IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of	) Supreme Court No. SC S54714
JAMES H. BOLDT,	)
Respondent on Review,	) Court of Appeals
and	) No. CA A126175
LIA BOLDT,	) Jackson County Circuit Court
Petitioner on Review	) No. 98-2318-D(3)

BRIEF ON THE MERITS OF *AMICUS CURIAE*, DOCTORS OPPOSING CIRCUMCISION

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FACTS AND PROCEDURAL HISTORY

Once again, and in the interests of judicial economy, the *Amicus Curiae*, Doctors Opposing Circumcision, defers to the facts and procedural history as related by counsel for the appellant.

PREAMBLE

We respectfully ask the Court to consider this Brief on the Merits as supplemental to our first, completing our contribution to the record on review, and detailing issues of law and bioethics not able to be appropriately presented within the constraints of our earlier Brief in Support of the Petition for Review.

ISSUES PRESENTED

1. Should the father be allowed to impose circumcision upon his son, Misha/Jimmy, by proxy consent, alleging religious motives, without a showing of medical necessity?
2. Is the child entitled to due process consisting, minimally, of a hearing on his own rights as an individual before the law, considered separately from his parents?

We argue herein that Misha/Jimmy's Constitutional and International Treaty rights guarantee his bodily integrity and this honorable Court has the power to identify and enforce those rights *sua sponte* without deference to procedural matters of domestic or family law in Oregon. The matter of custody, for instance, being factual, might by remanded to the trial court for a plenary hearing to determine the best interests of the child and ensure his safety. By contrast, the proposed circumcision itself, being

admittedly non-therapeutic and medically unnecessary, could be fully enjoined outright without the necessity of a hearing, there being no facts in dispute.

We respectfully assert that this Honorable Court has the power to declare, without further testimony, the child's fundamental rights to an intact body free of medically unnecessary surgery. Once again, the Amicus Curiae takes no position on who of the litigants might be the better custodial parent.

ARGUMENT

I.

MEDIA SPECULATION IN THIS CASE HAS FOCUSED ON THE RELATIVE RIGHTS OF THE PARENTS. SUCH AN ASSUMPTION FAILS TO NOTE THE CHILD HAS LEGAL RIGHTS OF HIS OWN, WHICH NEED TO BE ANALYZED –AND RESPECTED– INDEPENDENTLY.

The child Misha/Jimmy is not the mere chattel of either of his parents; indeed, children are loaned to us, given in trust, and are entitled to our continuing protection during their minority. Thus to focus exclusively on the relative rights of one parent as against another, custodial or otherwise, is to peer through the wrong end of the telescope, and gaze at the wrong party. It may be tempting to demean the mother's efforts as merely addressing her personal preferences. As it happens, what might be uncharitably called her preferences, are, however, completely congruent with and supportive of the child's rights under international, federal and state law. Indeed Misha/Jimmy's case can be entirely analyzed and adjudicated without the slightest consideration of the mother's wishes or rights as a natural mother, merely with reference to the child's *own* rights.

It is the custodial *father* who asks leave of this Court to ignore his child's best interests in favor of his own alleged free exercise of religion. Thus the case is one of the father's religious rights of belief vs. the fundamental human rights of his own son to the

security of his person. The case is not about the parental rights of the natural mother, and Misha/Jimmy's rights are not derivative of hers or dependent on them. He is entitled to, and has been accorded, his own.

Law Professor James Dwyer of William and Mary School of Law notes the following in his analysis of 'The Children We Abandon: Religious Exemptions to Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors:'

> **We commonly excuse parents, legally and morally, for inflicting upon their children what most people would regard as harm, when parents act on the basis of religious belief. While states have prosecuted some parents for causing their children to die by failing to obtain necessary medical care, even though the parents had sincere religious objections to medical care, these cases represent only the most extreme situation and mask a quite widespread but generally overlooked phenomenon.[1]**

And indeed, in the instant case the problem is not the denial of necessary medical care from Misha/Jimmy, but the obverse — the imposition upon a healthy child of an unnecessary surgical amputation that is medically contraindicated and carries well-documented physical and psychological risk as well as creating ineluctable and permanent loss to the child. Inevitably, a similar analysis to the cases where *necessary* medical care is denied, focusing on the legal and bioethical rights, actual needs, and best interests of the child considered independently from the whims of his parents, must apply.

