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*Circumcision: Immigration, Religion, History, and Constitutional Identity in Germany and the U.S.*

I: Migrants Enter the Constitutional Order

The great waves of global migration into and out of Europe such as those that preceded World War I, followed World War II, and again drew our attention in 2015 inevitably challenge the fixity or stability of a country's constitutional identity.

Whether official ideologies are those of assimilation, integration, pluralism, or multiculturalism seems not to matter; challenges will arise no matter. Constitutional

identities are not just ensembles of laws and an accumulated national jurisprudence.

They are grounded in cultural configurations that evolve over long periods of time

but are, for the most part, taken for granted. Thus, for example, a thoroughly secular constitution such as that of Germany (not to mention, France) nonetheless is built on a deep foundation, a vital layer of which is the Christian past.<sup>1</sup> Fundamental constitu-

tional tenets of many a receiving country, such as the "separation of church and state," are barely thinkable outside the history of western Christianity.

Migrants bring with them their own established social and cultural identities, sometimes more akin to that of the receiving country and sometimes less. In any

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<sup>1</sup>Cecile Laborde thus coined the term "Catho-laïque" to describe the Christian assumptions underlying the constitutionalism of utterly secular France; *Critical Republicanism: The Hijab Controversy and Political Philosophy* (London: Oxford University Press, 2008).

event they become new passengers on a ship that has been sailing for quite some time. They become entitled, perhaps even before they become citizens but certainly once they do, to affect the whither, the wohin, of that ship, but they are also called upon to acknowledge and defer to the whence, the woher of the vessel they have chosen or forced to board. Consciously or otherwise, natives and immigrants both change, though which side bears how much burden is, obviously, a source of great political and social debate and stress. Most liberal constitutional orders (and some illiberal ones) allow for a certain measure of legal pluralism, so that a fundamental secular constitutional identity or order is not necessarily threatened by the existence of religious officials or tribunals in family disputes, the arbitration of commercial conflicts, or a range of other matters.<sup>2</sup>

In addition to recent migrants, minorities of long standing may hold to values different from or irritating to those of the majority— including values very much a part of group and individual identity. Here controversy may be a constant or recurring phenomenon with minorities enjoying certain rights guarantees but also being subjected to conformist pressures, legal and social.<sup>3</sup> With luck, a more capacious

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<sup>2</sup>It does, however, belong to the heated atmosphere of recent times that anxieties about being overwhelmed by sharia law or the like have gained real traction, not only in places like the Visegrad countries where demagogy is the coin of the political realm but also in firmly established constitutional democracies like Germany, Scandinavia, Canada, and the U.S.

<sup>3</sup>See, for example, Robin Judd, *Contested Rituals: Circumcision, Kosher Butchering, and Jewish Political Life in Germany, 1843-1933* (Ithaca: Cornell Univ Press, 2007).

constitutional identity may be the outcome of such controversies; without it, existing social fissures may be exacerbated.

The controversy over circumcision that I examine here combined a challenge to minority rights with “line drawing” intended to contain and transform practices of recent migrants, practices very much at the core of their identity but perceived by many in the majority as subversive of, if not directly contrary to, the constitutional identity of liberal Germany. In what follows, I examine the controversy and detail the legal and public conflict that it unleashed. I then turn to possible means of reconciling German constitutional identity with this important particular cultural practice of the Jewish and Muslim minorities, the former ancient but only recently reestablished and the latter a growing and “coming out” sector.

## II: Circumcision and Who “Belongs to Germany?”

The controversy began unspectacularly enough in November 2010. One Saturday morning, a four year-old Iraqi-German Muslim boy was brought to a local Cologne emergency room in an ambulance called by his mother, who was panicked over minor bleeding around the site of a circumcision performed two days earlier.<sup>4</sup>

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<sup>4</sup>The circumcision was performed by an experienced, German-trained and licensed Syrian-German surgeon, Dr Omar Keeze, to whom the family had been referred and who charged the going rate of €250. The procedure had been done two days earlier, and *bellas!*, Keeze had made a routine housecall that evening to treat the site. The family had a further check-in appointment with him scheduled for later that same Saturday. See Yassin Musharbash, “Die Operation war einwandfrei,” *Die Zeit*, 20 July 2012, p. 8. Other details are recounted in Bijan Fateh-Moghedan, “Criminalizing Male Circumcision? Case Note: Landgericht Köln, Judgment of 7 May 2012,” 13 *German Law Journal* 1131 (2012).

Due, it seems, to language shortcomings in explaining what had transpired and a possibly hostile on-call doctor, the conversation between mother and staff led to the police being called.<sup>5</sup> Two indictments followed: one of the parents for child abuse, soon dropped, and another, in January 2011, of the physician who had performed the circumcision for aggravated battery, “use of a dangerous instrument to physically abuse another and damage their well-being,” through a violation of the infant’s physical integrity.

The municipal trial court acquitted all parties and dismissed the indictments, finding circumcision customarily socially acceptable. Any potential elements of the offense of bodily injury were justified or excused by the effective consent of the child’s parents who, as properly responsible for the well-being of the child (*personen sorgeberechtigt*), undertook the circumcision for the sake of the “well-being of the child.”<sup>6</sup> In balancing the various interests involved –the right of parents to raise their children, their right to free exercise of their religion, and the right of a child to bodily

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<sup>5</sup>Whether calling the police was an obvious or reasonable response is difficult to reconstruct. The mother’s German was weak: she apparently did not know the word for “scalpel” and said the procedure had been done with “scissors.” She erroneously answered “no” when asked if there had been anaesthesia. For his part, the on-call doctor’s notes reported “normal range bleeding” but remarked that it had not been a good job and that the number of stitches had not been adequate. Later, at trial, he withdrew those accusations, though one can’t know why.

