

**Joseph Mazor**

## On the strength of children's right to bodily integrity: the case of circumcision

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# **On the Strength of Children's Right to Bodily Integrity:**

## **The Case of Circumcision**

JOSEPH MAZOR

*ABSTRACT This article considers the question of how much weight the infringement of children's right to bodily integrity should be given compared with competing considerations. It utilizes the example of circumcision to explore this question, taking as given this practice's opponents' view of circumcision's harmfulness. The article argues that the child's claim against being subjected to (presumably harmful) circumcision is neither a mere interest nor a right so strong that it trumps all competing interests. Instead, it is a right of moderate strength. Indeed, even the aggregate strength of children's rights against the practice of (presumably harmful) circumcision as a whole is not so weighty so as to always trump competing interests. The harms are not sufficiently serious to justify such a status. And the expressive wrongs associated with non-negligently benevolent harming are much less serious than those associated with intentional harming. The debate over banning circumcision thus cannot be conducted only in terms of competing rights. Competing interests, such as those that would be set back by the departure of religious citizens, should be considered as well and might plausibly justify allowing even a rights-infringing practice to continue.*

## **Introduction**

In 2013, the Nordic Ombudsmen for Children issued a statement calling for a ban on male child circumcision. In their statement, the ombudsmen appealed to the moral priority of children's rights to bodily integrity over competing considerations, such as parental rights.<sup>1</sup> However, this priority was merely asserted rather than argued for. Moreover, several important competing considerations were ignored. For example, a ban on circumcision could well cause a sizeable number of religious citizens (e.g., Orthodox Jews) to leave the Nordic states.<sup>2</sup> Might a government that viewed circumcision as a rights-infringement nevertheless allow the practice to continue on the basis of these competing considerations?

Answering this question requires evaluating *the strength* of children's rights to bodily integrity – how much weight the infringement of these rights should be granted relative to competing moral values. This is the issue I wish to consider in this article.

Some scholars hold that the child's right to bodily integrity is what Ronald Dworkin calls a *right-as-trump*.<sup>3</sup> While an infringement of a right of this strength can sometimes be justified by the need to respect competing *rights*, a right-as-trump is sufficiently strong to always outweigh the moral value of competing *interests*. If a child has a right-as-trump against being circumcised, then the mere interests set back by the departure of religious citizens will never justify allowing this practice to continue.

However, I shall argue in this article that, even if we take circumcision's opponents' positions regarding the practice's harms as given, and even if we consider *the aggregate strength* of children's rights against the practice of circumcision as a whole, this strength does not rise to an interest-trumping level for two reasons. First, the level of harm is insufficiently severe to justify a trump status. Second (and more controversially), the non-negligently benevolent motives of the agents who authorize circumcision make children's rights against this practice weaker than they would be in the case of malevolent harms of similar magnitude.

## **1. Specifying the Type of Bodily Encroachment**

While general talk of a child's right to bodily integrity is sometimes useful, when it comes to the question of strength, the child's moral claim to bodily integrity cannot be plausibly viewed monolithically. The child's moral claim against being bumped into accidentally, for example, is clearly much weaker than her claim against having her organs forcibly removed and sold for profit. Any exploration of the

strength of the child's moral claim to bodily integrity therefore requires carefully specifying the type of encroachment under consideration.

The encroachments on the bodies of pre-autonomous children that I wish to consider in this article satisfy two conditions:

- a) The encroachment is moderately harmful for the child in expectation.<sup>4</sup>
- b) The encroachment is authorized by parents who non-negligently believe they are acting in their child's best interests.

My aim in this article is to consider, not only the strength of a single child's claim against a bodily encroachment satisfying conditions a) and b), but also the *aggregate* strength of children's claims against a social practice constituted by a considerable number of such encroachments. When considering social practices, I shall assume that the encroachments that constitute the practice are *by and large* (rather than universally) authorized by non-negligently benevolent parents.

## **2. Male Infant Circumcision: An Example**

Since several terms above are vague (e.g., moderately harmful in expectation), it is useful to consider a concrete example of the type of encroachment I have in mind. The example I shall use is male infant circumcision in the United States, *taking as given the practice's opponents' positions regarding its harms*.

According to opponents of the practice, circumcision causes:

- Substantial pain to all infants being circumcised, even with local anesthetics, and significant pain and discomfort during the recovery process.<sup>5</sup>
- Some reduction in sexual pleasure and sexual functioning in all those who are circumcised (due to loss of the foreskin).<sup>6</sup>
- A variety of other medical and mental health complications in some cases, ranging from minor to very serious.<sup>7</sup>

- Death in a miniscule number of cases.<sup>8</sup>
- Health benefits that are fairly minor and routinely overstated.<sup>9</sup>

Let us also make the following assumptions friendly to circumcision's opponents:

- Circumcision sets back the child's weighty interest in deciding for himself once he is autonomous what is to be done with his body.
- The setback to an individual's interests of being circumcised as an infant is no greater than the setback to his interests in being circumcised as an adult.<sup>10</sup>
- 'Harm' is defined as a significant setback to a person's interests relative to some morally privileged baseline.
- The non-intervention status quo is the appropriate morally privileged baseline in this case.

Given these assumptions, we might say that circumcision is somewhat harmful to all boys and is seriously or severely harmful to those subset of the boys for whom the procedure's more serious risks materialize. From an ex ante perspective and given these assumptions, then, it is an encroachment on the child's body that we might characterize as *moderately harmful in expectation (MHE)*. I will use the term 'MHE circumcision' in the rest of this article to remind the reader that I am taking the practice's opponents' assumptions about its harms as given.