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[1] James G. Dwyer. *The Children We Abandon: Religious Exemption to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors.* 74 North Carolina L. Rev. 1321 (1996) at 1322.

II.
MISHA HAS A RIGHT TO EQUAL PROTECTION OF THE LAW

The United States Constitution provides:

> **Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** [2]

The Oregon Constitution provides:

> **No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.**[3]

The *International Covenant on Civil and Political Rights* (ratified June 22, 1992 and now supreme "law of the land"[4]) provides:

> **All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**[5]
>
> **Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.**[6]

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[2] U.S. Const. amend. 14
[3] Oregon Const. art. 1, §20.
[4] U.S. Const. art. VI: "…the judges in every state shall be bound thereby…"
[5] *International Covenant on Civil and Political Rights*, art. 26.
[6] *International Covenant on Civil and Political Rights*, art. 24(1).

Mikhail "Misha" James Boldt is a natural-born citizen of the United States, and therefore, enjoys the constitutional rights, privileges, and immunities of citizens of the United States. Among these rights is the right to equal protection of the laws under both federal[7] and state constitutions.[8] The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.[9] Equal protection is invoked "if the challenged government action classifies or distinguishes between two or more relevant groups."[10]

> **To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.[11]**

The legislature of Oregon has made the cutting of the genital organs of females a Class B felony.[12] This law serves a valid governmental objective, because child welfare is of the utmost importance to the state.[13] The legislature, however, neglected to extend the equal protection of the law to "all citizens" by naming body parts only possessed by

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[7] U.S. Const. amend. 14.
[8] Oregon Const. Art. 1, §20.
[9] *City of Cleburne v. Cleburne Living Ctr*. 473 U.S. 432, 105 S Ct 3249 (1985).
[10] *QUTB v. Strauss*, 11 F3d 488, 492 (5th Cir 1993), *cert. denied*, 511 US 1127, 92 S Ct 2134 (1994).
[11] *Dunn v. Blumstein*, 405 US 330, 335, 92 S Ct 995 (1972).
[12] ORS 163.207.
[13] *Prince v. Massachusetts.* 321 U.S. 158 (1944): "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."

females and omitting mention of body parts only possessed by males.[14] This omission must now subject the law to a necessary intermediate level of scrutiny.[15]

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.[16] Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.[17]

The burden, a substantial one, is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."[18] Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.[19] Oregon has not demonstrated a justification for its discrimination against males in this regard. Misha's father depends in part upon and exploits the omission within the Oregon statute. He has not shown that the Oregon statute has met that burden by showing that the discrimination against male children serves "important governmental objectives the discriminatory means employed" are "substantially related to the achievement of those objectives." Misha's father has also not shown that the circumcision is medically necessary and independent of custom or ritual in the Jewish religion. To the contrary he has stated under oath:

> **I want and intend—unless ordered by the Court not to—**
> **to have Jimmy circumcised. The primary reason is**

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[14] 18 U.S.C 116 is similar and equally discriminatory against males.
[15] *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S Ct 3331, 3336, 73 L Ed 2d 1090, 1098 (1982).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *United States v. Virginia*, 518 U.S. 515 (1996).

> **religious. This is required for conversion of Jimmy to Judaism. I am a Jew. A central tenet of Judaism is to raise one's children as Jews.[20]**

The intent of ORS 163.207 is to provide legal protection to the genital and bodily integrity of children. Both male and female children, in the absence of the protection of law, are subject to involuntary cutting and excision of healthy functional tissue from their genital organs in violation of their rights to bodily integrity[21] and security of their person.[22] Female children and male children, therefore, are similarly situated and equally deserving of protection and must be accorded equal protection.

Misha is entitled to an equal right to protection of his genital integrity. No exception need be made for his religious belief[23] or the religious belief of his father.[24] Medical necessity is not an issue. The father cites his religious beliefs as the primary reason.[25] His toss-in notion that male non-therapeutic circumcision is somehow medically

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[20] Affidavit of James H. Boldt, father, June 8, 2004 at 6.
[21] *Rochin v. California*, 342 U.S. 165 (1952).
[22] Indeed, Judaism is not the only belief system with a genital cutting tradition imposed on children who cannot resist. African animists, some Australian aboriginals, Muslims, Yemeni nomads, and others invariably justify such cultural practices in mystical terms.
[23] ORS 163-207(1)(b) This provision is in accord with *Employment Division of Oregon v. Smith.* 494 U.S. 872 (1990): Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.
[24] 18 U.S.C 116(c). This provision is in accord with *Employment Division of Oregon v. Smith.* 494 U.S. 872 (1990): Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.

beneficial is archaic. As physicians we know that, in actuality, circumcision presents a host of risks and complications,[26] degrades health and well-being,[27] causes irreversible loss of functional human tissue,[28] as well as permanent loss of fine-touch sensation,[29] as more fully described in our previous *Amicus* brief which forms a part of this record on appeal.

