Int Urol Nephrol 525-527 (2005). Available at: <http://www.cirp.org/library/complications/gerharz1/> Accessed February 21, 2007.

¹³⁵Hansi Kennedy. *Trauma in childhood: Signs and sequelae as seen in the analysis of an adolescent*. 41 Psychoanal Study Child 209-219 (1986). Available at: <http://www.cirp.org/library/psych/kennedy/> Accessed February 21, 2007.

family that exceeds its (non-existent) value in purely medical terms. Misha/Jimmy's altered genitalia would become a permanent, irrevocable symbol of the father's triumph over both the boy and his mother. The psychological damage to the child might well be permanent and cannot be gainsaid.

XV. NO COMPELLING MEDICAL REASON FOR MISHA/JIMMY'S CIRCUMCISION HAS BEEN SUGGESTED

As we detailed above, circumcision is significant surgery, with well-documented and statistically unavoidable risks to Misha/Jimmy. With a young adult, general anesthesia would be ethically and clinically required, along with *its* attendant risks. A topical anesthesia, (a 'numbing' agent applied to the outer skin in an outpatient setting), as suggested by one witness for the father, is utterly unacceptable under modern clinical and ethical guidelines for a surgery so extensive.

Where no necessity or the most scanty medical reason is suggested, both anesthesia¹³⁶ and surgery are an unnecessary risk not counter-balanced by a commensurate gain to the child, who gets nothing for the risk he is obliged to undertake.

Only the father benefits in this case, and only if one credits his belief system at face value. Surely the right to religious freedom of *belief* does not to reach as far as a religious *practice* endangering the health and psychological well-being of Misha/Jimmy, merely to accommodate the wishes of the father.

¹³⁶ L. Turet, T. Y. Nivoche, R Hatton, *et al.* *Complications related to anaesthesia in infants and children: prospective survey of 40 /240 anaesthetics.* 61 Br J Anaesth 263-269 (1988). R.M. Smith. *Anesthesia for Infants and Children.* 4th ed. St Louis: CV Mosby; 1980:653-661. J. F. Mayhew & W. S. Guinness. *Cardiac arrest due to anesthesia in children.* 256 JAMA. 216 (1986). Letter, R. I. Patel, R. S. Hanallah. *Anesthetic complications following pediatric ambulatory surgery: a 3-year study.* 69 Anesthesiology. 1009 (1988). W. L. Roy, J. Lerman. *Laryngospasm in pediatric anaesthesia.* 35 Can J Anaesth. 93 (1988).

And that applies doubly where the child is opposed to his own conversion or to the circumcision himself, or is at least unsure of his duty to his caregivers, by whom he may have been coerced or guilted into confused acquiescence.

XVI. NO MEDICAL SOCIETY IN THE WORLD RECOMMENDS NON-THERAPEUTIC CIRCUMCISION AS APPROPRIATE OR NECESSARY "MEDICAL CARE"

The father has tried to justify the religious circumcision by characterizing it in the alternative as an arguable ‘prophylactic’ procedure that benefits Misha/Jimmy. But not a single medical society in the world would agree with him. The American Medical Association dismisses male circumcision simply as ‘non-therapeutic.’ The American Academy of Pediatrics, which takes the lead in the U.S. on this issue, in their most recent statement of 1999 claim some minor medical advantages but deem them insufficient.¹³⁷

Medical societies not much farther afield are even more cautious. The College of Physicians and Surgeons of British Columbia, the regulatory body in that Canadian province, warns:

“Under the Canadian Charter of Rights and Freedoms and the United Nations Universal Declaration of Human Rights, an infant has rights that include security of person, life, freedom and bodily integrity. Routine infant male circumcision is an unnecessary and irreversible procedure. Therefore, many consider it to be “unwarranted mutilating surgery.”¹³⁸

Similarly, the Royal Australasian (Australia and New Zealand) Association of

¹³⁷ “...data are not sufficient to recommend routine neonatal circumcision.” American Academy of Pediatrics Task Force on Circumcision. *Circumcision Policy Statement*. 103 Pediatrics 686 (1999). Available at: <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;103/3/686> Accessed February 20, 2007.

¹³⁸ *Infant Male Circumcision*. In: Resource Manual for Physicians. Vancouver, BC: College of Physicians and Surgeons of British Columbia, 2004. Available at: https://www.cpsbc.ca/cps/physician_resources/publications/resource_manual/malecircum Accessed February 10, 2007.

Pediatric Surgeons advises its members:

“We do not support the removal of a normal part of the body, unless there are definite indications to justify the complications and risks which may arise. In particular, we are opposed to male children being subjected to a procedure, which had they been old enough to consider the advantages and disadvantages, may well have opted to reject the operation and retain their prepuce.”¹³⁹

Thus the father cannot double-up his justification —insisting that Judaism requires circumcision and also suggesting he has the best medical interests of his child in mind. It is one –or the other: either sound medicine, or a defensible exercise of religious rights, considered independently rather than added together to compensate for the shortcomings of each.

