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Fathers, Foreskins, and Family Law

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The legal column:

*Fathers, foreskins and family law**

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In the United States, a custodial parent has the right and responsibility to make medical decisions for one's child. But does that right encompass consenting for a surgical procedure for which there is little or no medical justification? What if the noncustodial parent opposes the procedure? And when is a child old enough to make the decision for him- or herself? How should a physician respond when asked to perform a surgical procedure when the decision is enmeshed in family controversy? These and other questions are considered in *Boldt*, a recent family law case decided by the Supreme Court of Oregon.[1]

The Boldts belonged to the Russian Orthodox Church when they married and had a child. They divorced in 1999 and embarked on an acrimonious battle for child custody. Custody of their son, whom the Court calls "M," was first awarded to Ms. Boldt, and four years later to Mr. Boldt. The Boldts appeared in court again in 2005. In the years since his divorce, Mr. Boldt had become increasingly interested in Judaism, and in 2004 he converted. Mr. Boldt had been taking M to a synagogue where M was learning Hebrew. Mr. Boldt mentioned his conversion to his ex-wife, adding that M might convert as well, and that in order to do so, the boy would need to be circumcised.

Lia Boldt reacted to this news by getting a temporary restraining order to forbid Mr. Boldt from having M circumcised, and by filing a motion for a change of custody. Amicus briefs were filed by the American Jewish Congress and by Doctors Opposing Circumcision (DOC). Although the case had begun when M was 9, he was 12 by the time it reached the state Supreme Court.

This case evoked a number of arguments, especially regarding religious freedom. From a medical ethics perspective, it is relevant that the procedure would be performed by a licensed physician, that the same physician (a urologist) claimed that "there were medical concerns that were sufficient cause…for the procedure" and that the urologist claimed that the boy understood the procedure and "wanted the circumcision so that he could convert to Judaism." The father's argument was, first, that his son wished to have the procedure, and second, that his son's wishes were nonetheless "legally irrelevant," because a custodial parent has complete authority to make medical decisions. The mother argued that the boy had told her that he didn't want to be circumcised but was "afraid" to contradict his father. She also asserted that, because of the "significant" medical risks associated with the procedure, M should not be circumcised even if he stated he wanted the procedure. Lawyers for DOC claimed that the urologist's medical claims were bogus, or resulted from ignorance of the natural physical maturation of an uncircumcised boy.

The court concluded that, "although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States. We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs—medical, religious or otherwise." However, because M is now 12, the court took into account the boy's own opinions in this matter. Remembering that this is primarily a custody case, the court ruled that if M did oppose circumcision, then forcing it upon him against his will would seriously impair his relationship with his father, thus giving weight to the mother's claim to have custody reconsidered. The court remanded the case to the trial court to determine M's opinion about a possible circumcision. Meanwhile, the boy has finally been furnished with his own legal counsel, separate from the parents' lawyers.[2]

I will not review the medical pros and cons of male circumcision. Suffice it to say that both risks and benefits are modest, causing the American Academy of Pediatrics, in 2005, to conclude that "Existing scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data are not sufficient to recommend routine neonatal circumcision."[3] Some of those benefits apply only to infants, so the benefit to M at age 12 is low. There is evidence from Africa that male circumcision has a protective effect against a number of sexually transmitted diseases. The extent to which this is true in the North American context is not known. Certainly the circumcision of a preteen boy is neither routine nor usually a medical necessity. (If the testimony of the urologist were dispositive, this case would have been over a long time ago.) So this case raises questions for a physician:

(1) Are there any circumstances in which a physician should perform cosmetic† surgery on a minor?
(2) Should a physician take into account a conflict between divorced parents about the child's best interests?

It is certainly possible to take a purist stand and refuse to perform any medically unnecessary procedure on a minor, from ear piercing to rhinoplasty. One could argue that these are nonreversible procedures that only a competent adult (or mature adolescent) should be permitted to make, and that there is often little harm in waiting until the child is 18 to perform the procedure. That position would rule out even routine newborn circumcision.

However, most pediatricians would attempt to balance the pros and cons of the procedure, the best interests of the child, and deference to parental decision-making authority. The law invests

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**I have benefited greatly from the ideas of Ron Brauner, Doug Diekema and Janet Dolgin, all of whom participated with me in a panel on this case at American Society of Bioethics and Humanities, and from the work of my research assistant, Alexandra Jeanblanc.*

†*I use the term "cosmetic" with some misgivings, as this might appear to trivialize a religious motivation. The term "elective," however, still suggests an underlying medical reason, and "nonmedically indicated" is clumsy.*

the health of food consumers, it is ethically necessary to consider such effects (along with animal and environmental impacts) when evaluating proposals of the sort that Joseph and Nestle endorse in their concluding paragraph. The idea that farming and food production can be treated like any other sector of our economy invites an overly simplified picture of food ethics. Farming performs many functions for us. Becoming landscapes and cultural meanings are important. Neither would I be too quick to dismiss the accumulated wisdom of past thinkers cited above. And one thing that they perhaps overlooked is that a society embedded firmly in the quotidian tasks of farming is less likely to underestimate its dependence on the continued functioning of natural ecosystems. What is more, the recent growth of "slow food," farmers' markets and organic diets suggests that reconnection with farmers may be part and parcel of effective reform. This presupposes, however, that there are farmers at those markets for people to reconnect with.