Proponents of male circumcision might object to my use of circumcision as an example on the grounds that it is in fact not harmful, but beneficial. Proponents of circumcision contest opponents claims about many of its negative effects (e.g., on sexual pleasure). Moreover, they hold that circumcision offers valuable protections against sexually transmitted diseases, penile cancer, and urinary tract infections.<sup>11</sup>

In response, I do not deny the plausibility of viewing circumcision as beneficial. However, the example of MHE circumcision is nevertheless useful to consider for several reasons. First, since banning circumcision would likely have a

variety of side effects that are generally viewed to be undesirable (e.g., religious citizens leaving the state), there is significant practical value in exploring the strength of children's rights against this particular practice. Second, the debate over this practice often becomes mired in empirical controversies. By arguing (as I will) that opponents of circumcision may be overestimating the strength of children's right against this practice *even taking their empirical assumptions about the harms of the practice as given*, it may be possible to make headway in this politically important debate. Finally, many of circumcision's opponents view this practice as among the most harmful interventions in children's bodies legally permitted in Western liberal democracies. Thus, if the strength of children's rights against even this practice can be shown to fall short of trump status, this may have implications for debates surrounding a variety of other legally permitted interventions in children's bodies (e.g., child mole removal).

Opponents of circumcision, on the other hand, might object to my use of this example by disputing the non-negligent benevolence of parents who authorize circumcision. Ungar-Sargon, for example, accuses parents who authorize this procedure of using their child's body as a means to their own ends.<sup>12</sup> He points out that circumcision is required *of the father* by Jewish law.<sup>13</sup> He also points out that many secular parents admit that a key reason for circumcising their son is so that he 'looks like' the father.<sup>14</sup>

Ungar-Sargon's arguments admittedly suggest that circumcision is in the interest of many parents who authorize the operation. However, this is insufficient to ground the very serious accusation that parents who authorize the procedure are using their children's bodies as means to their own ends. After all, it is certainly possible that the parents believe that *both* their ends and their child's ends would be advanced

by the circumcision. And they may well be motivated substantially by their child's good in addition to their own. Thus, ascertaining whether the children's bodies are being intentionally used as means to the parents' ends requires determining whether parents view the procedure as being in their child's interests.

Religious parents almost surely view circumcision as being beneficial for their sons. After all, the vast majority of religious parents presumably believe that it is in their son's interest to be members of their religious community. Since circumcision is important for membership in many of these communities,<sup>15</sup> it would be seen as good for the child. Moreover, only if someone believed in a malevolent, indifferent, or capricious god would she believe that God would command or recommend an act that is harmful to a child. Yet both Judaism and Islam view God as benevolent.

There are also good reasons to believe that secular parents who authorize the procedure view it as beneficial for their sons. First, though many parents who authorize circumcision cite the father's circumcised status as a reason for the procedure, they often have multiple reasons for authorizing circumcision, some of which seem clearly child-centered (e.g., hygiene).<sup>16</sup> Moreover, even the rationale that the father is circumcised is not unambiguously father-centered. After all, a major difference between the child's penis and the penis of his primary male role model that cannot be simply explained by the passage of time might generate some significant body image issues *for the child* – or so some parents might reasonably believe.<sup>17</sup> Moreover, some circumcised fathers may feel as though they will not know how to advise or care for their sons when it comes to penis-related issues if their son's penis is different from theirs in this important way.<sup>18</sup>

Opponents of circumcision may well have a variety of persuasive responses to these parental concerns. But the question here is not whether these concerns are

ultimately compelling. The point instead is that there is a perfectly plausible way of interpreting even the parents' expressed concern for the difference between the father and the son's penis as being based, at least in large part, on a concern with the *child's* welfare. Given the love the vast majority of parents feel for their sons, establishing that parents are circumcising their sons as a means to their own ends despite (or without any regard for) substantial perceived harm to their child would require compelling evidence – evidence that Ungar-Sargon does not provide.

Svoboda and his coauthors challenge the claim that circumcision is authorized by non-negligently benevolent parents in a different way – by arguing that many parents' belief that circumcision is in the best interests of their child is negligent. They argue that parents *must understand all available information* about the risks of circumcision in order to grant morally appropriate consent for the procedure.<sup>19</sup> And while the thrust of their criticism is aimed at medical professionals and the information they provide to parents in the United States, their argument also implies that parents who authorize circumcision solely on the basis of the medical information they are currently provided may well be acting negligently.

However, the standard of knowledgeability that Svoboda and his coauthors ask of parents is implausibly demanding. Circumcision is not some novel medical procedure recommended by an acquaintance. In the United States at least, it is a commonplace procedure viewed by respected medical bodies as plausibly having net medical benefits.<sup>20</sup> Moreover, given most parents' lack of medical expertise, they are not in an epistemic position to evaluate the complex, often conflicting evidence about the effects of the practice, even if they took the time to thoroughly research the procedure. It therefore does not seem negligent for parents to rely heavily on the

views of well-respected medical bodies or a doctor's recommendation in authorizing the procedure.

To be sure, these arguments do not establish that *all* parents who authorize circumcision are motivated by non-negligent benevolence. Some parents may authorize this operation primarily to relieve social pressure from religious relatives or to protect the father's body image, despite believing that the circumcision is harmful for their child. Others may negligently fail to take any time whatsoever to find out *anything* about the procedure (e.g., not even skimming the consent form or paying any attention to the doctor when she mentions any risks). However, given the love felt by the vast majority of parents for their children, and given the arguments above, it seems plausible to hold that circumcisions are *by and large* motivated by non-negligently benevolence. Thus, MHE circumcision is a good example of the type of practice that I am interested in here, and I shall use this example in the rest of this article.

