

**Is the Body Secular?
Circumcision, Religious Freedom, and Bodily Integrity**

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ABSTRACT

Recent legal and public debates over circumcision in Germany have tended to pit religious freedom against bodily integrity. This paper examines the background assumptions about religion and the body on which this framing depends. Insofar as the body is assumed to represent a fixed point determinable independently of 'religion', to frame the debate over circumcision in terms of a clash between rights pertaining respectively to religion and the body is, I argue, to circumscribe and contain religion within boundaries marked by the non-religious and non-negotiable. The secular body is thus not simply an additional consideration to be weighed against religious freedom but a condition of and limit to the modern conception of (free) religion itself. If the physical body is a synecdoche for the social system, the normative, uncircumcised body can be interpreted as standing in for the universalist order of secular law.

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When a German court in Cologne ruled in June 2012 that a four-year-old boy's 'fundamental right to bodily integrity' had been violated when his Muslim parents had had him circumcised, the decision sparked widespread and often emotional debate over, *inter alia*, the welfare of children, the status of Muslims and Jews in Germany, the place of religion in secular societies, and the meaning of multiculturalism.¹ In the wake of the controversy, the Bundestag voted in December 2012 to allow non-therapeutic (non-medically necessary) male circumcision under certain conditions.² The debate was framed – in the court, the parliament, media, and popular discourse – as a contest of basic rights, in which the bodily integrity of children was juxtaposed to the religious freedom of their parents. Those opposed to circumcision raised concerns about the inability of children to consent to having their bodies irrevocably altered, whereas critics of the Cologne court condemned its perceived paternalism and insensitivity to the concerns of religious minorities.

Taking the Cologne case as its point of departure, this paper examines this framing and the background assumptions about religion and the body on which it draws. I am interested especially in how the distinction between the religious and the secular – where the former is taken to denote an 'option' and the latter a natural baseline – functions so as to render a certain conception of human morphology normative but seemingly extra-cultural, with the result that the body is figured as a natural constraint on culture. So construed, a religion is something one *has*, whereas a body is something one *is*. Although it might be tempting to treat bodily integrity as a neutral condition of human agency (or 'capability') and 'religion' as a possible object of an agent's free choice, I argue that such an understanding misconstrues what is ultimately at issue in debates about 'the body' and its relation to religion and law.

To begin, it is worth taking note – however cursorily given present constraints – of circumcision's lengthy and complex cultural history. By some accounts the oldest surgical procedure (Doyle, 2005, 279), male circumcision has been closely linked to questions of religion, politics, cultural identity, social status, masculinity, sexuality, hygiene, medicine, and public health. The cultural meaning of the practice differs across communities and in many has long been contested. While it is anachronistic to separate circumcision's 'religious' meaning from other dimensions of its social significance, it is important to appreciate the centrality of the practice within the Hebrew Bible, where it is described as a mark of the special covenant between God and the Jewish people:

And God said to Abraham, 'As for you, you shall keep My commandment, you and your seed after you through their generations. This is My covenant which you shall keep, between Me and you and your seed after you: every male among you must be circumcised. You

¹ I would like to thank Méadhbh Mclvor and an anonymous reviewer for the journal for their comments on an earlier draft of this paper. The argument offered here developed out of a shorter 'viewpoint' I published on the topic (see Amesbury, 2014). I also am grateful for the support of the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School, where I currently am on sabbatical as Senior Schell Fellow.

² These include regulations about who can carry out the procedure, the information that parents must receive about risks, and the minimization of pain.

shall circumcise the flesh of your foreskin and it shall be the sign of the covenant between Me and you. Eight days old every male among you shall be circumcised through your generations, even slaves born in the household and those purchased with silver from any foreigner who is not of your seed. Those born in your household and those purchased with silver must be circumcised, and My covenant in your flesh shall be an everlasting covenant. And a male with a foreskin, who has not circumcised the flesh of his foreskin, that person shall be cut off from his folk. My covenant he has broken'. (Genesis 17:9-14, Alter, trans., 82-3)

Disputes over the significance of circumcision seem to have contributed to the bifurcation of Judaism and Christianity in the first century. Recognizing that the practice was an impediment to the incorporation of would-be Gentile converts into Christian communities, Paul and other church leaders insisted that it was unnecessary, except in a 'spiritual' sense (see Galatians 5). Although circumcision is thought to have been practiced on the Arabian peninsula long before the time of Muhammad and is not mentioned in the Quran, it was eventually to become associated with Islam and is regarded by many Muslims as a link back to Abraham. While not always viewed as compulsory, circumcision is in some hadith numbered among the *sunan al-fitra* – practices that enhance or perfect the body, to which human nature is said to be disposed, such as trimming one's mustache and cutting one's nails (see Bukhari, Book 7, Vol. 72, Hadiths 777 and 779, narrated Abu Huraira).

