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The Child's Right to an Open Future: Yoder and Beyond

Dena S. Davis
Cleveland State University, d.davis@csuohio.edu

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THE CHILD'S RIGHT TO AN OPEN FUTURE: *YODER* AND BEYOND

DENA S. DAVIS*

INTRODUCTION

Every time I teach a class on church and state, I am reminded again of how much we owe to the religious minorities in our midst. If it were not for Amish, Quakers,[1] Jews,[2] Santerians[3] and especially Jehovah's Witnesses,[4] what an impoverished understanding we would have, not only of the religion clauses of the First Amendment, but also of the Free Speech Clause. The original parents in *Wisconsin v. Yoder*[5] are now grandparents, and their children, with or without the benefit of a high school education, have grown to adulthood and probably have children of their own. But 25 years later, we are still chewing over and learning from this case. My focus in this essay is on the myriad ways we can learn from this case and how we can use it to enrich our thinking about topics that, at first glance, seem far removed from church and state, education, or the Amish.

I. A LIBERAL PERSPECTIVE ON *YODER*

My view of *Yoder* is heavily influenced by Joel Feinberg's 1980 essay, *The Child's Right to an Open Future*.[6] Feinberg begins his discussion of children's rights by noticing that rights ordinarily can be divided into four

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* Associate Professor of Law, Cleveland-Marshall College of Law.

1 *See* United States v. Seeger, 380 U.S. 163 (1964) (holding that one does not have to have a belief in a Supreme Being to qualify for exemption from the draft as a conscientious objector).

2 Jews have not fared well under our Religious Clauses jurisprudence. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Supreme Court was not sympathetic to an Orthodox Jew's complaint that compliance with Pennsylvania's Sunday closing laws would virtually put him out of business, as he would have to close up shop on Saturday for the religious observance and then on Sunday also. And in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court upheld an Air Force regulation that prohibited plaintiff from wearing a yarmulke while on duty.

3 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down a zoning law prohibiting animal sacrifice).

4 *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding a child's right to refuse to say the Pledge of Allegiance).

5 406 U.S. 205 (1972).

6 Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette, eds., 1980).

kinds. First, there are rights that adults and children have in common (the right not to be killed, for example).[7] Second, there are rights which are generally possessed only by children (or by "childlike" adults).[8] These "dependency-rights," as Feinberg calls them, derive from the child's dependence on others for such basics as food, shelter, and protection.[9] Third, there are rights which can be exercised only by adults (or at least by children approaching adulthood), e.g., the free exercise of religion.[10] Finally, there are rights which Feinberg calls "rights-in-trust," rights which are to be "*saved* for the child until he is an adult."[11]

These rights can be violated by adults in ways that cut off the possibility that the child, when he or she achieves adulthood, can exercise them. An example is the right to choose one's spouse. Children and teenagers lack the legal and social grounds on which to assert such a right, but clearly the child, when he or she attains adulthood, will have that right. Therefore, the child *now* has the right not to be irrevocably betrothed to someone. Rights in this category include a long list: virtually all the important rights we believe adults have, but which must be protected now to be exercised later. Grouped together, they constitute what Feinberg calls, "the child's right to an open future."[12]

Feinberg uses this concept to make the fairly easy call that Jehovah's Witness parents ought not to refuse a life-saving blood transfusion for the mother of three young children, whose future is severely compromised if their mother dies.[13] It is even easier to argue that the right to an open future forbids Jehovah's Witness parents from refusing necessary transfusions for their minor children, who have the right to grow into their own futures where they will decide such issues for themselves. Of course, we notice immediately that this is a context not of blacks and whites, but of many shades of gray. Many people argue that when children are raised within such an isolationist and high-demand religious culture as Jehovah's Witnesses, the idea that when they are 18 or 25 or whenever they magically become able to make truly autonomous choices, that they are, in Feinberg's words, "fully formed self-determining adult[s],"[14] is not tenable.