<sup>6</sup>Amtsgericht Köln, 528 Ds 30/11, here citing BGB §1627 (exercise of parental custody, best interests of the child). The concept of *Sozialadäquanz* is not easily rendered in English. The respective constitutional provisions on parenting (Art 6, §2), religious exercise (Art 4, §§ 1-2), and bodily integrity (Art 2) are discussed below. It is characteristic of most “anti” literature that it begins graphically, sometimes luridly; this is also true in abortion debates.

integrity (all Constitutionally guaranteed)— the court asserted that it was important to start from the fact that circumcision served as a rite of passage to document cultural and religious membership in the Muslim community. Uncircumcised, the boy would face the threat of stigmatization in that community. As a final point, the court also noted that its own appointed expert as well as American practice saw in circumcision a positive medical benefit improving hygiene and perhaps helping to prevent certain diseases. In sum, the parents had given the doctor valid consent with the best social, religious, and health interests of the child in mind, thereby justifying what might otherwise arguably be construed as a criminal battery. As is often the case with lower court opinions, this court was very practically minded, with an ear to the ground and with an interest in disposing of problems brought to it.

Under German law, however, prosecutors have certain rights to appeal an acquittal, and here she persisted in pursuing the case against the physician. One must assume that the prosecutor fervently believed in her case, though there is some evidence that the prosecutor was encouraged by circumcision opponents in the legal academy —scholars, as we shall see, claiming to be standing up for and protecting the country’s constitutional identity--to pursue a test case. In the event, on May 7, 2012, the District Court (*Landesgericht*) in Cologne found that circumcision, notwithstanding parental consent, religious motivation, or community custom constituted a criminal

bodily injury.<sup>7</sup> Tellingly, this court began its opinion with mention of anaesthetics, scalpels, stitches (4), and the fact that the procedure had been undertaken “without any indication of medical necessity.” Although the surgeon committed no malpractice mistakes, this court quickly asserted that its expert appraisal found “at least in central Europe no medical need for or usefulness as a preventative healthcare measure.”

The court then rejected the “customarily socially acceptable” (*Sozialadäquanz*) argument of the lower court and found that “the right of parents to a religious upbringing of their children does not outweigh the right of the child to bodily integrity and self-determination.” The well-being of a child, who, as here is unable to give consent (*Einwilligung*), may not be infringed or the law violated just because the infringement is “inconspicuous, generally approved of, or historically mandated.” Further, “neither concern with avoiding ostracism within his own religious community nor parental authority over child rearing” renders circumcision compatible with the welfare of the child. Religious rites and freedom simply may not trump civil rights accorded by law.

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<sup>7</sup>LG Köln, Urt. V. 7.5.2012– 151Ns 169/11, finding a violation of criminal code StGB §224(2), “causing grievous bodily harm using a dangerous instrument.” (“The child’s body is permanently and irreparably changed by the circumcision. This change conflicts with the child’s [protected] interest of later being able to make his own decision...”). Article 2, §2 of the Constitution guarantees that “Every person shall have the right to life and physical integrity.” Still, the doctor was himself cleared as under German law he could not have been expected to know of the subsequent finding of illegality (*Verbotsirrtum*), StGB §17. Such a finding is not available under U.S. law.

As authority for these holdings, the court cited several scholars, long-time anti-circumcision activists who would come to play outsized roles in the controversy that followed.<sup>8</sup> Religiously-motivated circumcision, the court continued, was “disproportionate,” a “permanent and irreparable” change to the body of the child that also undermined his ability later to decide himself what his religious preferences might be. It would not be too much of an imposition on the parents, the court finally concluded, to require them to “wait until their boy was of legal age and could decide for himself if he wished circumcision as a visible marker of Islamic belonging.”

The court offered no explicit mention of the parties’ migration status. But it did clearly disdain the alien, if not backward, practice of those whose religious or community motivations ignored or transgressed against the country’s constitutional identity in which autonomy (even as against parents), consent, bodily integrity, and scientific enlightenment are core, premier values. A constitutional identity is more than an assemblage of the majority’s preferences (let alone prejudices), the court suggested. Rather, for this court, if not entirely universalist, these values are Germany’s and outweigh any valid claims of religious free exercise that are also part of Germany’s constitutional identity, whether brought by minorities, migrants, or others.

What transpired in the months following was tumultuous. In the courts, in the

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<sup>8</sup>In particular, Professors Rolf Dieter Herzberg and Holm Putzke. Scholarly treatises are much more important to judicial opinions in Germany than is the case in the U.S.

Bundestag, in the press and other media, among legal scholars, NGOs and other pressure and anti-defamation groups, and within the medical disciplines a whole range of historical and contemporary fissures were laid bare— some for the first time; some a renewal of old conflicts. Circumcision and the debates over it offered a window onto a breadth of contemporary social issues, most notably how a secular, formerly Christian or enlightened-Christian liberal democratic welfare state and society should address its large and often tradition-oriented Muslim immigrant and citizen minority: Should the latter’s requirement of male circumcision be tolerated as a matter of individual religious freedom? Should it be recognized as a valid group right in a multicultural society? Should it be tolerated as a matter of social peace or recognition of the “other”? Or should it, as an archaism, be opposed in the name of modern liberal values like autonomy, bodily integrity, and public health? Or should it even be banned in the name of *ordre publique* and the state’s duty to protect children, even as against their well-intentioned parents? The balance between the collective identity of Muslims and Jews, on the one hand, and of the the “entire” political community, on the other, was at issue.