Religious circumcision gains no legitimacy by alleging a medical benefit, especially where world medical societies themselves expressly decline to support the practice.

Medical opinion and alleged medical benefits are also irrelevant in a ritual circumcision. Unproven medical claims have been introduced in ritual settings to counter ambivalence by wavering parents. Either Misha/Jimmy should have a ritual circumcision at age 18 or later because conversion is his sincere mature desire, OR he should request a medical circumcision at that age because he has reviewed the medical literature and concluded that this would be in his best medical interest.

XVII. CIRCUMCISED CHILDREN ARE NOW A MINORITY ON THE U.S. WEST COAST

The rate of circumcision on U.S. West Coast—(CA, OR, WA), has been dropping

¹³⁹ J. Fred Leditshke. *Guidelines for Circumcision*. Australasian Association of Paediatric Surgeons. Herston, QLD: 1996

for decades, is now less than 26%, and will surely drop much further. The child Misha/Jimmy, if circumcised, would be in a minority among his West Coast peers, with whatever psychological or social effect that might entail. Jews themselves are in a minority in southern Washington State, and some will have chosen Brit Shalom¹⁴⁰ rather than circumcision as their sign of membership to the Jewish community. (And Misha/Jimmy is not Jewish, as Judaism is matrilineal; Jewish law grants birthright Judaism only to those born of a Jewish mother, as the respondent admits.¹⁴¹)

XVIII. MISHA/JIMMY IS PROTECTED BY WASHINGTON CONSTITUTIONAL LAW

Misha/Jimmy's father has established residence for himself and Misha/Jimmy on the soil of Washington where they reside under the protection of the laws of Washington. Misha/Jimmy's father, who practices law in Washington,¹⁴² is now asking Oregon to legitimize an act clearly unlawful in Washington state.¹⁴³ Washington constitutional law provides protection for (and more importantly, *from*) religious rights as follows:

SECTION 11 RELIGIOUS FREEDOM.

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, ***and no one shall be molested or disturbed in person or property on account of religion;*** but the liberty of conscience hereby secured *shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state....* [AMENDMENT 88, 1993 House Joint Resolution

¹⁴⁰ *Brit shalom* is a peaceful non-cutting naming ceremony in which the child is not harmed in any way. It is increasingly becoming popular among Jewish parents.

¹⁴¹ *Affidavit of James H. Boldt*, June 8, 2004, at 10.

¹⁴² The address of Mr. Boldt's law practice is PMB 301, 800 Sleater Kinney Rd SE, Lacey, WA 98503-1127. His Washington attorney number is 32225. He was admitted to practice in Washington on May 30, 2002. He has a significant and long-standing connection with Washington state.

¹⁴³ Edwin B. Baxter, who attempted to perform a circumcision he alleged was religiously mandated, on his own son, was sentenced by Superior Court Judge James Rulli in Clark County, Washington, to three years in jail on December 15, 2004. *State v. Baxter* (2004).

No. 4200, p 3062. Approved November 2, 1993.] (Emphasis added)¹⁴⁴
 Misha/Jimmy enjoys protection from molestation or disturbance of his person on account of religion. The Washington Constitution does not permit religious *practices* inconsistent with the peace and safety of the state or its citizens. Non-therapeutic, merely religious circumcision of Misha/Jimmy would certainly be prohibited under this clause.

Misha/Jimmy is “entitled to all privileges and immunities of citizens in the several states.”¹⁴⁵

The full faith and credit clause provides:

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.¹⁴⁶

Moreover, the laws of Washington do not conflict with the laws of Oregon in this regard. Oregon may honor and respect the extra protection extended Misha/Jimmy by Washington law without offending the sovereignty of Oregon. Misha/Jimmy¹⁴⁷ and his father both have significant connections with Washington (where his father practices law). It would be in Misha/Jimmy’s best interests and well-being for this Honorable Court to respect Washington law in this case.

Thus the respondent’s attempt to evade Washington civil rights protection for his own son is offensive to the spirit, and perhaps the letter, of the full faith and credit clause. This honorable Court should not entertain this improper request on that basis alone.

¹⁴⁴ Washington Const. art. 1, § 11. This section of the Washington Constitution is in accord with the ICCPR, art. 18, and *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹⁴⁵ U. S. Const. art. IV, §2.

¹⁴⁶ U. S. Const. art. IV, §1.

¹⁴⁷ Misha/Jimmy attends public schools in Olympia, Thurston County, Washington. He receives eye and dental care in Olympia, Washington. The father admits Misha/Jimmy’s significant connection with Washington. *Affidavit of James H. Boldt*, June 8, 2004 at 3-6.