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7 *See id.* at 125.
8 *See id.*
9 *Id.*
10 *See id.*
11 *Id.* at 125-26. (emphasis in original).
12 *Id.* at 124.
13 *See id.* at 130.
14 *Id.* at 126.

But where does one draw the line? Where should the state intervene; or in less stringent terms, what ought public policy encourage when faced with the dilemma of parents who seek to make choices for their children that dramatically limit the children's possibilities for an open future? Most readers of this essay probably agree that parents ought not to be allowed to let their children die when medical intervention could restore them to long and productive lives. I predict most of us would have no trouble siding with the State of Wisconsin if the Amish had insisted on keeping their children illiterate. Aside from the detriment to society of having an illiterate subset within its midst, one can argue, taking a leaf from Feinberg's book, that a person who reaches adulthood unable to read is going to find her future so severely truncated that the state is morally required to intervene.[15]

Feinberg, in fact, declined to take issue with the Court's holding in *Yoder* largely because he agreed with the concurring opinion of Justices White, Brennan and Stewart that the difference between 8th grade, where the Amish drew the line, and 10th grade, when most of the children would have become 16 and therefore eligible to leave school in any case, was "minor in terms of the children's interests."[16] Feinberg agreed, however, with the holding in the 1966 case, *State v. Garber*,[17] where the Kansas Supreme Court refused to allow the Amish to keep their children out of state-accredited schools altogether.[18] Feinberg said:

> The case against the exemption for the Amish must rest entirely on the rights of Amish *children*, which the state as *parens patriae* is sworn to protect. An education that renders a child fit for only one way of life forecloses irrevocably his other options . . . . [C]ritical life-decisions will have been made irreversibly for a person well before he reaches the age of full discretion when he should be expected, in a free society, to make them himself.[19]

I am generally in agreement with Feinberg and would actually go further and say that *Yoder* was wrongly decided. But I concede one

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15 *Cf. id.* at 128 (noting that "[c]hildren are not legally capable of defending their own future interest against present infringement by their parents, so that task must be performed for them, usually by the state . . . ").

16 *Id.* at 137.

17 419 P.2d 896 (Kan. 1966).

18 *See id.* at 131-32.

19 Feinberg, *supra* note 6, at 132 (emphasis in original).

problem with this point of view. As a liberal who believes that the state should not dictate notions of "the good life," Feinberg believes that the state must be neutral about the goals of education, skewing the question neither in favor of the Amish lifestyle nor in favor of the "modern," technological life most Americans accept.[20] The goal of education is to allow the child to make up her own mind from the widest array of options; the best education is the one that gives the child the most open future. Feinberg stated that a neutral decision

> would assume only that education should equip the child with the knowledge and skills that will help him choose whichever sort of life best fits his native endowment and matured disposition. It should send him out into the adult world with as many open opportunities as possible, thus maximizing his chances for self-fulfillment.[21]

The problem here is that an education that gives a child this array of choices would quite possibly make it impossible for her to choose to remain Old Order Amish. Her "native endowment and matured disposition" might now have taken her away from the kind of personality and habits that would make Amish life pleasant. Even if she envies the peace, warmth, and security that a life of tradition offers, she may find it impossible to turn her back on "the world," and return to her lost innocence. To quote the Amish, she may have failed irreversibly to "acquire Amish attitudes"[22] during "the crucial and formative adolescent period."[23] This problem raises two issues. First, those of us who would make arguments based on the child's right to an open future need to be clear and appropriately humble about what we are offering. Insisting on a child's right to a high school education may open a future wider than she otherwise could have dreamed, but it also may foreclose one possible future: as a content member of the Amish community. Second, if the Amish are correct in saying that taking their children out of school at grade eight is crucial for the child's development into a member of the Amish community,[24] then there is no "impartial" stance for the state to

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20 *Id.* at 132-33.

21 *Id.* at 134-35.