Since at least the nineteenth century, circumcision has sometimes been advocated for reasons of putative public health, such as reducing risk for penile carcinomas and, more recently, HIV/AIDS. During this same period it has occasionally also been seen as a means of curbing sexual desire and/or masturbation. Modern opposition to circumcision has taken an equally wide variety of forms, with negative attitudes toward the practice ranging from the benevolent to the overtly anti-Semitic: during the Holocaust/Shoah, whether a man was circumcised was often used to decide if he would be sent to the camps (Aggleton, 2007, 18).

Although debates about circumcision are not new in Germany, the Cologne case served to highlight significant social cleavages around the issue, which seemed to function as a metonym for larger questions about multiculturalism and the integration of cultural and religious minorities in the shadow of a traumatic history. The key facts of the case were uncontested: on November 4, 2010, the boy, then four, was taken by his Muslim parents to a clinic, where, for 'religious reasons' (*religiösen Gründen*) he was circumcised by a doctor. Two days later, the parents, concerned by their son's continued bleeding, brought him to the emergency room of a university hospital, whereupon a public prosecutor filed charges against the doctor who had performed the circumcision, who was also a Muslim. A Cologne district court (*Amtsgericht*) ruled that the circumcision had constituted a bodily injury but that it had been justified in light of the procedure's benefits, among which it numbered both medical and cultural advantages. In the lower court's opinion, circumcision is a 'traditional-ritual course of action for documenting belonging culturally and religiously to the Muslim community' (Hans, 2012).

The prosecutor appealed the decision, and although the regional court (*Landgericht*) reaffirmed the doctor's non-culpability (on the ground – this time – that his performance of the circumcision had constituted an unavoidable error of law, given legal ambiguity surrounding the issue), it also concluded that circumcision had not in fact been in the child's best interests and was not warranted by the parents' consent (Hans, 2012). Noting that a 'child's body is permanently and irreparably altered by circumcision', the court held that the rights of parents are 'limited by the fundamental right of the child to bodily integrity and self determination' (Landgericht Köln, translation mine). Although parents are free to bring their children up in accordance with their religious convictions, civil rights 'cannot be limited by the exercise of religious freedom' (Landgericht Köln, translation mine). Properly balanced, the child's right to bodily integrity outweighs his parents' freedom of religion. But is this the best way of understanding what was at stake in the case?

Consider the ambivalent effects of framing circumcision as a 'religious' issue. On the one hand, to claim for circumcision the status of a *religious practice* is to position it as a candidate for legal protections. That debates over circumcision often involve claims to religious freedom attests partly to the privileged status of 'religion' in liberal legal orders. On the other hand, because the sort of religion thus privileged is generally understood as voluntary, practices so classified tend to be understood as elective, i.e., as options for individuals, rather than as a cultural default. Thus, the Cologne court held that religious freedom 'would not be unduly impaired' by a ban on the circumcision of boys because individuals could decide later whether or not to be circumcised (Kulish, 2012).

Although I lack the space here to explore in depth the historical background from which this understanding emerged, it is worth noting that these presumptions of individualism and voluntarism draw upon a distinctively modern construction of religion as a differentiated sphere of life and/or of society principally characterized by private *belief*. In antiquity, by contrast, the Latin term *religio* referred to binding obligations, including but not limited to cultic rites (Dubuisson, 2003, 15). Augustine later used the term to mean 'worship', and by the middle ages the religious had come to be contrasted with the secular, where the latter referred to a modality of time in the 'world' (itself a theological category) (Taylor, 2007, 55). But it was not until after the collapse of the sacramental structures by means of which the church mediated time that the distinction between the religious and the secular came to be understood quasi-spatially, as marking a division between private and public. On such a construal, 'religion' names a limited and discrete domain, the claims of which hold authority only for those who have freely consented to being so (conditionally) bound. Because Western Christianity, particularly liberal Protestantism, was instrumental to and/or largely complicit in the emergence of the secular state, the resulting shared conception of religion encodes a political settlement that enables the conceit of state noninterference in and neutrality vis-a-vis *religion*. The universalism claimed for religious freedom – its positioning as a human right and a neutral baseline for mediating disputes in multicultural societies – thus occludes a cultural