A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination.[30] This honorable Court, therefore, should find that ORS 163.207, as drafted, unconstitutionally denies equal protection to males. This court might uphold the constitutionality of ORS 163.207 but could extend its reach to the protection of male children. Misha should receive protection of his genital integrity equal to that already granted to female children in Oregon. At the very least, Misha's right to equal protection demands that this case should be remanded to the trial court with instructions to hold a plenary hearing on the rights of this child and the co-relative responsibilities of his parents.

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[25] Affidavit of James H. Boldt, father, June 8, 2004 at 6: "The primary reason is religious."

[26] Nigel Williams, Leela Kapila. *Complications of circumcision.* 80 Brit J Surg 1231-1236 (1993).

[27] Robert S. Van Howe. *A cost-utility analysis of neonatal circumcision*. 24 Med Decis Making 584-601 (2004).

[28] John R. Taylor, A. P. Lockwood, A. J. Taylor. *The prepuce: specialized mucosa of the penis and its loss to circumcision.* 77 Br J Urol 291 (1996); Christopher J. Cold & John R. Taylor. *The prepuce.* 83 Suppl 1 BJU Int 34-44 (1999).

[29] Morrie L. Sorrells, James L Snyder, Mark D. Reiss, Christopher Eden, Marilyn F. Milos, Norma Wilcox, and Robert S. Van Howe. *Fine-touch pressure thresholds in the adult penis.* 99 BJU Int 864-9 (2007).

[30] *United States v. Virginia*, 518 U.S. 515 (1996).

III.

PARENTAL DUTY TO RESPECT A CHILD'S HUMAN RIGHTS

Misha's mother, Mrs. Lia N. Boldt, instinctively senses her duty to protect the person of her son and his legal rights to bodily integrity. It is for this purpose that she instituted this litigation in the face of a threat by the natural father, James H. Bolt, to violate his son's person in the name of the father's religion. The determination of the parent's duties to the child is at the heart and soul of this litigation.

It is a settled point of law that parents have a duty to represent their legally incompetent child's best interests in financial and legal matters.

Our previous *Amicus Curiae* brief in support of the petition for review provides an extensive discussion of the International Covenant on Civil and Political Rights (ICCPR) as it has become duly welcomed into American law. In the interests of judicial economy it will not be necessary to repeat that discussion.

The Supreme Court of Canada has addressed the issue of the parent's responsibility and we respectfully call the Court's attention to a Canadian appellate case on point.

The ICCPR was adopted by the General Assembly of the United Nations on 16 December 1966.

Canada modernized its constitution in 1982 with the passage of the Constitution Act 1982. That act contained the *Canadian Charter of Rights and Freedoms.* The language of the *Charter* appears to have been derived in part from the ICCRP and is similar. Article 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person…

The ICCPR, adopted by the United States Senate on June 22, 1992, provides:

> **Every human being has the inherent right to life.**[31]
>
> **Everyone has the right to liberty and security of person.**[32]

Both Canadians and Americans, therefore, enjoy the right to *life* and the right to *security of the person*.

The Supreme Court of Canada, in its consideration of a Jehovah's Witness blood transfusion case, said:

> **While children undeniably benefit from the *Charter*, most notably in its protection of their rights to life and to the security of their person, they are unable to assert these rights, and our society accordingly presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children.**[33]

The Court elaborated:

> **The child's right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child. Although an individual may refuse any medical procedures upon her own person, it is quite another matter to speak for another separate individual, especially when that individual cannot speak for herself. Parental duties are to be discharged according to the "best interests" of the child. The exercise of parental beliefs that grossly invades those best interests is not activity protected by the right to liberty in s. 7. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate**

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[31] *International Covenant on Civil and Political Rights*, Art. 6(1)
[32] *International Covenant on Civil and Political Rights*, Art. 9(1).
[33] B. (R.) *v.* Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 318. Available at http://scc.lexum.umontreal.ca/en/1995/1995rcs1-315/1995rcs1-315.html Accessed July 7, 2007.