22 Wisconsin v. Yoder, 406 U.S. 250, 211 (1972).

23 *Id.*

24 *See* Wisconsin v. Yoder, 406 U.S. 205, 210-11 (1972).

> Formal high school education beyond the eighth grade is contrary to Amish beliefs . . . because it takes them away from their community,

(continued)

take. The state may well be impartial about whether the "better life" is to be found within or without the Amish community, but it cannot *act* in an impartial fashion: forcing the parents to send their children to school or exempting them from the requirement each has likely consequences for the child's continued existence within the community when she grows up and is able to make a choice. Feinberg seeks to avoid this second problem by claiming that the neutral state . . . would act to

> let *all* influences . . . work equally on the child, to open up all possibilities to him, without itself influencing him toward one or another of these. In that way, it can be hoped that the chief determining factor in the grown child's choice of a vocation and life-style will be his own governing values, talents, and propensities.[25]

The problem with this is that, as I understand the Amish way of life, being Amish is precisely *not* to make one's life choices on the basis of one's own "talents and propensities," but to subordinate those individual leanings to the traditions of the group.[26] If one discovers within oneself a strong passion and talent for jazz dancing, one ought to suppress it, not nurture it.

II. THINKING BEYOND *YODER*

A. *Introduction*

I take *Yoder* to be a paradigm for a number of challenging issues—not necessarily legal but always involving public policy—issues in which there is a tension between some autonomy-based claim on behalf of the child set against a parental claim to control over family life, and to the character and education of their children. These claims of individual parents or couples are probably at their most sympathetic when they are grounded in culture and religion, as is the case with the Amish, and especially so when

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> physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor.

Id. at 211.

[25] Feinberg, *supra* note 6, at 136 (emphasis in original).

[26] *See, e.g., Yoder*, 406 U.S. at 212 (noting one expert's testimony that the Amish upbringing prepares adolescents to be "productive members of the Amish community").

the parents claim that without the ability to mold their children's lives, their culture itself will be destroyed. I wish to challenge this sympathetic perspective by pointing to two other contemporary examples of this sort of issue.

B. *Female Genital Mutilation*

In at least 25 African countries, girls in babyhood or adolescence are subjected to a surgical procedure in which their labia minora and labia majora are cut away, the clitoris is removed, and, often, the vaginal opening is stitched up with only a tiny passage left for urine and menstrual fluid.[27] When the young woman marries, the closed area is then cut open.[28] This procedure is extraordinarily painful, often leads to infection and even death, and makes normal sexual pleasure impossible.[29] The World Health Organization estimates that 90 million girls and women have endured some form of female genital mutilation ("FGM"), and that 2 million girls undergo this practice every year.[30]

This custom presents Western nations with a number of legal and ethical challenges as immigrants from these African cultures come to our shores. In 1991 in Britain, according to one estimate, 10,000 female children were "circumcised."[31] Some of these operations were done in people's kitchens, but others in private medical clinics in London and Wales.[32] There are accounts, though without hard numbers, of the practice continuing in the United States as well.[33] Some doctors defend performing FGM by saying that if they refuse to perform the operation in a safe and sanitary setting, it will be performed anyway, in a much more dangerous fashion.[34] Obvious legal issues arise: should a mother be jailed

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[27] *See* Judith S. Seddon, *Possible or Impossible? A Tale of Two Worlds in One Country*, 5 YALE J.L. & FEMINISM, 265, 266-67 (1993).

[28] *See id.* at 284. In some cases the ritual is carried out as a marriage rite. *See id.*

[29] *See id.* at 267-68.

[30] *See id.* at 266.

[31] *See id.* (citing Allison Wyte, *Mutilated by an 'Act of Love,'* INDEP. (London), Feb. 19, 1991, at 15).

[32] *See id.*

[33] *See* Celia W. Dugger, *Tug of Taboos: African Genital Rite vs. U.S. Law*, N.Y. TIMES, Dec. 28, 1996 at A3; *See also* Neil MacFarquhar, *Mutilation of Egyptian Girls: Despite Ban, it goes on*, N.Y. TIMES, Aug. 8, 1996, at A1 quoting Nawal Saadawy, an Egyptian feminist now living in the United States, as saying that approximately 40,000 FGM procedures are performed in the United States yearly.