### **3. The Strength of Moral Claims: Different Possibilities**

There are many possible views regarding the strength of the child's claim against being subjected to MHE circumcision. At the most stringent extreme is the position that a single child's claim against being subjected to MHE circumcision is an *absolute right*.<sup>21</sup> On this view, no other moral consideration, no matter how weighty, could ever justify the MHE circumcision of a single child. At the other extreme is the position that the child's moral claim against being subjected to MHE circumcision has no weight at all. On this view, even trivial goods would justify the practice of MHE circumcision.

Although these positions are useful to highlight, no scholar (that I am aware of) endorses either of these extreme positions. The controversial question instead is this. Where between these two extremes lies the strength of the child's moral claim against MHE circumcision?

It is perhaps unsurprising that many opponents of circumcision defend a position that is closer to the more stringent end of the spectrum. Ungar-Sargon, for example, endorses the view that the child's right against being subjected to MHE circumcision is a trump.<sup>22</sup> A right-as-trump is not as strong as an absolute right since its infringement can be justified by the need to respect other, more morally weighty rights. However, it is sufficiently strong to always outweigh *any mere interests*.<sup>23</sup> So, for example, on this view, the interests that would be set back by the departure of religious citizens (including the interests of the departing citizens themselves as well the interests of remaining citizens who lose friends, colleagues, and community members) can be safely ignored in an analysis of the permissibility of MHE circumcision (since a setback to these interests can never justify permitting the infringement of a right-as-trump).

An alternative view that lies towards the weaker end of the spectrum of possible strengths is that the child's moral claim against being subjected to MHE circumcision is a mere interest. Some proponents of will-based theories of rights are committed to this position (since the child is pre-autonomous).<sup>24</sup>

However, there is also an intermediate position between the interest view and the right-as-trump view – a position that is often overlooked.<sup>25</sup> Namely, we could view the child's claim against being subjected to MHE circumcision as a right, but one that is weaker than a trump. On this view, the child's moral claim against being subjected to MHE circumcision is not itself a mere interest. However, it is also not

sufficiently weighty to necessarily outweigh all competing interests. We might call a moral claim with this level of strength a *right-as-priority*. I shall argue in the rest of this article in favor of this right-as-priority position.

#### **4. A Right against Substantially Harmful Bodily Encroachments**

I begin my case for the right-as-priority position by arguing that the child's claim against being subjected to encroachments such as MHE circumcision is stronger than a mere interest. There are at least three reasons why this is so. First, the potential harms associated with MHE encroachments, though not of the most serious kind, are certainly substantial. In the case of MHE circumcision, for example, there is a risk of death (albeit miniscule). There is also a significant risk of serious negative physical and psychological consequences, at least for a small minority of circumcised boys. Furthermore, there are (we are assuming) significant harms to all children subjected to MHE circumcision from the loss of sexual pleasure/functioning as well as the pain of the procedure and recovery process. Finally, the countervailing benefits of circumcision are (we are assuming) minor. It seems implausible to describe a child's claim against being subjected to such substantial net harms and serious risks as a mere interest.<sup>26</sup>

Second, it is morally relevant that we are considering here an encroachment *on the body* of the child. As a variety of philosophers have argued, the body should be granted special moral protection compared with encroachments on other interests.<sup>27</sup> A person's body is, after all, tied up in intimate ways with an individual's personhood – with who *he or she* is.<sup>28</sup> In the case of circumcision, this consideration is particularly weighty since the penis is an especially intimate body part, one that is often tied to a male's conception of himself as a man.

Finally, viewing the child's claim against MHE circumcision as a mere interest might implausibly imply (at least on some views) that the permissibility of circumcision can be determined by a simple utilitarian calculus – one that grants weight to the interests of individuals besides the child equal to the weight granted to the interests of the child in determining what is to be done with the child's body. Yet it seems implausible to hold that the permissibility of MHE circumcision might turn solely on, say, how inexpensive the cast-off foreskins made cosmetics or on how many traditionalists in the United States would like the practice to continue. Holding that the child has *a right* against MHE circumcision precludes these simplistic utilitarian approaches.

## **5. An Insufficient Degree of Harm for Trump Status**

However, accepting that the child has a right against MHE circumcision does not imply that it is a right-as-trump. It could be a right-as-priority – a moral claim not subject to a simple calculus of interests but also not so strong as to always outweigh all competing interests in society. Indeed, I shall argue in the next two sections that, not only does a single child's right against MHE circumcision not rise to the level of a trump, but even the strength of children's rights against the practice of MHE circumcision as a whole does not rise to an interest-trumping level. The first reason, which will be my focus in this section, is that the expected harms caused by MHE circumcision are insufficiently grave to justify an interest-trumping status.

To explore the relationship between the magnitude of expected harms and the strength of rights to bodily integrity, consider the following case:

***Non-Essential Pollution:*** Scientists in a society similar in size and development to the United States discover that the air pollution caused by motorized travel is causing bodily harms to children.

The harm caused by the pollution was previously thought to be natural and unavoidable.

Assume further that:

- The government can permit *essential* motorized travel (i.e., motorized travel that is necessary for respecting rights such as ambulance services and transportation of necessities) without causing bodily harm to children. However, *any* pollution caused by motorized travel above this threshold will unavoidably cause the relevant bodily harms.
- Non-essential motorized travel only benefits the adults in the society.
- There is no way for society to compensate the children who suffer the bodily harms.

The government has only two choices: Ban all non-essential motorized travel or allow this polluting activity and the associated bodily harms to children.