The tenuous position of Muslim immigrants and citizens in German society in recent years seemed to stand in distinct contrast to the success of a reviving Jewish population. Indeed, Germany, decades later than the U.S. and particularly in conservative circles, had begun to adopt the language of a “Judaeo-Christian tradition”

(*christlich-jüdischen*), which at times was viewed as a simultaneous instrumentalization of Jews and marginalization of Muslims. As late as November 2010, the CDU could proclaim at its convention that “our cultural values, shaped by the philosophy of the ancient world, the Christian-Jewish tradition, the Enlightenment, and historical experiences form the basis of our social cohesion and constitute the dominant/mainstream (*Leitkultur*) of Germany.” And although in October 2011 Bundespräsident Christian Wulff, announced, controversially, that “in the meanwhile, Islam also has come to belong to Germany,” he was criticized at the time and since. The recent rise of the AfD underscores the issue, with its Chairman Gauland announcing shortly before the September 2017 elections that Muslims and Islam were guided by sharia, “a political doctrine... and as such incompatible with the free liberal-democratic (*freiheitliche*)” constitutional identity of Germany and that consequently “Islam does not belong to [in] Germany” and is “not to be viewed” through the framework of “religious liberty.”<sup>9</sup>

The rancorous circumcision debate took place in a variety of fora but never on a clean slate.<sup>10</sup> Beneath the surface lay an imperfectly scrubbed palimpsest; the Jewish

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<sup>9</sup>CDU Program quoted in Alfred Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte* (Göttingen: Wallstein Verlag, 2012), p. 15. Gauland 18 September 2017, <http://www.sueddeutsche.de/politik/gauland-islam-gehoert-nicht-zu-deutschland-1.3672693>

<sup>10</sup>It should be noted that debates about circumcision are almost always rancorous and acrimonious. In the U.S., otherwise staid and even boring business law professors can turn lurid and violent on the subject. A good example is Geoffrey Miller, “Circumcision: Cultural-Legal Analysis,” 9 *Virginia Journal of Social Policy and Law* 497 (2002).

narrative is omnipresent in Germany. On the brains of living German society lies a past nightmare— namely, the Holocaust. A key feature of (West) German *Ver-gangenheitsbewältigung* (coming to terms with the past), of its constitutional identity as well as its public culture, has been making Germany a place hospitable both to its tiny surviving Jewish population and to new waves of Jewish immigrants from eastern Europe, the FSU, and Israel. Since the circumcision of infant boys is arguably *the* core collective marker of Jewish ethnic identity, constitutive beyond any religious commitments,<sup>11</sup> to ban circumcision would be to break a core post-war or post-‘68 taboo and to cross a pronounced red line.

A ban on circumcision would represent a dis-invitation to Jews, a hostile act akin to Holocaust denial would significantly reverse endless efforts at reconciliation. A century and longer ago, conflicts over Jewish rites like circumcision and kosher animal slaughter had been salient in the construction of a secular and enlightened (if imperfectly liberal) German nation state.<sup>12</sup> In the course of the recent controversies, virtually no one in Germany’s political or cultural elite wished to revisit these matters— though some legal scholars and hundreds, perhaps thousands, of letters-to-the editor-

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<sup>11</sup>One might ask what the analogue is for Jewish females, but I shall not do so here. The question has been addressed: Shaye Cohen, *Why Aren’t Jewish Women Circumcised?: Gender and Covenant in Judaism* (Berkeley: Univ. of California Press, 2005), pp. 143-90. Cohen argues both that Judaism was thoroughly patriarchal and less attentive to women and that circumcision was meant to bring men down a notch and also bind them to the Lord.

<sup>12</sup>Judd, *supra*, fn. 3.

writers seemed less inhibited and even eager for the opportunity to break free of the past and a perceived sense of coerced national self-denial.<sup>13</sup> Germany's political class seemed to sense that a Pandora's box was opening, and that a re-estrangement or new othering of Jews was threatening. And, indeed, in the immediate aftermath of the district court decision, several hospitals in Germany (and Austria and Switzerland) ceased performing circumcisions for fear of criminal liability, and in August 2012 the Chief Rabbi in Hof had criminal charges lodged against him by an irate citizen for performing a circumcision. Jews risked, once again, being included among the excluded.

On those occasions that German politicians did lift the lid on Pandora, it was not always pretty. Thus one social democratic parliamentarian insisted that "respect for life is after all the lesson we draw from the Nazi period," and "the legalization of bodily injury to helpless children" on account of some biblical passage would violate that lesson— thus making the prohibition of a central Jewish practice into evidence of

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<sup>13</sup>Some unknown portion of the German population is fed up with these taboos and would like to act out. But these taboos are very strong and carry other features of the post-war settlement with them, such as a pro-American orientation, anti-racism, etc. It is not impossible, it seems to me, that some of the itch to break the taboo is acted out on toward Muslim immigrants instead. One recalls the controversy begun in October 1998 when novelist Martin Walser unleashed a furor from the pulpit of the Paulskirche. Walser lamented that Germany continued to be constrained and extorted through its Holocaust guilt, a "moral cudgel" used—one wonders by whom?— to hold down the German people. Specifically, he condemned the "instrumentalization of Auschwitz" for contemporary purposes as "a permanent exhibit of our shame." On the other hand, is learning from history an "instrumentalization" of history? Is the past "unusable," an equally problematic and incapacitating proposition?