[34] *See* Dugger, *supra* note 33.

for subjecting her daughter to this operation, as happened in France?[35] Should a mother and her daughter be granted political asylum if they can show that the child would surely be subjected to FGM if forced to return home? Canada granted such an asylum in 1993, the first country to do so,[36] and the United States has just granted asylum to an adult woman fleeing FGM as a marriage rite.[37] Should the operation be made explicitly illegal? Britain did that in 1985,[38] and in the United States, Congresswoman Pat Schroeder's bill was finally passed in 1996.[39]

It is difficult to make a serious defense of FGM, but let me try to sketch one. A sort of "mega-defense" mounts the obvious argument that we ought not to impose our Western ideals upon people from other cultures, or at least that it is virtually impossible for Westerners to comment on the procedure in a constructive and culture-sensitive fashion. Western medicine has mutilated women as well, including clitoridectomy for "nervousness" and hysterectomy for depression.[40] To quote one Arab woman, an activist against FGM:

> The West has acted as though they have suddenly discovered a dangerous epidemic which they then sensationalized in international women's forums creating a backlash of over-sensitivity in the concerned communities. They have portrayed it as irrefutable evidence of the barbarism and vulgarity of underdeveloped countries . . . . It became a conclusive validation to the view of the primitiveness of Arabs, Muslims and Africans all in one blow.[41]

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[35] *See* Marlise Simons, *French Court Jails Woman for Daughter's Circumcision*, N.Y. TIMES, Jan. 11, 1993, at A4.

[36] *See* Clyde H. Farnsworth, *Canada Gives Somali Mother Refugee Status*, N.Y. TIMES, July 21, 1994, at A1.

[37] *See* Celia W. Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, April 15, 1996, at A2.

[38] *See* Seddon, *supra* note 27, at 269.

[39] *See* Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 18 U.S.C.A. § 116 (West Supp. 1997)).

[40] *See* Council on Scientific Affairs, American Medical Association, *Female Genital Mutilation*, 274 JAMA 1714 (1995).

[41] Nahid Toubia, *Women and Health in Sudan*, *in* WOMEN OF THE ARAB WORLD: THE COMING CHALLENGE (1988), *quoted in* Sandra D. Lane & Robert A. Rubinstein, *Judging the Other: Responding to the Traditional Female Genital Surgeries*, 26 HASTINGS CENTER REP. 31, 36 (1996) (alteration in original).

From within the cultures that practice FGM, a number of arguments are available. To quote one researcher:

> Circumcision is the traditional ritual that confers full social acceptability and integration into the community upon the females. The ability to identify with one's heritage and to enjoy recognition as a full member of one's ethnic group, with just claim to its social privileges and benefits, is very important to most African families. For many women and young girls, circumcision satisfies this deep-seated need to 'belong' and ensures that they will not be ostracized.[42]

Even among people who agree that the practice is harmful and ought to be eradicated, there is a reluctance to flout tradition. If a daughter is not circumcised, she may well be unable to find a husband within her ethnic group, and may be ostracized by the others.[43] Her choices then are not to marry at all, or to marry outside her group. Either of those choices, if repeated among enough girls, could lead to the death of the diaspora community as a distinctive culture, for example the Nigerian community in London. Furthermore, a girl who is not circumcised at the "proper" time because she lives in the United States or the United Kingdom, may find it impossible to return to the country her family left behind, because she would have no place there.[44]

Looking at these two cases, *Yoder* and FGM, important similarities emerge. In both cases, parents, supported by and embedded within a tightly bound community, wish to make crucial choices about their children's present and future which are radically at variance with the Western norm. These choices are made with the child's well-being in mind, certainly, but with a concept of well-being that sees the role of the individual as almost indistinguishable from the culture in which he or she grows up. Parents do not value, perhaps do not even think about, the concept of children growing up free to make important choices for themselves: what religion to follow, whether or not to marry within one's religious or ethnic group, what sort of career to prepare for, etc. The choices being made here are virtually irrevocable. The Amish child, after reaching adulthood, may manage to get a high school equivalency degree

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[42] Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1949 (1993).