Whether the government should permit non-essential motorized travel depends on what is meant by ‘non-essential’ and on the degree of harm caused by the resulting pollution. Uncontroversially specifying which types of motorized travel are ‘non-essential’ requires a full account of rights, and is thus far beyond the scope of this article. However, travel that would need to be curtailed would almost surely include the majority of voyages taken for leisure, entertainment, and social purposes as well as those used to transport a variety of non-essential consumer goods.

As for the harms, I wish to consider the following three possibilities:

- i. If continued, the pollution will damage one boy’s foreskin such that he must be subjected to MHE circumcision.
- ii. If continued, the pollution will damage the foreskins of 50% of society’s boys such that they must be subjected to MHE circumcision.
- iii. If continued, the pollution will cause the death of 20% of society’s children.

In which cases, if any, should the government allow non-essential motorized travel to continue?

I take it that this type of travel should not be banned if its only effect is to damage a single child's foreskin. All the interests satisfied by non-essential motorized travel seem clearly sufficiently weighty to justify this degree of harm. If so, then it is implausible to hold that a single child has a right-as-trump against MHE circumcision. Indeed, even if we are confident that, statistically speaking, the pollution would kill one child if it were allowed to continue, I take it that the non-essential motorized travel should be allowed to continue.

On the other hand, if the pollution from the non-essential motorized travel were responsible for the deaths of 20% of society's children, I take it that the government should ban this activity. The aggregate harms involved are horrific, and the rights against such harms can therefore much more plausibly be held to have interest-trumping status.

The intermediate case in which the pollution damages the foreskin of 50% of society's boys such that they have to be subjected to MHE circumcision is more difficult to judge. Nevertheless, I submit that the non-essential motorized travel should be permitted in this case. The moral weight of all of the benefits generated by this travel seems sufficiently great to justify the negative consequences to the boys. Since the harms caused by Non-Essential Pollution are approximately as great as the harms caused by the practice of MHE circumcision in the United States,<sup>29</sup> this example suggests that even the harms caused by *the practice of MHE circumcision as a whole* do not justify granting the rights against this practice an interest-trumping status.

The example of foreskin-damaging pollution is admittedly fanciful. But it usefully highlights just how radical the right-as-trump view is. As the example of pollution demonstrates, societies *routinely* accept fairly serious bodily harms (and even death) for individuals for the sake of sufficiently weighty aggregate social benefits.<sup>30</sup> Only rights against the gravest and most numerous bodily harms reliably trump *all* competing interests in society.<sup>31</sup> Insisting that children's rights against moderate expected bodily harms are trumps would require drastic changes in society – changes that many of circumcision's opponents would find difficult to countenance.

Opponents of circumcision might respond by arguing that, while children's rights against the practice of MHE circumcision may not have an interest-trumping status, these rights are sufficiently strong to *clearly* outweigh any interests set back by banning this particular practice. They might even appeal to Non-Essential Pollution to support this position. After all, even with all of the weighty interests that would be frustrated by a ban on non-essential motorized travel, Non-Essential Pollution seems like a difficult case to judge. The strength of the children's rights and the moral weight of the interests at stake are not orders of magnitude apart. However, the interests that would be frustrated by a ban on circumcision seem nowhere near as weighty as the interests that would be frustrated by a ban on non-essential motorized travel. It might therefore appear as though children's rights against MHE circumcision, though not trumps, easily outweigh the competing interests.

However, the interests sufficient to justify permitting MHE circumcision need not be nearly as weighty as those needed to justify Non-Essential Pollution for two reasons. First, in Non-Essential Pollution, no competing rights are at stake. In the case of MHE circumcision, on the other hand, there might plausibly be some religious or parental rights that would be infringed by a ban on the practice. Second, as I shall

argue in the next section, the strength of children's rights against the practice of MHE circumcision is *substantially* weaker than their rights against the foreskin-damaging pollution (despite the similarity of the harms).<sup>32</sup> The reason, which I now turn to discussing, is the difference in the harmers' motives.

## **6. Non-Negligent Benevolence and the Strength of Rights**

The degree of harm is not the only relevant factor in determining the strength of rights. I will argue in this section that the harmers' motives matter as well and that a person has a weaker right against a non-negligently benevolent harm compared with an intentional harm. This explains why the children's rights against MHE circumcision are substantially weaker than their rights against the foreskin-damaging pollution.

### **6.1 Motives, Expressive Wrongs, and the Strength of Rights**

To explore the relationship between motives and the strength of rights, consider the following case:

*Two Different Motives:* Two equally-sized, economically well-off groups of parents are currently planning to circumcise their sons.

Parents in Group 1 intend to subject their sons to MHE circumcision in order to sell the foreskins to cosmetic companies for the parents' profit, despite believing that the circumcision would moderately harm their sons in expectation.

Parents in Group 2 subject their sons to MHE circumcision because they non-negligently believe it would be in their sons' best interests to be circumcised. The foreskins are discarded.

The government views the practice of circumcision as harmful and is committed to banning it. However, it only has the resources to prevent *one group of parents* from circumcising their children.

Assume further that:

- The government can hold both groups of parents appropriately accountable for their actions after the fact.
- The government can appropriately educate parents after the fact so that the children in Group 1 will be subjected future treatment no worse than children in Group 2.
- The children will never find out how they were treated with regards to this circumcision.

The government prevents the non-negligently benevolent circumcisions in Group 2 rather than the circumcisions in Group 1.