history of 'religion' and a distinctive political theology the legacy of which redounds to the benefit of some constellations of power and the disadvantage of others. Appeals to religious freedom on behalf of practices like circumcision necessarily involve ambiguity, since the price of the desired protections is often acquiescence to an individualistic and voluntaristic paradigm that does conceptual violence to the cultural understandings in which the practices in question are embedded.

The idea of religion as a matter of choice is of course internally related to the idea of the secular as something that is *not* optional (or that functions as a default option). Although 'secularity' is often contrasted with 'religion' as though the distinction between them ran *through* society, sorting practices and people into competing kinds, their relation is perhaps better conceived of as analogous to that between a frame and what is framed by it: secularity is not simply the inverse, negative space of religion but the epistemic regime that enables us to speak of 'religion' in the first place, as a particular object of modern interest and anxiety. It is, on this construal, a *horizon* to which belong the natural, neutral, and non-negotiable. Insofar as the body is assumed to represent a fixed point determinable independently of 'religion', to frame the debate over circumcision in terms of a clash between rights pertaining respectively to religion and the body is, in effect, to circumscribe and contain religion within boundaries marked by the non-religious and non-negotiable. The secular body is thus not simply an additional consideration to be weighed against religious freedom but a condition of and limit to the modern conception of free religion itself. As the Cologne case illustrates, religious freedom is possible only on the condition that religion is not allowed to contravene the secular framing on which its conceptualization *as religion* depends: the outcome is essentially predetermined by the categories in terms of which the problem is posed.

But just as there are good reasons to be wary about universalizing a modern Western understanding of religion as voluntary, so too are there good reasons to subject to critique the corresponding idea of the body as a natural limit to religious choices. We can begin here with the observation, central to Foucault's writings on punishment and sexuality, that the body is itself an artefact of cultural construction. It is 'directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs' (Foucault, 1995, 25). In opposition to the idea that the body is anterior to law – and thus something which resists, or stands in need of liberation from, external regulation – Foucault famously argued that 'the body' is produced *through* relations of power.

Judith Butler has argued that Foucault's account of the body's relation to culture seems sometimes to betray its own central insight: insofar as bodies are imagined as 'surfaces' on which regimes of power seek to inscribe themselves, the impression arises that they can be conceived of as distinct from and antecedent to the political 'fields' into which they are inserted, thus reintroducing the conception of a 'natural' body that is analytically distinguishable from what culture makes of it. On this picture, the body is, as it

were, the raw material on which history impresses recognizable forms. Butler writes:

That history is 'inscribed' or 'imprinted' onto a body that is not history suggests not only that the body constitutes the material surface preconditional to history, but that the deregulation and subversion of given regimes of power are effected by the body's resistance against the workings of history itself. In other words, Foucault appears to have identified in a prediscursive and prehistorical 'body' a source of resistance to history and to culture, where history and culture are finally and paradoxically conceived in juridical terms. That this is contrary to Foucault's stated program to formulate power in its generative as well as juridical modes seems clear. Yet his statements on 'history' appear to undermine precisely the insight into the constructed status of the body which his studies on sexuality and criminality were supposed to establish (Butler, 1989, 607).

By imagining the body as a prediscursive surface for cultural inscription, Foucault 'appears to assume a materiality prior to signification and form' (Butler, 1990, 177).

Because this distinction between material and (historical) form is central to Foucault's practice of genealogy, it is not itself subjected to genealogical critique. Doing so, Butler argues, would yield a view more consistent with Foucault's own aim of understanding power generatively, in which the 'culturally constructed body would be the result of a diffuse and active structuring of the social field with no magical or ontotheological origins, structuralist distinctions, or fictions of bodies, subversive or otherwise, ontologically intact before the law' (Butler, 1989, 607). Citing Mary Douglas's observation that '[a]ny discourse that establishes the boundaries of the body serves the purpose of instating and naturalizing certain taboos', Butler proposes to 'understand the boundaries of the body as the limits of the socially *hegemonic*' (Butler, 1990, 178, 179).³ To reject a prediscursive body is to appreciate that debates over the body's proper morphology take place within the space of 'culture', where the latter term can no longer be contrasted invidiously with an uncultured but normative 'nature'.