[43] *See* Seddon, *supra* note 27, at 264.

[44] *See id.*

and be accepted into college or a vocational program, but it will be extremely difficult. The girl who has undergone FGM, even assuming that her wounds healed without incident, will always be denied clitoral pleasure, and will find it almost impossible to marry out of her group.

So if the Amish case is a "close call," as Feinberg says,[45] and therefore on one end of a continuum of judicial and public opinion, I suspect that FGM is on the other end. Even if issues of pain and infection were eradicated, the intervention is so serious in its attack on bodily integrity, its irrevocable nature, and its implications for the child's adult life, few Westerners would defend it (although we might disagree on the best way to approach its eradication).

C. *Cochlear Implants for Deaf Children*

Another group that makes claims somewhat parallel to those of the Amish is that segment of deaf society which calls itself the DEAF-WORLD.[46] DEAF-WORLD members (who call themselves *DEAF* or *Deaf* as opposed to *deaf*) describe themselves as members of a linguistic and cultural minority who use American Sign Language and who participate in "a tight-knit social structure and . . . culture with characteristic customs, values, and attitudes."[47] Although most Americans probably would automatically characterize deafness as a disability, many Deaf members reject this assumption and characterize themselves as a linguistic, cultural minority on par with being, e.g., Italian-American.[48] Particularly in the wake of the Deaf President Now revolution at Gallaudet University in March of 1988, which is to Deaf Pride what the Stonewall Riots are to gays and lesbians, Deaf members have been asserting their claims not merely to equal access but also to equal respect as a cultural minority.[49] In one writer's words, what is needed is a "paradigmatic shift" in how deafness is viewed, from a "medical model" of a disability that needs to be "fixed" to a "civil rights model" of a minority deserving equal

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[45] Feinberg, *supra* note 6.

[46] *See* Harlan Lane & Michael Grodin, *Ethical Issues in Cochlear Implant Surgery: An Exploration into Disease, Disability, and the Best Interest of the Child*, 7 KENNEDY INST. OF ETHICS J. 231, 233-34 (1997).

[47] *Id.*

[48] Edward Dolnick, *Deafness as Culture*, ATLANTIC, Sept. 1993, at 38.

[49] *See* Lane & Grodin, *supra* note 46, at 247. As Lane and Grodin point out, there are logical difficulties inherent in claiming *both* that one is disabled under the Americans with Disabilities Act and therefore entitled to certain protections to guarantee equal access, *and* that one is not disabled and entitled to the respect given to cultural minorities. *Id.*

respect.[50] The implications of this claim are wide-ranging and fascinating.[51] Many Deaf parents, for example, have a strong preference for having deaf children, and have expressed interest in using diagnostic and reproductive techniques to help them *increase* their likelihood of having deaf children.[52]

Another provocative issue involves the use of cochlear implants for deaf children. Cochlear implants are electronic devices which are surgically implanted in the inner ear and stimulate surviving nerves in the ears of patients with profound hearing loss; the implant is linked to a small external microphone, which is worn behind the ear and linked to a pocket-sized speech processor, which sends coded information to the implant.[53] The devices still are considered experimental, and their success varies.[54] It is agreed that children who are deafened post-lingually will do better with implants than those who have never developed language. On the other hand, if implants are to be used with young, pre-lingually deafened children, studies suggest that children are more likely to be successful at developing spoken language if the implants are acquired very early in life.[55] However, Lane and Grodin state that there is "no case reported in the scientific literature of a child acquiring spoken language as a result of implant surgery,"[56] and that the vast majority of children who are born deaf and receive implants never even learn to recognize spoken words.[57] Parents desiring to use the technology to increase the likelihood that their deaf children will enter the hearing world and members of the medical profession who are advocating implants are engaged in a "bitter and emotional" debate with Deaf community advocates who argue that implants constitute "genocide" against the Deaf minority and rob the individual child of the "birthright" of membership in a rich and supportive