XIX. SUMMATION

The matter before the court is a child custody /discretion of the custodial parent issue that arises out of the divorce of Misha/Jimmy's parents. The best interests and welfare of Misha/Jimmy and *no other person* are at issue and at stake here.¹⁴⁸ The trial court's duties are described by ORS 107.425, which grants the trial court extensive powers to obtain information. Although permissive in nature, clearly the legislative intent is that the trial court should determine the facts before making a decision regarding a child. The court has been given adequate powers to determine the facts. The court may appoint experts to advise it. The court may appoint a guardian *ad litem* to protect Misha/Jimmy's interests.¹⁴⁹ Although Misha/Jimmy's physical integrity is at risk,¹⁵⁰ his specific and separate interests have not been accommodated. In effect, the trial court took only limited action to protect his best interests and welfare. Trial courts traditionally are granted broad discretion in custodial issues. That discretion, however, is not so broad as to allow the overarching constitutional and international treaty law to be ignored.

The father has adopted a religion *some* of whose adherents profess a *belief* in the sacrifice of circumcision regardless of its anatomical result. This is not Misha/Jimmy's religion, yet the trial and appellate courts would authorize the diminution of Misha/Jimmy's genitalia based on protected religious *beliefs* of the father, when religious *practices* which might harm the child are forbidden. Such license is completely abhorrent for human rights, legal, and ethical reasons.

¹⁴⁸ ORS 107.137

¹⁴⁹ ORS 107.425(6).

¹⁵⁰ John R. Taylor, A. P. Lockwood & A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 Br J Urol 291 (1996). App-46.

The trial court has failed to respect Misha/Jimmy's paramount religious rights under the First Amendment to the United States Constitution; the Oregon Constitution, Article one, Sections Two and Three; the Washington Constitution, Article one, § eleven; and the ICCPR, Article 18.

The cutting of the genital organs of a female is a felony under both federal and Oregon state law.¹⁵¹ Similar protection of the genital organs is not yet provided to males. But classification by gender, however, must substantially further "important governmental objectives" and must bear a "rational relationship to that objective."¹⁵² The required important governmental objective and rational relationship thus far has *not* been demonstrated. The United States Supreme Court, on several occasions, has held that sex-based discrimination warrants heightened scrutiny on the part of courts.¹⁵³ The United States Supreme Court says:

"Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."¹⁵⁴

Both the trial Court and the Court of Appeals have declined to provide this required scrutiny, and by doing so, have denied Misha/Jimmy the equal protection of the law.¹⁵⁵

The trial court's failure to ascertain the facts results in a denial of due process of

¹⁵¹ 18 U.S.C. §116, ORS 163.207.

¹⁵² *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁵³ *Craig v. Boren*, 429 U.S. 190 (1976);

¹⁵⁴ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁵⁵ U.S. Const. amend. XIV, §1; Oregon Const, article 1; ICCPR, art. 16.

law, to which Misha/Jimmy is also entitled.¹⁵⁶ He has a right to be recognized as a human being before the law,¹⁵⁷ and to have his rights under the common law, the United States Constitution, the Oregon Constitution, and the ICCPR, as described above, respected and enforced by the Oregon court system.

Under the doctrine of *parens patriae* the State of Oregon has the sovereign duty to provide protection to those unable to care for themselves.¹⁵⁸ Misha/Jimmy's best interests and welfare may best be obtained by enforcement of his rights, privileges, and immunities under the common law, federal and state constitutional law, and the ICCPR.

Failure to observe this child's rights raises federal issues, as described herein, under Article IV, the First Amendment, the Ninth Amendment, the Fourteenth Amendment of the U.S. Constitution, and the ICCPR.

This honorable court should take this opportunity to address these Constitutional issues and take action to put them to rest and protect this child and others similarly situated.

XX. CONCLUSION AND PRAYER FOR RELIEF

In view of the above arguments, we ask this honorable Court to find:

1. that Misha/Jimmy has a right to recognition as a distinct person before the law.¹⁵⁹
2. that the trial court erred in failing to conduct a plenary hearing on the matter of Misha/Jimmy's proposed circumcision.
3. that Misha/Jimmy has thus been denied his U.S. Constitutional and Oregon

¹⁵⁶ U.S. Const. amend. XIV, §1; ICCPR, art. 26.

¹⁵⁷ ICCPR, art. 16.

¹⁵⁸ *Black's Law Dictionary*, Abridged. Seventh Edition, q.v. (2000).

¹⁵⁹ ICCPR art. 16.