If motives make no difference to the degree of badness, the government's choice seems like the right one. After all, the circumcisions are equally bad in terms of the consequences for the children. But the circumcisions in the Groups 1 produce foreskins useful for the cosmetic companies while the foreskins in Group 2 circumcisions are uselessly discarded.

Yet I submit that the government's choice here is mistaken. If the government can only prevent one group of parents from circumcising their sons, I submit that it should prevent the circumcisions in Group 1. If so, this suggests that motives can make one action worse than another, even if the harms are the same.

One reason why bad motives may make harmful actions worse is because these motives constitute *expressive wrongs* – wrongs based on a certain type of disrespect exhibited by an agent for the individual affected by her actions. Although he does not use the term 'expressive wrong', Warren Quinn describes this type of disrespect (in cases in which an agent harms another person as a means to the agent's ends) as follows:

The agent [who harms others as a means to his ends]... has something in mind for his victims – he proposes to involve them in some circumstance that will be useful to him precisely because it involves them. He sees them as material to be strategically shaped or framed by his agency... He must treat them as if they were then and there for his purposes.<sup>33</sup>

In harming their children for their own financial gain, the parents in Group 1 treat their children as materials – there simply for the parents’ purposes.<sup>34</sup> This grave expressive wrong makes the Group 1 circumcisions substantially morally worse and therefore more pressing to prevent than the circumcisions in Group 2. Framed in terms of the rights of the harmed individuals, we can say that children have *a stronger right* against being circumcised as a means for generating parental profit compared with their right against being circumcised by non-negligently benevolent parents.

Interestingly, German law currently permits circumcision only when this operation is motivated by the child’s well-being.<sup>35</sup> This legal requirement of benevolence is consistent with the moral importance I am attributing to the harmer’s motives.

However, some scholars explicitly object to this aspect of the German law and, more generally, to the claim that motives can affect an action’s badness or goodness. As Merkel and Putzke write, ‘Wicked motives concern the morality of the parental actors. As to justifying the violation of the child’s body, however, they do not even touch upon, let alone solve, the normative problem.’<sup>36</sup> On Merkel and Putzke’s view (which is shared by many philosophers),<sup>37</sup> motives, though certainly relevant for evaluating the moral character of a harming agent and her degree of blameworthiness, are *irrelevant* for ascertaining the degree of badness of a harmful action. Parents who circumcise their sons’ for profit may well be particularly bad or blameworthy. But the act itself is no morally worse and the child’s right against this act no stronger than in the non-negligent benevolence case.

Merkel and Putzke do not address the counterintuitive implications of their view (of which there are many examples).<sup>38</sup> Instead, they defend their position by arguing that the opposing view – the view that motives *can* affect the degree of an

action's badness – has implausible implications. The whipping of a child, they point out, is impermissible even when done by parents who believe it to be in their child's best interests. And a malevolent father who takes his son to a beneficial dentist appointment for the sole reason of watching his son writhe in pain is acting permissibly, they claim.<sup>39</sup> If the permissibility-status of these actions is not affected by the parents' motives, this seems to support the position that motives do not affect an action's goodness or badness.

I concede that Merkel and Puzke's case judgments are compelling. And I cannot hope to definitively refute their position that motives do not affect the degree of badness/goodness in this short section. However, I shall respond to Merkel and Puzke by defending the following modest claim: There is a plausible way of understanding the moral role of motives that

- a) allows motives to substantially affect an action's degree of badness/goodness,
- b) is consistent with Merkel and Putzke's compelling case judgments,
- c) is consistent with the judgment in Two Different Motives above, and
- d) can justify the government's permitting non-negligently benevolent MHE circumcisions while banning intentionally harmful MHE circumcisions.

It is admittedly difficult to see how motives can affect the badness of an action if the malevolent but beneficial dentist visit is permissible. After all, the expressive wrong committed by the father is a heinous one and the benefit for the child is (we might assume) fairly minor. If bad motives make an action worse, the badness of the expressive wrong in this case should easily outweigh the goodness of the minor benefits and thus make the father's action impermissible.

However, this difficulty only arises if we view the role of expressive wrongs *additively*. We can instead understand their role *multiplicatively* – viewing them as a

magnifying/shrinking factor (a positive multiple) for the badness or goodness of an action. On this *magnifying-factor view* of the role of expressive wrongs, very serious expressive wrongs act as large shrinking factors of the moral good of a beneficial action (while more modest expressive wrongs act as more modest shrinking factors). And for harmful actions, very serious expressive wrongs act as large magnifying factors (while more modest expressive wrongs act as low magnifying factors).

The consistency of this magnifying-factor view with the judgments in the malevolent dentist visit and the benevolent whipping cases is not difficult to demonstrate. A positive multiple cannot make a negative value positive nor can it make a positive value negative. Thus, in the absence of competing considerations, the beneficial dentist visit cannot be made impermissible by the father's malevolent motives. The malevolent motives can only shrink the moral good of this action relative to a dentist visit motivated by a benevolent parent. Similarly, in the absence of competing considerations, the harmful whipping cannot be made permissible by benevolent motives. The benevolent motive can only shrink the degree of badness that the harmful whipping constitutes relative to whipping done, say, to simply vent the parents' frustrations. Thus, the magnifying-factor view grants an important role to expressive wrongs in determining an action's overall goodness/badness while also being consistent with the impermissibility of the benevolent whipping and the permissibility of the malevolent dentist visit.