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[50] Kathryn Ivers, *Towards a Bilingual Education Policy in the Mainstreaming of Deaf Children*, 26 COLUM. HUM. RTS. L. REV. 439, 441, 443 (1995).

[51] I explore some ramifications of this stance for genetic counseling in Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 28 RUTGERS L.J. 549 (1997). For a different perspective, see Lois Shepherd, *Protecting Parents' Freedom to Have Children with Genetic Differences*, 1995 U. ILL. L. REV. 761 (1995).

[52] *See* Walter Nance, *Parables*, *in* DIANNE M. BARTELS, PRESCRIBING OUR FUTURE 92 (1993).

[53] *See* Lane & Grodin, *supra* note 46, at 235-36.

[54] *See id.* at 236.

[55] *See* Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather than a Disability*, 1995 WIS. L. REV. 235.

[56] Lane & Grodin, *supra* note 46, at 236.

[57] *See id.*

Deaf culture.[58] Some Deaf advocates have called for legislation that would forbid implants for minor children,[59] and others are attempting to persuade the United States Food and Drug Administration to reverse its approval of implants for children aged two through seventeen.[60]

At present, the very limited success of implants makes it easy to argue against them. It is all too likely that the (pre-lingually deafened) child will end up unable to function in either the Deaf or the hearing world, as parents pour all their resources of time, money, and energy into getting the child to communicate orally, with little or no success. Meanwhile, the child, without the benefit of sign language, is missing developmental milestones that are crucial to good communication skills.[61] However, Lane and Grodin raise the issue of whether cochlear implants would be ethically acceptable *even if they were risk-free and totally effective.*[62]

The arguments advanced by Lane and Grodin are strikingly reminiscent of those advanced by the Amish parents in *Yoder.* If the DEAF-WORLD is a culture, with its own history, language, literature, and values, in which deaf children can have a happy and productive future, then cochlear implants, which potentially would be available to almost all of the 90% of deaf children who are born to hearing parents,[63] would drastically reduce the population of that culture, challenging its very survival.[64] Lane and Grodin proceed on the assumption that "preservation of minority cultures is a good;"[65] others speak less temperately of a minority culture's "right to survive."[66] In any case, the argument here is that the majority (hearing) culture, by forcing implants on children, is threatening the destruction of the minority (Deaf) culture and that this is ethically wrong and, perhaps, ought to be legally forbidden or at least discouraged. The difference, of course, between this case and the Amish is that, in *Yoder,* it is the parents themselves who represent the minority culture; their desire to have their children be like them, and their desire to have their children participate in the minority culture are one and the same. Thus, the Amish can align a number of powerful legal and ethical arguments: free exercise of religion, the continued survival of their

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58 *See* Brusky, *supra* note 55, at 235.

59 *See id.* at 324.

60 *See id.*

61 *See* Lane & Grodin, *supra* note 46, at 236.

62 *See id.* at 232.

63 *See id.* at 233.

64 *See id.* at 237.

65 *Id.*

66 *See, e.g.,* Brusky, *supra* note 55, at 243.

culture, *and* the right of parents to make decisions about their children's schooling.