> ***parens patriae* jurisdiction and jeopardize the *Charter*'s goal of protecting the most vulnerable members of society.[34]**

Thus the Supreme Court of Canada puts protection of the child's human rights above the parents' rights to practice their religious beliefs, as is proper.

> **A parent's freedom of religion, guaranteed under s. 2(*a*) of the *Charter*, does not include the imposition of religious practices which threaten the safety, health or life of the child. Although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, as it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others.[35]**

The Court, in reaching its decision, considered several decisions of the United States Supreme Court.[36] We further note that Canada, like the United States, is a common law jurisdiction. This Canadian case, therefore, is solidly in accord with previous Anglo-American law. Accordingly, we respectfully suggest to this honorable Court that the Supreme Court of Canada has reached a proper position and we urge the Oregon Supreme Court to adopt a similar position as the law of Oregon.

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[34] *Id* at 319-320.

[35] *Id* at 322. This Canadian finding is in accord with the United States case of *Prince v. Massachusetts*, 321 U.S. 158 (1944) and the *Covenant on Civil and Political Right*s, art.18(3).

[36] In addition to Canadian precedents, the Supreme Court of Canada considered the following United States Supreme Court decisions in reaching its decision: *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Every court in the nation is charged with the duty to apply paramount constitutional and treaty law,[37] even above the statutory legal rights of the parents upon dissolution of their marriage and its effect on the disposition of their child. The two, however, are in accord with one another because protection of a child's human, legal, and constitutional rights is in *a fortiori*, identical to the child's best interests.

The protection of Misha's constitutional, legal, and human rights, therefore, is in his best interests. James H. Boldt, the father of Misha Boldt, therefore, should be enjoined from violating his son's human right to *security of the person*.

The protection and enforcement of Misha's human rights is clearly in his best interests and in this case, costs the litigants absolutely nothing of their own *legitimate* rights or freedoms.

IV.

BASIC BIOETHICS LIMITS PROXY CONSENT TO MEDICAL PROCEDURES THAT ARE THERAPEUTIC, NECESSARY, AND BENEFICIAL TO THE PATIENT. THUS THE PERSONAL PREFERENCES OF THOSE, LIKE PARENTS, WHO PROFFER PROXY CONSENT ARE ETHICALLY IRRELEVANT.

The guidelines of the Bioethics Committee of the American Academy of Pediatrics which govern its members, state clearly and unequivocally:

> **…[P]roviders have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses.**

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[37] U.S. Const. Art. VI; International Covenant on Civil and Political Rights, Art. 2(3).

> **…The pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent.**[38]

This must surely apply with doubled force where the child is facing an unwanted and unnecessary amputation requested by a parent, but is healthy in all respects. One would have to suspect the motives and professional judgment of a physician who would strap down a healthy child and amputate functional and protective tissue from him against his will. Indeed, the wise and humane clinician would not proceed where there was even the slightest chance the child was coerced or cajoled, and especially where there was no defensible therapeutic reason to do so.

The first rule of medicine is '*Primum non nocere*' or 'First do no harm.' Amputating healthy, natural, protective, highly nerve-supplied and acutely erogenous tissue from an unwilling child, to accommodate the aesthetic wish of a parent —even if the motive is allegedly religious— is highly unethical medical practice, even a battery upon the child.

The U.S. medical community is the last in the Anglophone world to offer male circumcision to youthful parents (the practice never took hold in Europe). In the UK the practice was fully abandoned in 1950. The practice was abandoned in New Zealand in the mid-1960's. The current incidence rates in Canada (<9%) and Australia (<13%) have been plunging for decades. Only the U.S. lingers at 55% nationally, though rates have declined steeply since a peak near 90% in the late 1960's, and they continue to drop, especially in the U.S. West Coast. Even the 55% national circumcision rate is due more

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[38] American Academy of Pediatrics Committee on Bioethics. *Informed consent, parental permission, and assent in pediatric practice*. 95 Pediatrics 314-7 (1995). Available at: http://www.cirp.org/library/ethics/AAP/ Accessed February 10, 2007.

to the economics of the U.S. multi-payer medical marketplace than to scrupulous bioethics or world-class science.