The magnifying-factor view is also consistent with the judgment in Two Different Motives above. The expressive wrong associated with non-negligent benevolent harming is clearly lower than the expressive wrong associated with harming an individual as a means to one's end. The parents in Group 2 do not see their children as mere materials for their purposes. They are instead non-negligently

trying (though presumably failing) to make their children's lives better. The magnifying-factor view thus implies that the MHE circumcisions performed for the parents' profit are substantially worse than MHE circumcisions authorized by non-negligently benevolent parents and can therefore explain why the prevention of circumcisions in Group 1 should be prioritized over those in Group 2.

Finally, the magnifying-factor view can justify permitting non-negligently benevolent circumcisions while banning malevolent circumcisions (in line with Germany's approach). Admittedly, *in the absence of competing considerations*, benevolent motives cannot make MHE circumcision permissible according to the magnifying-factor view. Benevolent motives can only reduce the moral bad of MHE circumcisions relative to malevolent MHE circumcisions. However, if there are weighty competing moral considerations (e.g., avoiding the departure of substantial number of religious citizens), motives can make a difference to the *all-things-considered permissibility* of a practice. The badness of non-negligently benevolent MHE circumcisions might be sufficiently shrunk such that it is outweighed by moral bad of the departure of the religious citizens. Malevolent MHE circumcisions, on the other hand, might nevertheless have a badness greater than the badness of the departure of the religious citizens. Thus, the magnifying-factor view can explain how the parents' motives can affect whether the practice of MHE circumcision should be permitted, all things considered.

## **6.2 Non-Essential Pollution vs. the Practice of MHE Circumcision**

Having provided a defense (albeit tentative) of the claim that harmers' motives can affect the badness of actions, I now wish to compare the strength of children's rights against the practice of MHE circumcision with the strength of their rights

against Non-Essential Pollution (assuming that the harms are equivalent). This comparison is important for two reasons. First, if children's rights against the foreskin-damaging pollution are not trumps (as I argued above), and if the expressive wrongs associated with the practice of MHE circumcision are less severe than those associated with the foreskin-damaging pollution (as I shall argue in this section), this strongly suggests that children's rights against the practice of MHE circumcision are not trumps, either.<sup>40</sup> Second, as I shall argue in this section, the rights against the MHE circumcision are *substantially* weaker than the rights against the foreskin damaging pollution, then the plausibility that competing interests (e.g., avoiding the departure of religious citizens) can justify permitting the practice of MHE circumcision increases.

Let us begin by considering the motives of the harmers in the two cases. In the case of MHE circumcision, I argued above that parents are by and large motivated by non-negligent benevolence. However, I conceded that a small minority may be harming their boys as a means to their ends (e.g., relieving pressure from religious relatives or protecting the father's body image).<sup>41</sup> In the case of the foreskin-damaging pollution, on the other hand, all the boys are harmed *as a byproduct* of achieving the adults' ends.<sup>42</sup> Although the children's foreskin is damaged as a foreseeable consequence of the motorized travel, this damage is not used as a means for producing this benefit.

To compare the two practices, we must therefore compare the expressive wrongs from non-negligently benevolent harming, harming as a byproduct to one's end, and harming as a means to one's end. To do so, let us consider a variation of Two Different Motives in which a third group of parents (which is also economically well-off) is added. This group of parents wish to produce a good to sell for their own

pecuniary benefit. However, the production of this good generates pollution that damages foreskins such that the children will need to be subjected to MHE circumcision. The parents produce this good despite believing that the foreskin loss would moderately harm their sons in expectation.

These parents' actions seem morally abhorrent. Although this action is not quite as bad as harming children *as a means* for profit, these actions are, I submit, *far closer* in terms of overall badness to those of the foreskin-selling parents than to those of the non-negligently benevolent parents. This suggests that the expressive wrong associated with non-negligent benevolent harming is not only far less grave than the expressive wrong associated with harming another as a means to one's end. It is also substantially less grave than the expressive wrong associated with harming another as a byproduct of achieving one's ends.

Much of the literature on the moral consequences of motives has focused on the distinction between harming as a means and harming as a byproduct (this is the distinction at the heart of the well-known Doctrine of Double Effect).<sup>43</sup> However, on the view I am defending here, this distinction is only one among many that affect the magnitude of expressive wrongs. And it may not even be the most important one. In this case, at least, the difference between non-negligent benevolent harming and intentional harming as a byproduct seems to dwarf the difference between intentional harming as a byproduct and intentional harming as a means.

Given the nature of expressive wrongs, this judgment is unsurprising. Although the parents who harm their sons as a byproduct cannot be accused of treating their children as mere materials to be shaped by their agency, they nevertheless display a callous disregard for the well-being of their child. Parents who

are non-negligently trying to benefit their children (but end up harming them nevertheless) treat their children's lives with far greater respect.<sup>44</sup>

We can now see why children's rights against the practice of MHE circumcision are substantially weaker than their rights against the foreskin-damaging pollution. In the case of MHE circumcision, a large majority of boys are harmed by non-negligently benevolent agents while a small minority are harmed as a means to other agents' ends. In the case of the foreskin damaging pollution, all of the boys are harmed as a byproduct of achieving other agents' goals. If, as I have argued, the non-negligently benevolent/intentional harm distinction makes a much greater difference to expressive wrongs than the byproduct/means distinction, then the children's rights against the practice of MHE circumcision are indeed substantially weaker than their rights against being subjected to equivalently harmful pollution. Thus, if children's rights against the foreskin-damaging pollution are not trumps, the strength of their rights against MHE circumcision likely falls *well short* of an interest-trumping level.