Germany's moral arrival. A Green Party deputy allowed as how "ultimately the burning of widows was also overcome" despite its cultural-religious validation, thereby equating the "harms" in question while also offering a probably unconscious nod in the direction of colonial enlightenment.<sup>14</sup>

Along with the immigration, religion, and historical disputes unleashed by the circumcision debate, a more circumscribed legal debate was opened up as well, one suited for international and constitutional comparisons. Who may speak for an infant --or for any minor-- when it comes to consent generally, as well as specifically for something like infant or boy-child<sup>15</sup> circumcision?

### III: Protecting Children, Parents and the "Barbaric"

Here comparison with the U.S. is instructive. In the legal regimes of both countries, the state as well as parents bear responsibilities of many sorts for children,

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<sup>14</sup>Marlene Rupprecht and Irmgard Schewe-Gerigk, respectively, quoted and characterized in Volker Heins, *Der Skandal der Vielfalt* (Frankfurt: Campus Verlag, 2013, pp. 152-153. Impressionistically, it seems that women are more outspoken on this question than men.

<sup>15</sup>Jewish practice is quite uniform in requiring circumcision 8 days after birth, barring extraordinary circumstances; Genesis 17:10-14, reaffirmed in Joshua 5:2-4. Eric Silverman, *From Abraham to America: A History of Jewish Circumcision* (Lanham: Univ. Press of America, 2006). Circumcision was abandoned by the Christians as part of their focus on faith in Christ and their decision to appeal to heathens and Hellenists, Acts 15:19; Romans 1:25-29. Muslim practice varies, and the procedure is generally allowed anytime pre-puberty. Since the practice is not itself Koranic but comes from the *hadith* (sayings of the Prophet), there is considerable variation in the timing and details by country, class, and sect; Paul Clotter, "Die Beschneidung in Islam," 23 *Cibedo-Texte* (Frankfurt 1983), p. 6. Clotter goes so far as to say that, despite its cultural centrality, circumcision itself has "no religious significance or canonical mandate." Rather, "since all of social life is molded by Islam, a relatively important ritual like circumcision necessarily takes on a religious dimension." p. 11. Still, it is a practice of *Muslims* rather than of *Islam*, a matter of community identity.

their safety, health, education, and general upbringing. Laws in both countries recognize this, with Germany even going so far as to constitutionalize the principles of primary and shared responsibility. Article 6, §2 of the Constitution reads, “The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.”<sup>16</sup> As a general proposition, it may be said that in the triangular relationship among parent, child, and state, the state-child leg is thicker in Germany than in the U.S., where the parent-child leg enjoys greater deference. Whereas parental rights in Germany are assessed for their “proportionality,” those rights in the U.S. enjoy nearly “fundamental” status.

The greater power of a stronger, homogenizing German state as against a more private-power centered American constitutional regime is evident elsewhere in the parent/child/state triangle as well. To take another noisy example: “home schooling” is legal and widely well-regarded as an example of both parental engagement and prerogative in the U.S. but illegal in Germany. So substantial is the gap here that German home-schoolers have (been organized and) moved to file for asylum in the U.S.<sup>17</sup> on the grounds of state persecution, much to the consternation and incredulity

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<sup>16</sup>See also Art 5, §1. In addition, Civil Code (BGB), §§ 1601-1615, 1631 lay out the responsibilities of parents and children for one another. The District Court found circumcision a “disproportionate” exercise of the parental right to religious education of children.

<sup>17</sup>The case of the Romeikes, supported by Christian home schooling lobbies (such as the Home Schooling Legal Defense Fund) in the U.S., drew worldwide attention; see, for example,

of Germans, who overwhelmingly endorse *Schulpflicht*, the obligation of parents to send their children to one of a large variety of available schools where they will meet and get to know others. In the U.S., this position has long been held to be an authoritarian, not to say tyrannical, appropriation of parental responsibility by an overweening state and reflects that different collective and constitutional identity.<sup>18</sup>

Parental child “abuse” is, of course, illegal in both countries, though Germans may be less willing to rely on moral opprobrium to do the primary preventive work. Thus, to cite perhaps similar instances, neither ear piercing nor tattooing is permitted in Germany below the age of 16, regardless of parental permission, and parental authorization is determinative for only the two years between 16 and 18.<sup>19</sup> U.S. laws on tattooing vary a great deal, though generally they take account of parental authorization while rarely if ever do state laws impede parents who wish to pierce even a baby’s ears.<sup>20</sup> In the Cologne district court opinion, both the religious rights of the

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<http://www.bbc.com/news/world-us-canada-26454988> ; <http://www.stthomas.edu/news/hot-topics-cool-talk-german-home-schoolers>; <http://www.bbc.com/news/business-24804804>

<sup>18</sup>See *Pierce v Society of Sisters* 268 U.S. 510 (1925) (requiring *public* schooling of children violated parental liberty to direct education of their children); *Meyer v Nebraska*, 262 U.S. 390 (1923) (public interest in younger children being educated in English does not outweigh parental discretion); *Milliken v Bradley*, 418 U.S. 717 (1974) (state did not have authority to bus children out of their school district in order to desegregate); *Yoder v. Wisconsin*, 406 U.S. 205 (1972) (requirement that parents send their children to school to age 16 violated religious freedom of Mennonite parents).