In the event the US institutes universal, single-payer medical care for children, financial constraints will likely end the practice as it did in the UK over 50 years ago.

In Oregon the home of Misha/Jimmy's mother, the 2005 circumcision rate is 28%, one of the lowest in the US, and dropping. In Washington, the home of Misha/Jimmy, the 2005 circumcision rate is only 24%. Thus around three-quarters of Oregon and Washington children are left natural and intact and are statistically just as healthy, or healthier, for avoiding this genital reduction.[39]

V.

FUNDAMENTAL BIOETHICS FORBIDS NON-THERAPEUTIC SURGERY ON HEALTHY MINORS, LET ALONE UNNECESSARY SURGERY AGAINST THE CHILD'S WISHES OR WHERE THERE IS EVEN A DISTANT *POSSIBILITY* THE CHILD MAY HAVE BEEN COERCED OR MANIPULATED.

Beauchamp and Childress, "*Principles of Biomedical Ethics*," a standard U.S. textbook for students studying medicine or nursing, lists five basic principles of bioethics and the co-relative obligations which must always constrain the medical practitioner. Though the subject of many volumes in print, these principles bear brief explication here. An honest surgeon challenges him or herself with, and presents to the patient or those giving proxy consent, the following test:

> **Beneficence** —Does the proposed procedure provide a net therapeutic benefit to the patient, considering the risk, pain, and loss of normal function?

[39] U.S. Dep't of Health and Human Services, Healthcare Costs and Utilization Project (HCUPnet) http://hcupnet.ahrq.gov/ accessed March 8, 2007.

Non-maleficence —Does the procedure avoid permanently diminishing the patient in any way that could be avoided?

Proportionality —Will the final result provide a significant net benefit to the patient in proportion to the risk undertaken and the losses sustained?

Justice —Will the patient be treated as fairly as we would all wish to be treated?

Autonomy – Lacking life-threatening urgency, will the procedure honor the patient's right to his or her own likely choice? Could it wait for the patient's assent?

These principles apply with even more urgency in pediatric cases where the child cannot give effective consent and a proxy consent is required. The party with proxy consent power is never, of course, personally constrained by fear of surgical risk whatsoever to him or herself. (Old medical maxim: "Minor surgery is what *other* people undergo.")

Thus the ethical physician must remain ever alert that the proper balance is struck between the wishes of the proxy-adult (which may reflect religious urges but ignore scientific and biological realities) and the actual physical needs of the child-patient.

There is absolutely nothing in the bioethical analysis of *Beauchamp and Childress* that requires or permits consideration of the pleasure, convenience, whims, aesthetic preferences, –or religious beliefs however sincere– of a surrogate for the patient. Bioethics is *all* about the patient, from the patient's perspective; it is not about satisfying third-parties, no matter how wholesome or salutary their motives might appear.

Nor is the *Beauchamp and Childress* challenge a test where satisfying a single element earns a passing grade. *All* prongs of the test (the fundamental and underlying principles of all modern bioethics since the Nuremberg Code of 1947) must be satisfied for a procedure to be deemed ethical.

The proposed amputation procedure for Misha/Jimmy, a healthy child, meets not a single prong, let alone the complete test, of the fundamental multi-step standards of bioethics, viewed as it must be from Misha/Jimmy's perspective.

The bioethics in Misha/Jimmy's case appear, instead, to have been substantially skewed by the religious preference of the father and his physician ally, who are failing to honor the human rights and genuine physical needs of the actual patient, the child Misha / Jimmy.

The more judicious solution to this case comes then, not from accepting, uncritically, minority sectarian religious tenets, themselves controversial even within Judaism, but instead by observing –scrupulously– well-recognized principles of medical bioethics.

VI.

WE AGREE WITH THE OREGON COURT OF APPEALS THAT THE EXPRESS PREFERENCES OF PERSONS IN A DOMESTIC RELATIONSHIP CANNOT BE RELIED UPON. THUS WE URGE THE COURT TO DISTRUST ANY ALLEGED ACQUIESENCE OF THE CHILD HIMSELF.