It is therefore not difficult to see how even a government sympathetic to the Nordic Ombudsmen for Children's premises might nevertheless resist their calls to ban circumcision. Even if the government agreed that the practice is harmful and infringes on children's rights to bodily integrity, and even if the government agreed that the children's rights are more weighty than any parental or religious rights to perform circumcision, it might nevertheless oppose a ban. Since children's rights in the case of MHE circumcision are priorities rather than trumps, competing social interests must be considered. And sufficiently weighty social interests, such as those that would be set back by the departure of substantial numbers of Jewish and Muslim citizens, might well be sufficient to justify permitting the practice.

## Conclusion

My aim in this article has been to explore the strength of pre-autonomous children's right to bodily integrity. Using the example of circumcision, I have argued that both the degree of expected harm and the degree of expressive wrong matter. If a group of parents were castrating their sons, no realistic competing considerations would justify allowing the practice to continue, not even if the parents sincerely believed castration was beneficial. And if parents were intentionally harming their children in more moderate ways for the parents' personal benefit, such a practice, too, would be all but impossible to justify.

However, cases like circumcision are more complex. Even taking opponents' empirical assumptions about the practice's harms as given, circumcision is no more than moderately harmful in expectation. And it is authorized by parents who, by and large, non-negligently believe that the procedure is in the best interests of their sons. In such cases, I have argued that the strength of children's rights, even against the practice as a whole, falls well short of interest-trumping status. Thus, not only competing rights, but also competing interests (e.g., those that would be set back by the departure of substantial numbers of religious citizens) will need to be considered in determining whether the practice should be permitted. The debate cannot be settled by appeals to infringements on children's rights to bodily integrity alone.

*Joseph Mazor, London School of Economics, London, United Kingdom.  
j.m.mazor@lse.ac.uk*

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## NOTES

- 1 'Let the boys decide on circumcision: Joint statement from the Nordic Ombudsmen for Children and pediatric experts.' Oslo, September 30, 2013. (<https://www.crin.org/en/docs/English-statement-.pdf>, accessed on 14 April, 2017)
- 2 Ron Kampeas, 'US envoy warns circumcision bans will create Jew-free Europe,' July 12, 2014, the Times of Israel (<http://www.timesofisrael.com/us-envoy-warns-circumcision-bans-will-create-jew-free-europe/>, Accessed on 14 April, 2017)
- 3 Ronald Dworkin, 'Rights as Trumps', *Theories of Rights*, J. Waldron (ed.), (New York: Oxford University Press, 1984).
- 4 In using the term 'in expectation', I do not wish to commit to measuring the harm of a risky action via a straightforward expected value calculation. I shall instead the question of how different risks of harms are to be aggregated open.
- 5 J. S. Svoboda, R. S. Van Howe and J. G. Dwyer, 'Informed consent for neonatal circumcision: an ethical and legal conundrum', *Journal of Contemporary Health Law & Policy* 17, 1 (2000): 61-133, pp. 94-103, pp. 109-110.
- 6 *Ibid.*, pp. 111-12.
- 7 *Ibid.*, 103-109. For a description of psychological consequences from an unrepresentative sample of circumcised men, see G. J. Boyle, R. Goldman, J. S. Svoboda and E. Fernandez, 'Male circumcision: pain, trauma and psychosexual sequelae', *Journal of Health Psychology* 7, 3 (2002): 329-343, pp. 335-36.
- 8 G. J. Boyle, J. S. Svoboda, C. P. Price and J. N. Turner, 'Circumcision of healthy boys: criminal assault?', *Journal of Law and Medicine* 7, (2000): 301-310, p. 303.
- 9 Svoboda, Van Howe, and Dwyer op. cit., pp. 94-103.
- 10 Indeed, some thinkers argue that circumcision is *more* costly for an infant than for an adult. See E. Ungar-Sargon, 'On the impermissibility of infant male circumcision: a response to Mazor (2013)', *Journal of medical ethics* 41, (2015): 186-190, p. 186.
- 11 For a discussion, see M. Benatar and D. Benatar, 'Between prophylaxis and child abuse: the ethics of neonatal male circumcision', *American Journal of Bioethics* 3, 2 (2003): 35-48.
- 12 See Ungar-Sargon op. cit., p. 189
- 13 *Ibid.*
- 14 Ungar-Sargon (op. cit., p. 189) inaccurately reports the 'father circumcised' rationale in the Rediger and Muller study he cites (C. Rediger and A. J. Muller, 'Parents' Rationale for Male Circumcision', *Canadian Family Physician* 59, 2 (2013): 110–15) as a rationale that the son 'look like' the father. Ungar-Sargon's rewording exaggerates the father-centeredness of the parents' reported concern.
- 15 Circumcision is important, for example, for membership in the Orthodox Jewish community. Admittedly, in certain extreme cases (e.g., former Soviet Jewry), there has been leniency on this matter. But a parent in a traditional community who refuses to circumcise their child for secular ethical reasons can hardly expect to remain a member of the community in good standing. See Rabbi Professor David Golinkin, 'What is the Halakhic Status of an Uncircumcised Jew?', February 2015, (<http://www.schechter.edu/what-is-the-halakhic-status-of-an-uncircumcised-jew/>, accessed 14 April, 2017)
- 16 Rediger and Muller op. cit.
- 17 As one circumcised father (who ultimately decided against circumcising his son) writes, 'But for my son to have his penis look absolutely nothing like mine, well, it worried me somehow. If he ever had questions about his, I wouldn't have the firsthand experience to offer answers. And if he saw me naked, he might notice the difference. Would he feel less of a father-son connection to me, as paranoid as that may sound?' Chris Silva, 'To Circumcise or Not to Circumcise: A New Father's Question' 1 March, 2016, New York Times. ([https://www.nytimes.com/2016/03/04/fashion/mens-style/circumcision-fatherhood-dilemma.html?\\_r=1](https://www.nytimes.com/2016/03/04/fashion/mens-style/circumcision-fatherhood-dilemma.html?_r=1), accessed 14 April, 2017)
- 18 For an example of this worry (again from a father who ultimately decided against circumcising his son) see, 'Circumcised dad, intact son,' 12 April, 2015 ([https://www.reddit.com/r/daddit/comments/32btkv/circumcised\\_dad\\_intact\\_son/](https://www.reddit.com/r/daddit/comments/32btkv/circumcised_dad_intact_son/), accessed 14 April, 2017)
- 19 Svoboda, Van Howe, and Dwyer op. cit., p. 89.
- 20 See, for example, Centers for Disease Control and Prevention, 'Recommendations for Providers Counseling Male Patients and Parents Regarding Male Circumcision and the Prevention of HIV Infection, STIs, and Other Health Outcomes.' (2014). (<http://www.regulations.gov/#!documentDetail;D=CDC-2014-0012-0003>, accessed 14 April, 2017).
- 21 For a discussion, see A. Gewirth, 'Are there any absolute rights?', *The Philosophical Quarterly* 31, 122 (1981): 1-16.