<sup>19</sup>The *Jugendschutzgesetz* [Law for the Protection of Children and Youth], Bundesgesetzblatt, Part I, 2002-07-26, No. 51, pp. 2730-2739 (rev 2013) is “tougher” than any comparable U.S. law.

<sup>20</sup>In the U.S. this is particularly popular in communities of Hispanic background. On tattooing, Jane Caplan, *Written on the Body: The Tattoo in European and American History* (Princeton:

parents and their authority to educate and raise their child (*Sorgerecht*) were outweighed by the child's right to bodily integrity and self-determination in the future –rights the state was empowered, expected, and, here, compelled to enforce.

The circumcision debate, finally, also exposed rifts of subjectivity in the medical sciences or, at least, distinct national practice preferences in Germany and the U.S. Whereas pediatricians and public health professionals in Germany have long been resolute opponents of circumcision on evidence-based scientific grounds, their American peers have been staunch advocates on grounds presumptively equally scientific. Such sharp differences should not exist, or at least need to be accounted for. Insofar as medicine and public health are also social institutions, they have historically paid attention to or cast their gaze on “inferior” immigrant populations. These might be burdened with inherited customs needing enlightened upgrading, such as by being either dissuaded from primitive unhygienic customs like circumcision disdained by the majority culture in Germany or, alternatively, being introduced to its cleansing and disease-preventing benefits as construed when dealing with immigrants by the dominant American culture.<sup>21</sup>

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Princeton University Press, 2000).

<sup>21</sup>It is necessary to establish numbers for various sub-populations, but overall, about 20% of males in Germany are circumcised compared to about 75% in the U.S. Numbers in the U.S. have declined some, partly because the practice is less common among the Latin American immigrants who dominate the current stream, because insurance companies are trying to pay for less and less, and possibly for other reasons to be explored. Numbers in Germany seem to have risen slightly along with the Muslim population. “Gesundheitsforschung- Gesundheitsschutz,” *Bundesgesundheits-*

At the fevered peak of the controversy, hundreds of German doctors, scientists, and lawyers published an open letter to the government and parliament in which they denounced the “exercise of sexual violence against non-consenting boys,” drew a direct connection between male and female circumcision, and insisted that the real issue was “protecting Jewish and Islamic life within the framework of the German legal order”<sup>22</sup> against what one prominent ethicist, Reinhard Merkel, labeled the “barbaric,” a term usually reserved in German discourse for Nazism. Human Rights laws seem to underscore these enlightened scientific obligations as well, though circumcision’s proponents were not lacking in medical-scientific arguments of their own.<sup>23</sup> German physicians made a distinct contribution to the violent-archaic argument, helping to propagate the notion that “whoever doesn’t belong to our times, does not belong in our land.”<sup>24</sup> Not only are immigrant and minority cultures barbaric but, as bad from the perspective of German majority cultural identity, they are *archaic*.

#### IV: Repose without Resolution

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*blatt* (2007), 50 (5-6): 836-50.

<sup>22</sup>“Offener Brief zur Beschneidung, “Religionsfreiheit kann kein Freibrief für Gewalt sein,” <http://www.faz.net/aktuell/politik/inland/offener-brief-zur-beschneidung-11827590.html> (8.8.2012).

<sup>23</sup>Thus in the Convention on the Rights of the Child, Article 19.1 commits signatories to take all appropriate measures “to protect the child from all forms of physical... violence, injury, or abuse” while Article 24 requires them to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” Proponents regularly referred to well-documented hygienic and disease-prevention benefits.

<sup>24</sup>See Heins, p. 151.

For the time being, at least, the circumcision debate in Germany has been legislatively resolved in favor of those who might wish, even in the absence of any medical indication, to circumcise their male children for religious reasons. On July 19, 2012 the Bundestag passed a resolution intended to guarantee that “Jewish and Muslim religious life be viable in Germany” and on December 12<sup>th</sup> a bill was passed that legislatively overrode the ruling of the Cologne District Court and established circumcision, not as *per se* legal, but as a non-punishable undertaking when undertaken for religious reasons by someone professionally trained to perform the procedure (and who need not be a doctor if the child is under six months of age).<sup>25</sup> Insofar as a legislature may be more immediately responsive to the public’s sense of identity than either the courts or the academic professions, it would seem that German identity grew in capaciousness.

Settled as the matter itself seems to be for the time being, the controversy has left us with extraordinary amounts of published and unpublished documentation from elite and popular sources. Sometimes the documentation reveals thoroughly incommensurable discourses with no translation keys; sometimes the confrontations seem very knowing and direct. Together with the professional social science, legal,

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<sup>25</sup>The Resolution of Parliament appears at *Deutsche Bundestag Drucksache* 17/10332 while the law is codified at §1631(d) of the Civil Code (BGB) among the sections dealing with parental authority and near to §1626(1), which states that “parental custody includes care of the person of the child.” The if-under-six-months clause enables Jewish circumcisers (*mohelim*) to continue to pursue their trade.

and medical literature around the circumcision question, the debate addressed the four topics –and their ideological and professional expressions-- adumbrated here, namely:

1) Germany's relations with its Muslim immigrants and citizens; 2) Germany's relations with its Jewish minority; 3) differences between German and American views of the relationship among parents, child, and state; and 4) differences between German and American medical thinking and practice in this area.