In the case of cochlear implants for children of hearing parents, the parents' right to make medical and educational decisions for their minor children is pitted against the claims of the Deaf community for continued survival.[67] Thus, it is very unlikely that an American court would ever accede to the wishes of Deaf activists to block a parental decision in favor of implants. However, there are other situations in which the balance between the demands of the Deaf and the hearing world are more equal, and thus somewhat more akin to *Yoder*. For example, what if a deaf newborn was available for adoption, and a court had to decide between a hearing family that would use cochlear implants to draw the child into the hearing world, and a Deaf family that would rear the child within the Deaf culture with American Sign Language. What if the decision about implants became an issue in a child custody dispute between divorcing parents with different philosophies? What if implants become safe and effective, and Deaf parents have to defend in court their decision not to have their own deaf children implanted? Will they, like the Amish, have to defend themselves against allegations of child neglect for deciding not to give their children the tools with which to enter the majority culture?

CONCLUSION

My purpose here is not to defend my belief that *Yoder* was wrongly decided, but to challenge our assumptions about the issues represented in that case, and especially to challenge the importance given in *Yoder* to the claims of culture and cultural survival. If the deference given to culture in *Yoder* is correct, than ought we to give more respect to the wishes of African immigrants to America who wish to preserve *their* culture by subjecting their daughters to FGM, especially if bringing it under the aegis of medical practice (like male circumcision) would render it virtually pain-free and risk-free?[68] And how do we explain our legal deference to

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[67] Lane and Grodin raise the question of whether Deaf adults have some sort of parental rights over deaf children born to hearing parents, in somewhat the same way in which the law acknowledges the interest of Native American tribes in Native American children. *See* Lane & Grodin, *supra* note 46, at 247-48.

[68] An interesting by-way is the story of some Seattle physicians who attempted to find a constructive solution by agreeing to consider making a "ritual nick of the prepuce . . . with no removal of tissue, 'as a way of responding to repeated requests by Somali mothers that the physicians do the full-scale procedure on their daughters.'" *See* Dugger, *supra* note 33. However, the physicians' hospital abandoned the proposal after they were inundated with protesting letters and calls, and after a state representative informed them

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Amish culture but not to the African culture and use it to make some predictions about how well the DEAF culture will fare in America? If we adopt Lane and Grodin's useful thought experiment and hypothesize a future where cochlear implants are risk free and totally effective, then ought their use be mandated for all babies born deaf? Should hearing and DEAF parents alike be considered negligent for not having their children implanted? What weight should be given to the argument by DEAF parents that, first, they wish their children to be like them, and second, they wish to preserve DEAF culture by making sure that their children choose to stay within it?

These are difficult questions. One reason *Yoder* was a relatively noncontroversial decision (outside the world of legal scholarship) is that the Amish are quaint, colorful, familiar icons of the American countryside (as well as a lucrative tourist attraction). They are different, but not *too* different (they are, after all, white, Protestant, and of European descent). Because they do not vote, run for public office, or seek to convert our children, we are content to leave them alone. It is easy to sentimentalize their claims for cultural survival over individual self-determination. But we should not let the familiarity of the Amish, and the relative innocuousness of their demand to deprive their children of only two years of school, blind us to the implications of the choice made by the *Yoder* majority. By placing two other examples in juxtaposition to *Yoder*, I hope I have raised some disquieting questions.

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that they would be in violation of a new state law. *See id.* Since it appears that the Seattle proposal would result in an operation no more risky, disfiguring, or painful than male circumcision, why was it vilified when male circumcision is a common and uncontroversial practice? Male circumcision, after all, has no benefits other than custom, and—for Muslims and Jews—the fulfillment of a religious obligation. The recommendations of the Canadian Paediatric Society and the American Academy of Pediatricians is that "[c]ircumcision of newborns should not be routinely performed." *Neonatal Circumcision Revisited. Fetus and Newborn Committee, Canadian Paediatric Society* 154 CANADIAN MED. ASS'N J. 769, 769 (1996). If the new law really does proscribe even a "ritual nick" performed under sterile procedures, does the law discriminate against the religious practices of some cultures while protecting those of others who have more political clout in America? (The question of whether FGM is required by Muslim law is controversial. *See, e.g.*, John Lancaster, *Egyptian Court Overturns Decree that Banned Female Circumcision*, WASH. POST, June 25, 1997, at A26.)