Constitutional rights to due process of law.¹⁶⁰

4. that parental religious rights of *belief* involving their children are limited to religious education and do not reach to non-therapeutic physical changes (as a religious *practice*) upon the child at the request of a parent, without demonstrated medical necessity.¹⁶¹

5. that Misha/Jimmy was not born into Judaism and that he has not clearly evinced, without persuasion, a need to convert to Judaism independent of the wishes of his father.¹⁶²

6. that Misha/Jimmy has a right to special protection from the state during his minority.¹⁶³

7. that Misha/Jimmy has a common law right to bodily integrity and a corresponding ICCPR right to security of the person.¹⁶⁴

8. that Misha/Jimmy has an equal right to protection from cutting of his genital organs under 18 U.S.C. 116 and Oregon Revised Statute 163.207.¹⁶⁵

9. that Misha/Jimmy is the only person who may decide on his religious preference.¹⁶⁶

¹⁶⁰ U.S. Const. amend. XIV §1, Oregon Const., art. 1, §10,

¹⁶¹ *Wisconsin v. Yoder* 406 U.S. 205 (1972); ICCPR art. 18, §4.

¹⁶² Jewish law states that a child born to a Jewish mother is Jewish. Also, one who has converted is Jewish. Misha's mother is not Jewish, so Misha is not Jewish and he has not converted. *Who is a Jew?* Jewish Law 101 Available at: <http://www.jewfaq.org/whoisjew.htm> Accessed February 10, 2007.

¹⁶³ Blackstone, Book 1, Chapter 16, page 434; OR Const., Article 1, §1; ICCPR, Article 24(1).

¹⁶⁴ Blackstone; *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); ICCPR art. 9, § 1.

¹⁶⁵ U.S. Const. amend. XIV, §1; Oregon Const. art. 1, § 20, ICCPR art. 26.

¹⁶⁶ Oregon Const., art. 1, §3, ICCPR Article 18, §1.

10. that circumcision presents surgical, anesthetic, and psychological risks to Misha/Jimmy.¹⁶⁷

11. that the prepuce is a functional organ, worthy of retention.¹⁶⁸

12. that removal of a healthy functional body part during Misha/Jimmy's minority is inhuman or degrading treatment to which Misha/Jimmy has an immunity.¹⁶⁹

13. that Misha/Jimmy resides in Washington, has a significant connection with Washington, and has an immunity to being disturbed or molested in his person on account of religion under the constitution of that state.¹⁷⁰

14. that Misha/Jimmy's best interests and welfare are best served by protection from circumcision.¹⁷¹

We respectfully ask this honorable court to:

Enjoin the parents from submitting Misha/Jimmy to non-therapeutic circumcision before he reaches his majority at which time he may decide for himself.¹⁷²

Or in the alternative:

To remand this matter to the trial court for a plenary hearing¹⁷³ at which time all facts,

¹⁶⁷ Nigel Williams & Leela Kapila. *Complications of circumcision*. 80 Br J Surg 1236 (1993).

¹⁶⁸ Christopher J. Cold & John R. Taylor. *The prepuce*. 83 Suppl 1 BJU Int 34 (1999); Paul M. Fleiss, Frederick Mansfield Hodges & Robert S. Van Howe. *Immunological functions of the human prepuce*. 74 Sexually Transmitted Infections 364 (1998).

¹⁶⁹ ICCPR, Art. 7.

¹⁷⁰ Washington Const., art. 1, §11.

¹⁷¹ Washington Const. op. cit.

¹⁷² This would protect Misha's bodily and genital integrity, provide his best interests and welfare, and resolve all Constitutional and ICCPR issues. This has a precedent in *Schmidt vs. Niznik*, Cook County Illinois, No. 00 D 18272 (See Appendix C, App-19).

¹⁷³ In a similar circumcision case in New Jersey, the mother wanted the child circumcised. The father disagreed and moved to protect the child's bodily integrity. The trial court refused to hold a hearing and this ruling was sustained by the appellate court. The Supreme Court of New Jersey reversed the lower courts and remanded the case to the trial

medical and ethical, may be presented and arguments made regarding Misha/Jimmy's best interests and welfare, with the further provision that a guardian *ad litem* be appointed to protect Misha/Jimmy's numerous rights to be recognized as a person before the law.

Respectfully submitted on behalf of Mikhail James ("Misha/Jimmy") Boldt and his natural mother, Lia Boldt;

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court for a plenary hearing. *Price v. Price*, 165 N.J. 597; 762 A.2d 215 (2000) (See Appendix B, App-18), mandating due process.

CERTIFICATE OF MAILING AND FILING

I hereby certify that I served the foregoing Brief of Amicus Curiae on the other parties herein by mailing to them two true copies, first class mail on April 18, 2007, addressed as follows:

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I also certify that the Brief of Amicus Curiae was filed with the Supreme Court this date by mail.

Dated: April 18, 2007

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