Although it might be thought that these issues, at least as viewed through the window of circumcision, are now “over,” this is hardly the case. New and contradictory developments continue to take place in all four arenas. Thus, at the same moment that AfD, Pegida and other populist anti-Muslim and anti-immigrant groups grow on the basis of the claim that “the German way of life” is under siege, the German Constitutional Court has moved in the opposite direction, ruling that, absent a concrete danger,” it was an infringement on personal and religious liberty for schools to ban teachers from wearing Muslim headscarves at work, particularly where a state had exempted similar display of “Christian and Western educational and cultural values or traditions” from any ban, thereby privileging a specific religion.<sup>26</sup> At the same time that Jewish Germany has experienced a tremendous revival, anxieties as to community security have also been revived by an assortment of recent events.

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<sup>26</sup> BVerfG, Beschluss des Ersten Senats vom 27. Januar 2015, 1 Bv R 471/10 und 1 BvR 1181/10. The fallout from this decision has taken some time to settle, in both the courts and the schools.

## V: “Free Exercise” in a Post-Secular Culture

There has been considerable angsting in recent years as to how we live in a “post-secular” world,<sup>27</sup> yet secular liberals still find it hard to accept how seriously religious folks take religion and what that means not only for culture-war issues but for social integration.<sup>28</sup> “Religious liberty,” the right, especially of minorities, to exercise religious requirements may not provide an adequate framework for today’s conflicts. Migration and religious revival together have challenged the insulation of the state from religious demands, a prerequisite for existing liberal constitutional understandings of religious liberty. From India to Israel to Turkey to Poland to the United States and beyond, existing “separation with free exercise” regimes have suffered.

Coming from a different direction, multiculturalism, especially in the strong sense of “group rights,” is also averse to inherited liberal law and legal culture with their emphasis on the separation of public from private and unapologetic emphasis on individuals rather than groups. Even Will Kymlicka’s seminal *Multicultural Citizenship* was initially intended to address historic national minorities, not voluntary

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<sup>27</sup>See, for example, Christian Joppke, *The Secular State under Siege: Religion and Politics in Europe and America* (Cambridge: Polity, 2015).

<sup>28</sup>Sarah Carol, Marc Helbling, and Ines Michalowski, “Gretchenfrage der Integration: Religiöse Praxis prägt das Zusammenleben starker als angenommen,” *WZB Mitteilungen* 142 (December 2013), pp. 18-20.

immigrants.<sup>29</sup> Still, even those liberal theorists rejecting group rights accept that individual human rights also demand certain concessions to minorities as groups. Thus, it has been urged that nation states may “reproduce men and women of a certain sort: Norwegian, French, Dutch, or whatever,” but on the condition that they allow “minorities an equal freedom to organize their members, express their cultural values, and reproduce their way of life.”<sup>30</sup> Indeed, the International Covenant on Civil and Political Rights insists that persons belonging to [ethnic, religious, or linguistic] minorities shall not be denied the right... to enjoy their own culture.”<sup>31</sup> But no right can be unlimited, and the state certainly need not further that which it dare not deny. Where then might lines be drawn?

At times, High Courts have recognized that religious liberty cannot nullify laws of general applicability. Thus, 25 years ago, in the U.S., it was still held that “if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision,” religious freedom “has not been offended .... To make an individual’s obligation to obey such a law contin-

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<sup>29</sup>Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 2000), pp. 94-96, 114-115.

<sup>30</sup>Michael Walzer, “Comment,” in Amy Gutman, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), pp. 99-101. Walzer is one of the more sovereigntist and communitarian of liberals.

<sup>31</sup>International Covenant on Civil and Political Rights, arts. 1, 27, Dec. 16, 1966. S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

gent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,'" permits a person "by virtue of his beliefs," unacceptably "to become a law unto himself."<sup>32</sup>

More recently, however, responding to this post-secularism, legislatures in some places, including the U.S., have offered religious liberty or religious sentiments greater protection or preference.<sup>33</sup> Indeed, the Congress of the United States in passing the "Religious Freedom Restoration Act" sought to overcome the *Smith* ruling and compel the courts to use a "strict scrutiny" and "compelling interest" test—the highest barriers—whenever a "free exercise of religion" claim was made against a law.

The key provision of that Act states:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except... [g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; (2) is the least restrictive means of furthering that compelling government interest.<sup>34</sup>

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<sup>32</sup>*Employment Division v Smith*, 494 U.S. 872, 885 (1990) (per Scalia, J)(involving the religious use of peyote, a banned drug)

<sup>33</sup>The U.S. Congress in response passed the so-called Religious Freedom Restoration Act (RFRA), precisely in order to require a compelling government purpose when religious interests are affected. 42 U.S.C. § 2000bb(1)-(4). Although highly valued these days by Christian Conservatives, RFRA was initially proposed by liberals seeking to protect Native American rituals involving ceremonial drugs. One *might* interpret the Bundestag's overwhelming endorsement in December 2012, BGB ¶ §1631(d) "Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes" in this vein as *privileging religious freedom over normal government regulation*.

<sup>34</sup>42 U.S.C. §2000bb(1)(a)-(b).