In 1998, in a case involving the same litigants, when Misha/Jimmy was barely three years old, (97-DR-0441; CA A99286, filed July 15, 1998), and entitled:

IN THE COURT OF APPEALS OF THE STATE OF OREGON
LIA NIKOLAEVA BOLDT
Respondent,
v.
JAMES HARLAN BOLDT,
Appellant.
Appeal from Circuit Court, Josephine County.
Loren L. Sawyer, Judge.
Argued and submitted May 5, 1998.
Before De Muniz, Presiding Judge, and Haselton and Linder, Judges.

LINDER, J.
Reversed.

The Oregon Court of Appeals was required to decide whether to give credence to the complaints of a spouse engaged in what might have been (or might NOT have been) a voluntary Master-Slave relationship between the married parties herein. The Court very sagely observed, albeit *in dicta*:

> **"…[n]otions of consent, agreement, or mutuality must be approached with particular care in domestic contexts. Words of consent can be spoken under circumstances in which the words are not a reflection of genuine volition and free will. That may be particularly true of patterns of abuse and battery in interpersonal relationships, which can involve complicated emotional dynamics that preclude free choice and voluntary behavior."[40]**

We agree heartily with the Court of Appeals in this regard and simply ask: Does not the same principle apply equally well to a child caught up in the *maelstrom* of adult fantasies of the custodial father, as well as to a former spouse at that time similarly ensnared?

Should we credit what the child Misha/Jimmy's wishes for himself, even those which might be adduced *in camera*, when those preferences might conveniently mirror those of a custodial parent who has time, education, wit, leverage, and motive to manipulate the wishes of a mere child for his convenience?

Notes Professor Dwyer in "*Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*."

> **Parental control over the lives of children certainly differs in important respects from the institution of slavery, but it nevertheless can manifest some of the "badges and incidents" of slavery. One recent scholarly work argues that parents'**

[40] Lia N. Boldt v. James H. Boldt. CA A99286 (1998).

> **substantive due process right to the custody of their children can amount to state-enforced slavery "when a parent perverts this coercive authority by systematically abusing and degrading his ward —treating his child not as a person but as a chattel, acting as if the had title over the child rather than a trusteeship on behalf of the child."[41]**

Notes Dwyer, continuing: [emphasis ours]:

> **<u>Parental free exercise rights, which are not tied to the interest of the child, and which ensure parents the freedom to exercise nearly complete dominion over their children, arguably come closer to this understanding of slavery than to legitimate custody privilege</u>.[42]**

Is there even the tiniest (albeit tawdry) possibility in this unfortunate case that the child Misha / Jimmy has become a replacement "slave" in the absence of the vulnerable, (and unavailable) ex-wife Lia?

Thus we ask the Court to protect the child from his father and even himself, until he is of age, the result most likely to protect the child (and the adult he will become) from manipulation in the short term.

The child Misha/Jimmy must not be abandoned by the Courts, to become embroiled in his father's need for a replacement slave in the father's master-slave fantasy world, if that is what has occurred.

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[41] James G. Dwyer. *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at 1413 *quoting*: Akhil R. Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 Harv. L Rev. 1359, 1364 (1992).

[42] James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at 1413.

VII.
MISHA/JIMMY HAS A RIGHT TO HAVE HIS CUSTODY DETERMINED BY DUE PROCESS OF LAW.

Misha/Jimmy is a natural born citizen of the United States. He has a right to due process of law in Oregon courts conferred by both the U.S. Constitution[43] and the Oregon Constitution.[44]

Oregon requires courts to determine custody in accordance with "the best interests of the child and *the safety of the parties*."[45] (Emphasis added.) The mother has requested a modification of the previous judgment. The court has a duty to proceed under ORS 107.135.

Misha/Jimmy has a right to recognition as a person before the law[46] and is entitled to a guardian ad litem to represent his interests.

This *Amicus Curiae* offers no evidence and takes no position as to which party should be granted custody of Misha, but we do request due process on behalf of the child, as well as protection and security of his person.

IX
CONCLUSION

We hope to have shown in the prior *Brief of Amicus Curiae, Doctors Opposing Circumcision, In Support of the Petition For Review,* that circumcision presents unavoidable physical and psychological risks and losses to Misha/Jimmy.