The framing of the German debate over circumcision presupposes a broadly liberal conception of agency. According to Martha Nussbaum, bodily integrity is one of ten 'Central Capabilities' that any 'decent political order' must secure for its citizens (Nussbaum, 2011, 33). Religious liberty is also to be protected, as a subspecies of the capability of practical reason (Nussbaum, 2011, 34). The capabilities approach is put forward not (to use Rawlsian language) as a comprehensive doctrine, but as a freestanding political conception – i.e., a candidate for an overlapping consensus 'among holders of the main religious and secular views (the major religions and the major secular ethical views)' (Nussbaum, 2011, 79).⁴ Its purpose is to protect basic agency, rather than to stipulate how this agency is subsequently to be exercised. But is this

³ Douglas had famously argued that the 'physical body is a microcosm of society' (Douglas, 2003 [1970], 80).

⁴ For an explanation of the distinction between comprehensive doctrines and freestanding political ideals, see the introduction to Rawls, 2005 [1993].

conception of the agent – whatever attitude one might take toward it – like the corresponding conception of religion as an object of choice, not itself the (contestable) expression of a specific comprehensive ideal? As Talal Asad has argued, ‘A subject possessing bodily integrity, able freely to express himself or herself, and entitled to choose for herself or himself what to believe and how to behave is not simply a “freestanding moral core of a political conception” to which people sign on. It is itself a thick account of what being human is – and one that underpins human rights’ (Asad, 2003, 150).

The aim of this paper is by no means to criticize or reject the conception of the body presumed as normative in the context of human rights law; nor is it to block criticism of rival conceptions of embodiment or the social hegemonies for which they are proxies. The point, rather, is that what counts as a *whole body* cannot be determined independently of or set against what is called (to borrow the language of the distinction I am attempting here to collapse) ‘culture’ or ‘religion’.⁵ To frame debates over circumcision in this way – as a contest of indexed human rights – is to recur to a specific conception of the body that has, for a certain audience, become so naturalized as to appear capable of providing a critical perspective on ‘culture’ from a position external to it. Far from a brief for cultural relativism, my argument is that this sought-after perspective – from which (it is supposed) we can take a ‘sideways-on’ view of the relation of culture to nature, whether to criticize some ‘cultures’ or to declare all to be equally valid – is illusory.⁶ Moreover, insofar as distinguishing in this way between nature and culture installs a gap between fact and value, the ‘prediscursive’ body imagined, *per impossibile*, as perceptible from such an angle would, ironically, be morally inert, incapable of functioning normatively as a moral constraint or ground of rights claims.

What is at risk of being lost in contemporary debates over circumcision is a recognition of law’s role in the cultural construction of bodies. Because it presupposes a normative account of what it is intended to safeguard, law functions not simply to protect, but also to construct, bodies and subjects. The body the integrity of which is secured by means of human rights – like the subject to whom that body and those rights are imagined to belong – is a culturally specific formation naturalized and universalized by means of the regime of national and international law. As law gradually expands its reach,

⁵ Asad has written: ‘If our worry is over communicating with members of other cultures about their experience, I cannot see how accepting the idea of the body as a universal datum solves anything. Because, if experience is essentially a matter of pure physiological sense data, then even two persons from the same culture will have a problem taking about it. On the other hand, if experience is – as Mauss suggested – a function of teachable bodies, then cultural differences are not an insurmountable barrier to communication (communication must not, in any case, be confused with identification), but a reason for trying to understand the practices, the ways of living, that are presupposed by different experiences’ (Asad, 1997, 49-50).

⁶ I borrow the phrase ‘sideways-on’ from John McDowell, who writes: ‘We find ourselves always already engaging with the world in conceptual activity within such a dynamic system. Any understanding of this condition that it makes sense to hope for must be from within the system. It cannot be a matter of picturing the system’s adjustments to the world from sideways-on: that is, with the system circumscribed within a boundary, and the world outside it. That is exactly the shape our picture must not take’ (McDowell, 1996, 34).

the legally constructed body exerts ever greater gravitational pull.⁷ What emerges is, paradoxically, both specific and universal – the product of a cultural history that seeks to cover its own tracks. By positioning ‘the body’ outside ‘culture’ – as ‘*intact before the law*’ – law occludes its own culture.