22 See, for example, Ungar-Sargon op. cit., p. 186.

23 The distinction between a right and an interest is difficult to delineate. My desire to upgrade to the newest model of smart phone is clearly a mere interest. My claim against being murdered is a right. However, where exactly the line is drawn is a highly controversial matter that I shall not attempt to address here. For a discussion, see Dworkin op. cit.

24 For a discussion, see N. MacCormick, *Legal right and social democracy: essays in legal and political philosophy* (Oxford: Oxford University Press, 1982), pp. 154-166.

25 I overlooked this intermediate position myself in previous work. See J. Mazor, 'The child's interests and the case for the permissibility of male infant circumcision', *Journal of medical ethics*, 39, 7 (2013): 421-428, pp. 423-424.

26 For a discussion, see C. H. Schroeder, 'Rights against risks', *Columbia law review*, 86, 3 (1986): 495-562.

27 See, for example, R. Dworkin, 'Comment on Narveson: in defense of equality', *Social Philosophy and Policy* 1, 1 (1983): 24-40, p. 39.

28 Indeed, due to the moral connections between a person and her body, encroachments on the child's body may not need to even *moderately* harmful in expectation to qualify as a rights-infringement. A child may well have a right against even less substantial bodily harms.

29 The rate of infant circumcisions performed in hospitals was 55.4% in 2007. Given the downward trend, circumcision may well have become significantly less prevalent since then. See Owings et. al., 'Trends in Circumcision for Male Newborns in U.S. Hospitals: 1979–2010,' National Center for Health Statistics ([http://www.cdc.gov/nchs/data/hestat/circumcision\\_2013/circumcision\\_2013.pdf](http://www.cdc.gov/nchs/data/hestat/circumcision_2013/circumcision_2013.pdf), accessed 14 April, 2017).

30 For a discussion of this tradeoff, see Guido Calabresi *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse, New York: Syracuse University Press, 1985), Ch. 1.

31 I say 'reliably' because, as I shall argue below, harmers' motives are also relevant for evaluating the strength of rights against harms.

32 Another reason why Non-Essential Pollution is different is that there are no competing rights in this case. In the case of MHE circumcision, on the other hand, there might plausibly be some religious or parental rights that weigh in the practice's favor.

33 W. Quinn, 'Actions, intentions, and consequences: The doctrine of double effect', *Philosophy & Public Affairs* 18, 4 (1989): 334-351, p. 348.

34 The parents also display a fundamental disregard for their duties of care and for their special relationship with their child. However, I will focus here on the more general expressive wrong that is independent of the fact that it is the parents (as opposed to a stranger) who are using their child as a means to their ends.

35 For a brief discussion of this aspect of the law and the reasoning behind it, see R. Merkel and H. Putzke, 'After Cologne: male circumcision and the law. Parental right, religious liberty or criminal assault?', *Journal of medical ethics* 39, 7 (2013): 444-49, pp. 447-49.

36 Ibid., p. 449.

37 S. Sverdlik, 'Motive and rightness', *Ethics* 106, 2 (1996): 327-49, pp. 327-32.

38 See *ibid.* for some of these examples.

39 Merkel and Putzke op. cit., p. 449.

40 Establishing this point definitively would require arguing either that nothing but harms and expressive wrongs affect the strength of rights or arguing that the other factors affecting the strength of rights weigh in favor of a weaker right in the case of MHE circumcision. Such arguments are beyond the scope of this article.

41 I will ignore the case of negligent benevolence for simplicity.

42 Admittedly, in the pollution case, each of the adults' actions individually only causes negligible harm. It is only collectively that these actions harm children as a byproduct of the motorized travel. Although it is possible that the expressive wrong of the polluting actions is therefore lower, I shall not address this complexity here.

43 For a discussion, see Alison McIntyre, 'Doctrine of double effect', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), Winter 2014 Edition, (<https://plato.stanford.edu/archives/win2014/entries/double-effect/>, accessed 14 April, 2017).

44 Once again, a substantial part of the difference in expressive wrongs may also have to do with the special parental relationship. Parents who are non-negligently trying to benefit their children and fail do not express nearly the same disregard for their duties of care and for their relationship with their child as do parents who intentionally harm their children. However, if we consider the case with strangers rather than parents, I submit that the difference between non-negligently benevolent harming

and intentional harming as a byproduct remains substantially greater than the difference between intentionally harming as a byproduct and harming as a means (though the difference may well not be as great).