Ought this to be the framework through which any full or partial ban on male circumcision should be analyzed? Or does protection of religious exercise permit too much— as seems recently to have become the case in the U.S.<sup>35</sup>— providing special rights and exemptions that undermine principles of equality? Certainly to its opponents, the Bundestag’s endorsement of a right to religiously-motivated infant circumcision does just that.

Religion is one aspect of culture, and like the former, except in the ever-fewer societies of extreme homogeneity, it is particularistic. Over the past generation, culture has largely replaced class as the idiom of political debate, largely dissolving universalistic assumptions and undermining the core liberal distinction between private and public. With the decentering of identities culture has taken much of the place of class, and various identity claims have displaced broad economic categories. Once, political economy was a virtuous way to organize conflict. In distributional matters, compromise was generally possible. Now however, many societies have arrived at a culturalization of social conflict, a situation where fixed group demographics and identity replace malleable class conflict as an explanation for electoral and political outcomes.<sup>36</sup>

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<sup>35</sup>Recently, the Supreme Court in *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014), held that it would violate RFRA to require that a closely held corporation provide insurance coverage for contraceptives that violated the corporation’s owners’ religious beliefs.

<sup>36</sup>The fundamentals of this debate were captured by Nancy Fraser and Axel Honneth, *Redistribution or Recognition?* (London: Verso, 2003); see also Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press 2002). Pres. Obama’s

## VI: Homogeneity, *Leitkultur*, and Constitutional Identity

As the circumcision debate helps to make clear, the genie is out of the bottle and issues of culture and identity are not to be denied or returned to a private sphere separated successfully from a public one. Just as socially embedded capitalism, a hallmark of the German society for decades, has given way to neo-liberalism, so social democracy has become social liberalism. From opposing perspectives, multiculturalists and nationalists alike have succeeded in this regard, and citizenship cannot be dissociated from culture. Outcomes as well as discourses will change when state organs have to govern a society where religion, culture, and identity have been made objects of explicit demands for recognition. Unthinking majorities and the constitutional identities they have crafted are now confronted by both long-time minorities and new “alien” immigrants.

It was not so long ago that Germany’s liberal constitutional identity was still a work in progress— at least for West Germany’s Catholics, themselves not fully comfortable with the country’s advancing progressive secularism. To assure both majority constitutionalists and *Kulturkampf*-anxious Catholics, the distinguished Catholic legal thinker and jurist Ernst-Wolfgang Böckenförde sought to show that West Germany was homogenous enough to accommodate all in a liberal constitutional state and

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2012 election victory was explained, especially by media and academic *supporters*, as a triumph of identity demographics, not of class interests.

society. He formulated this position, which came to be known as the “Böckenförde Paradox,” to explain that conflict could and would be real but self-limiting because of the ultimate homogeneity of the society. The paradox holds that liberal states sit atop value-laden societies:

[t]he liberal, secularized state is nourished by presuppositions that it cannot itself guarantee. That is the great gamble that it has made for liberty’s sake. On the one hand, it can only survive as a liberal state if the liberty it has allowed its citizens regulates itself from within, on the basis of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those internal regulatory forces by its own efforts—that is to say with the instruments of legal coercion and authoritative command—without thereby abandoning its liberalism and... lapsing into that pretension to totality... of the denominational civil wars.<sup>36</sup>

The liberality of the liberal state is, in other words, nourished by and dependent on a certain value consensus, generally left undiscussed, except perhaps in times of revolution or constitution writing. In order to be able to dispute and fight democratically and stably over a certain range of matters, there needs to be a background consensus on numerous other matters, a consensus that goes sometimes to pre-political cultural as well as political values and not just rules, to justice and not just fairness. That agreement, in turn, cannot be limited to procedures or legality but must, *pace*

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<sup>36</sup> Formulated in 1967, Böckenförde’s Paradox” was intended in part as a reminder of the salient role of religion in a democratic Germany. Böckenförde served on the Constitutional Court from 1983-1996. This English translation of Böckenförde is taken from the collection, *State, Society, and Liberty: Studies in Political Theory and Constitutional Law* (New York: Berg Publishers, 1991), p. 45. For a renewal of the Böckenförde discussion with reference to religious values, see Jürgen Habermas and Josef Ratzinger, *The Dialectics of Secularization: On Reason and Religion* (San Francisco: Ignatius Press, 2006) and Habermas, et al. *An Awareness of What Is Missing: Faith and Reason in a Post-Secular Age* (Malden, Mass.: Polity Press, 2010), pp. 18-19, 21.

both Rawls's overlapping or overarching consensus and Habermas's "constitutional patriotism," implicate historically and locally-produced sets of values, visions of justice, and a core of ethics. The homogeneity, however relative, that Böckenförde assumes, lies somewhere between constitutional patriotism and cultural uniformity.

Does this mean, or can this mean, that Germany is a country with a *Leitkultur*, one that is simultaneously modernist and Christian and which can therefore disfavor practices, such as circumcision, that are at odds with that *Leitkultur*? No one respectable explicitly makes such an argument.<sup>37</sup> At the same time, however, one must wonder why so many German ethicists and jurists cannot even imagine infant baptism as violating any of the legal-constitutional strictures they see transgressed by circumcision. Secularism and liberal Protestantism are more closely tied than most advocates of either would care to acknowledge.