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[43] U.S. Const, amend. XIV, §1.
[44] Oregon Const., art. 1, §10: "…every man shall have remedy by due course of law…"
[45] ORS 107.102

We hope to have shown that parents have a duty to the child to provide *protection.*[47]

We hope to have shown that parental rights to practice religion do not extend to placing children at risk or injuring their person.

We hope to have shown that the free exercise clause of the U.S. Constitution does not allow children to be injured in the name of religion.[48]

We hope to have shown that religious practice is subject to laws of general application.[49]

We hope to have shown that Misha/Jimmy shall have "such measures of protection as are required by his status as a minor, on the part of his family, society, and the State."[50]

We hope to have shown that the prepuce is a functional organ, worthy of retention.

We hope to have shown that non-therapeutic male circumcision is not recommended by medical authorities.

We hope to have shown that Misha/Jimmy is entitled to protection under the Constitution of Washington.[51]

We hope to have shown that Misha/Jimmy has a right to decide for himself his religious views when he is of age.[52]

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[46] ICCPR, art. 16.
[47] Blackstone's Commentaries on the Laws of England (1765-9).
[48] Prince v Massachusetts. 321 U.S. 158.
l[49] Reynolds v. United States, 98 U.S. 145 (1878) Employment Division of Oregon v. Smith 494 U.S. 872 (1990)
[50] ICCPR, art 24, §1.
[51] Washington Constitution, art.1, §11
[52] Oregon Constitution, art. 1, §3. ICCPR Article 18, §1

We hope to have shown that Misha/Jummy has a common law right to bodily integrity and an international treaty right to *security of the person*.[53]

We hope to have shown in this brief that Misha/Jummy is entitled to the equal protection of the law under ORS 163.207 and 18 U.S.C. §116.

We hope to have shown in this and our previous brief that parents' religious views must yield to the child's right to have his human rights protected.[54]

We hope to have shown that Misha/Jimmy has a right to have his custody determined in accordance with due process of law, that Misha/Jimmy has a right to recognition as a person before the law[55] and is entitled to a guardian *ad litem* to represent his interests where these diverge from inappropriate parental whims.

X
SUMMATION

There is no basis on which the father can hope to prevail in the face of overwhelming protections offered to Misha/Jimmy by the Washington, Oregon, and U.S. Constitutions, and moreover, in face of the protections offered by international treaties, in particular, the ICCPR. The Supreme Court has stated that "a child, merely on account of his minority, is not beyond the protection of the Constitution"[56] There are no material facts at dispute that require further hearings on the child's fundamental rights.

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[53] ICCPR, art. 9(1).
[54] B. (R.) *v.* Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 318. Available at http://scc.lexum.umontreal.ca/en/1995/1995rcs1-315/1995rcs1-315.html Accessed July 7, 2007. This opinion is in accord with ICCPR art. 18(3).
[55] ICCPR, art. 16.
[56] *Bellotti v. Baird*, *428* U.S. 132, (1976), quoting Re: Gault, 387 US 1, (1967).

This court is empowered by the doctrine of *parens patriae* to provide protection for Misha/Jimmy. We respectfully aver that this court is further bound by the U.S. Constitution to apply paramount constitutional and treaty law.[57] Moreover, ICCPR art. 2, §3 further empowers and requires this court to act to protect Misha/Jimmy's human rights.

Further proceedings on the matter of the proposed circumcision would be a waste of Oregon court resources. This Court, therefore, *sua sponte*, should enjoin either parent from having Misha/Jimmy circumcised until his eighteenth birthday, at which time he may decide for himself and have his decision respected by law.

In the alternative, this question should be remanded to the trial court for a plenary hearing, with instructions that the Court below give proper accord and respect to the minor child's independent rights under well-recognized national and international law.

RESPECTFULLY SUBMITTED on behalf of the *Amicus Curiae*, Doctors Opposing Circumcision, an international non-profit physicians' educational organization.

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[57] U.S. Constitution, art VI; Cooper v. Aaron, 358 U.S. 1 (1958); Howlett v. Rose, 496 U.S. 356 (1990).

CERTIFICATE OF MAILING AND FILING

I hereby certify that I served the foregoing Brief on the Merits of Amicus Curiae on the other parties herein by mailing to them two true copies, first class mail on July 31, 2007, addressed as follows:

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I also certify that the Brief on the Merits of Amicus Curiae was filed with the Supreme Court this date by mail.

Dated: July 31, 2007

_____
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