In short, no short development of these themes can hope to be convincing. Yet food ethics must continue to bear Lincoln's concern for farmers and rural communities in mind, even while searching for a balance of the concerns that authors such as Lappé, Singer and now Joseph and Nestle introduce to counter Lincoln's advocacy of pushing the soil to its limit. Food ethics is every bit as complex as medical ethics.

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[1]Singer P. Famine, affluence and morality." *Philosophy and Public Affairs* 1972; 1: 229–243.

[2]Singer P. Animal liberation. *New York Review of Books,* April 5, 1973.

[3]Lappé FM. *Diet for a Small Planet.* New York: Ballantine Books; 1971.

[4]Jereski L. Oprah knocks beef, and a big rancher in Texas has a cow. *Wall Street Journal*, June 3, 1997, p. Al.

[5]Lyson TA, Stevenson GW and Welsh R, eds. *Food and the Mid-level Farm: Renewing an Agriculture of the Middle.* Cambridge, MA: MIT Press; 2008.

[6]Mazoyer M and Roudart L. *A History of World Agriculture: From the Neolithic to the Current Crisis.* Membrez JH, trans. London: Earthscan Books; 2006.

[7]Thompson PB. *Sustainability and Agrarian Ideals.* Lexington, KY: University Press of Kentucky; forthcoming.

[8]Lincoln A. An address by Abraham Lincoln before the Wisconsin State Agricultural Society Milwaukee, Wisconsin, September 30, 1859 National Agricultural Library, USDA. http://riley.nal.usda.gov/nal_display/index.php?info_center=8&tax_level=4&tax_subject=3&topic_id=1030&level3_id=6723&level4_id=11085 Accessed February 28, 2009.

[9]Thompson PB. *The Spirit of the Soil: Agriculture and Environmental Ethics.* London and New York: Routledge Publishing; 1995.

Response: We greatly admire Paul Thompson's work and concur with his insistence that food ethics encompass the broad social consequences of dietary habits and policies, among them the costs to farmers and agrarian values.

Thompson reminds us why farming has long been venerated by philosophers, poets and politicians. Farming demands responsibility, independence, ingenuity and thrift—as well as a (now) rare intimacy with the natural world. If our current food landscape is indeed characterized by caloric excess, ecological pollution and bewildering marketing claims, it is in part because we have forgotten small farms and the virtues of care, economy and prudence that they promote and sustain.

We ignore agrarian values at great peril to human health. Although it is understandable why farmers have exchanged rural life for urban amenities, this shift affects the way we feed and care for ourselves. Current agricultural practices may be productive, but they harm soil, animals and farm workers, and their inexpensive and excessive calories damage human health.

While a "philosophical error" may have led to this situation, its solution

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parents with this authority because parents are believed to act in the best interests of their children, and because parents have the right to raise children in their own religion and culture. The latter right has obvious limits; we do not permit parents to deny their children an education, nor to perform female genital cutting.‡ Taking all this into account, performing circumcision on a newborn at the parents' behest seems ethically acceptable, despite the fact that it deprives children of the freedom to make this important decision for themselves at a later time. When parents choose circumcision out of religious conviction, the procedure provides the added benefit of allowing the child to feel like a full member of the group, and in the Jewish context to become bar mitzvah at age 13.

A 12-year-old boy, however, is hardly a newborn. One could imagine that M has embraced Judaism, as his father claims, and has Jewish friends, perhaps all of whom will soon become bar mitzvah. It would be rational for M, despite the discomfort and risks of circumcision, to choose to undergo the procedure in order to be a full member of the Jewish community now, and if this is truly his wish, it would be wrong to force him to wait until he is 18, because his mother opposes circumcision. But one could equally imagine that M would just as soon not go through a painful and medically unnecessary procedure, that he is not enthusiastic about Judaism and that he feels somewhat intimidated by his father. In that case, requiring that he wait until he is of legal age harms no one, and gives M the space and protection he needs to make a more autonomous decision when he is older. Furnishing the boy with his own lawyer is long overdue. Hopefully, the hearing in family court held on April 22, 2009, will resolve some of these questions.

From the physician's perspective, it is difficult to imagine a doctor who would perform elective surgery on a protesting or even an unenthusiastic preteen. The principle of respect for autonomy requires that persons with the mental capacity to make certain medical decisions have those decisions respected. Circumcision, with modest benefits and risks, is well within the capacity of a boy of M's age. Although legally M's assent may be irrelevant, it is highly relevant to any physician and in my opinion, no doctor should perform this surgery unless he or she is confident of M's enthusiastic (not merely passive) participation. If M appears unsure or intimidated, nothing is lost by waiting until he is more certain of what he wants. □

‡*For a comparison between legal attitudes toward male circumcision and female genital cutting in the United States, see Davis DS, Male and female genital alteration: a collision course with the law?"* Health Matrix *Summer 2001 11/2.*

[1]344 Ore. 1; 176 P.3d 388; 2008 Ore. LEXIS 3.

[2]Personal conversation with John V. Geisheker, General Counsel, Doctors Opposing Circumcision.

[3]American Academy of Pediatrics, Task Force on Circumcision, "Circumcision Policy Statement," *Pediatrics* 103, no. 3 (1999): 686–93.