The reality of pluralism, the fact that consensus may be more an *overlapping* of different views than a single capacious *overarching* view, a fortiori commits the state itself to remain agnostic or neutral in its worldview and its conceptions of dignity or justice. For Habermasian liberals, the democratic constitutional state is self-sufficient, able by itself, without "pre-political" foundations, to supply normative justifications for loyalty and legitimacy. It is the democratic constitution and rational-discursive way of life itself that engenders legitimacy without metaphysics and while accommo-

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<sup>37</sup>The rise of the AfD, of course, shows that more and more Germans may actually think so, and though the explicit argument is not yet *salonfähig*, it is now in the Bundestag; see pp. 8. 9 *supra*..

dating citizens with diverse beliefs. Were it were (still) so. Legitimacy maybe cannot spring from legality alone but comes also from places like culture and ethics.

In debating with the then-Pope, Habermas recognized that “pre-political” civil society energies are what motivate citizens to go beyond their selfish interests to seek a common good and practice the solidarity and political virtue essential to a democracy: “liberal societal structures are dependent on the solidarity of their citizens.” Further, “not only in their abstract substance, but very specifically out of the historical context” of each nation is anything like constitutional patriotism possible. In the end, concedes Habermas, “the cognitive process on its own does not suffice”: “An abstract solidarity, mediated by the law, arises among citizens only when the principles of justice have penetrated more deeply into the complex of ethical orientations in a given culture.”<sup>38</sup> At the same time, however, Habermas wants the diverse ethical and religious values that inform society to be expressed only in the shared language of a secular state. This attempt to square the circle—“ethical orientations in a given culture” and expression through the secular state—haunts efforts to govern the circumcision question through principles of religious freedom, which the secular state can only understand and support in a limited and culture majoritarian fashion.<sup>39</sup>

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<sup>38</sup>Habermas and Ratzinger, *Dialectics of Secularization* pp. 31, 32, 33, 34. Finally, it is “cultural resources that nourish citizens’ consciousness of norms and their solidarity” (p. 46).

<sup>39</sup>Habermas’s vision of a secular state with religious people sounds quite American and is, in any event, modeled on a very Protestant model of separation that does not work in Israel or Muslim countries. “Wie viel Religion verträgt der liberale Staat,,” *Neue Zürcher Zeitung*, 6 Aug. 2012, p. 8.

We come close, then, to saying that a certain measure of community precedes the legal and social contract. At the same time, as Max Weber noted, “It is primarily the political community, no matter how artificially organized, that inspires the belief in a common ethnicity.”<sup>40</sup> German society then may, through its constitutional and give-and-take democratic political process, create the *Zusammengehörigkeitsgefühl* necessary to accept and treat as German non-majoritarian practices like circumcision. Those feelings and practices of solidarity, of *Gemeinsamkeitsgefühl*, in part on account of migration face great stress today in Germany as elsewhere while the law’s respect for individual rights and religious freedoms may tolerate or even encourage a certain fractiousness.

It may be that religious liberty and toleration are no longer adequate principles or mechanisms. Were circumcision the practice of a fictitious group of Germans of about 200,000 or a random ¼ of 1% of the population, then, though objectionable to the majority, it could be tolerated as a matter of indifference, harmless to the society as a whole, like the horse and buggy primary-school-only beliefs of some Mennonite sects.<sup>41</sup> But the 200,000 in question are Jews, and freighted history does not allow

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<sup>40</sup>Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich eds.(Berkeley: University of California Press, 1978 ed.), p. 389.

<sup>41</sup>The best known example of this approach is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case in which the U.S. Supreme Court found that on account of their family’s religious beliefs Amish children could not be forced to attend school to age 16 or past 8th grade. The Court (mis-)construed the Amish as a harmless, hermetically sealed sect of about 15,000 in Wisconsin.

“indifference” on either side of the relationship. “Mere toleration” on the majority’s side would imply acceptance of a dependent, asymmetrical inferior position by the tolerated minority, which is given “permission” to be different.<sup>42</sup> And as Rainer Forst points out quoting Goethe: “Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult.”<sup>43</sup>

If toleration of Jewish circumcision via cool indifference does not work for historical reasons, it could not work for the Muslim population of 5 million or nearly 6% for numerical reasons alone. They are too many and are not quaint. Further, since most of that population is still “becoming German,” the issue is one of respect (or non-respect) as moral and political equals, of recognizing Muslims as belonging to a common framework of social life. If not, then circumcision may be banned as a violation of that common framework, just as the District Court had maintained. Can majority German society and its legal institutions accept the right to justify the practice of circumcision?

Can the “homogeneity” or bonding forces of society provide bridges to others? If that homogeneity is based on particularistic ethical foundations –like the modernist, secularized, liberal Christianity of the *Leitkultur* that animates so many German jurists

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<sup>42</sup>This important point is made by Rainer Forst, “The Limits of Toleration,” *Constellations* 11:3(2004), pp. 313, 315.

<sup>43</sup>Ibid., p. 316 quoting J. W. Goethe, “Maximen und Reflexionen,” *Werke* 6 (Frankfurt: Insel Verlag, 1981), p. 507.

and ethicists— then “no.” Too much toleration would undermine the consensus that makes toleration and social solidarity possible to begin with. In the circumcision debates, the presumptive neutrality of science and the integrity of the individual and his will served as the outer defense perimeter against a challenge to that consensus. Illiberal liberalism at work. On the other hand, if some shared sense of fairness, fairness toward different ethical views, can grow out of the experience of living together and be backed by political and social power to help make others listen to diverse justifications, then the constructed homogeneity of society will allow us to say, “yes, bonds and bridges are both possible.”