One result of this positioning is the emergence of ‘religion’ as a distinct category within the law’s purview, an object in a visual field the transcendental conditions of which include the distinction between nature and culture. The uncircumcised body is *secular* not because it is ‘non-religious’ or culturally neutral – it is, among other things, *Christian* – but because it functions as part of the framework – the normative background – within which talk of ‘bodily integrity’ gets its critical purchase. If the body is, as Butler (following Douglas) suggests, a synecdoche for the social system of which it is a part (see Butler, 1990, 180), the normative, uncircumcised body can be interpreted as standing in for the universalist order of secular law.⁸ Given what Douglas describes as a ‘continual exchange of meanings’ between the physical body and the social body, it is not surprising that anxieties around societal integration in Europe have converged on the question of bodily integrity (Douglas, 2003 [1970], 72).⁹

Rethinking ‘the body’ will require rethinking its relation to ‘religion’, but this cannot fail to have far-reaching implications for the liberal imaginary within which these terms operate. The sort of religion conceived as permissible within this imaginary occupies a distinct social sphere which autonomous selves can enter and exit at will. As we have seen, conceiving of religion in this way functions to make so-called ‘secular’ dimensions of life – including secular conceptions of the body – appear neutral and natural, the baseline from which to take the measure of cultural diversity. So understood, religion functions as a possible (and potentially important) good of which individuals may choose to avail themselves, but – of necessity, being an object of choice – it has nothing of interest to say about the agency of those doing the choosing. What from this standpoint must always appear as an illicit form of heteronomy – a trespass of religion into the secular domains of law, education, and medicine – is religion associated not simply with private belief but with bodily discipline, religion cut into the self as a condition of its being the self that it is (a criterion, rather than an outcome, of full agency).¹⁰ The

⁷ It is worth noting in this connection that rights intended to demarcate and safeguard domains of individual autonomy can have the effect of inviting state power deeper into these very domains. B. Jessie Hill writes: ‘Once both children and parents are understood as rights-holders, opportunities for adjudication of their respective rights proliferate. Eventually, the law occupies all available space within the parent-child relationship, as every decision with respect to children’s bodies carries possible implications for the minor’s right to bodily integrity’ (Hill, 2015, 1355).

⁸ A notable exception to this order is the United States, where neonatal circumcision remains the norm. This variation of ‘American exceptionalism’ points to a link between bodily morphology and national identity.

⁹ Whereas Douglas’s work examines, among other things, the role of the ‘perfect body’ in the construction of ancient Jewish identity, the situation I am describing is one in which Jews (and Muslims) find themselves excluded from a bodily ideal used to construct contemporary ‘European’ identity (Douglas, 1999, 46).

¹⁰ So conceived, the body has a teleological trajectory: it is not fully formed at birth. On such an understanding, circumcision is not *against* nature but rather contributes to its perfection.

difficulty, in other words, is not that there is a plurality of *religions*, but that there is a plurality of ways of understanding embodied selfhood, not all of which require, or benefit from, the ideological apparatus of 'religion'.

The debate over circumcision raises fundamental questions about the meaning of multiculturalism and the limits of toleration. I have suggested that conventional ways of framing this debate fail to do justice to the depth of the disagreement, which centers on normative understandings of embodied selfhood. One final point is here worth noting – namely, the asymmetry between those conceptions of selfhood which aspire to universality and those characteristic of communities which understand themselves as 'set apart'. Behind the universalism of the secular body lurks the universalism of Saint Paul's invitation to the Gentiles.¹¹ Insofar as circumcision is understood precisely as marking *particularity*, the challenge for societies that aspire to 'multiculturalism' might better be understood as a quest not for common ground but for what the late cross-cultural philosopher of religion John Clayton called 'defensible difference' (Clayton, 2006, Ch. 3).

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¹¹ 'Interestingly, law's claim to the universal resembles – indeed arguably derives its power from – the universalism that is claimed by a number of religious traditions, including, notably, Christianity. "In Christ there is," in the words of the Apostle Paul, "neither Jew nor Greek" (*Galatians* 3:23)' (Sullivan, Yelle, and Taussig-Rubbo, 2011, 3).

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