TOO MUCH RELIGIOUS FREEDOM? INFANTS INFECTED WITH HERPES AFTER JEWISH *MOHEL* APPLIES ORAL SUCTION TO CIRCUMCISED PENISES

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I. INTRODUCTION

In October of 2004, New York City officials temporarily enjoined a particular *mohel*[1] from directly applying oral suction to babies' penises, an ultra Orthodox Jewish circumcision ritual known as *metzitzah be'peh*. Three infants circumcised by the *mohel* were infected with the Herpes Simplex Virus (HSV).[2] *Metzitzah be'peh* is an ancient Orthodox ritual procedure used to stop the bleeding following an infant's circumcision.[3] In November of 2004, one of a set of twin infants died from

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[1]*Mohels* are rabbis specially trained in aseptic techniques, the circumcision procedure, and have received rabbinical recognition. *See* 5 ENCYCLOPAEDIA JUDAICA 567, 570 (1st ed., 1994).

[2]*Id.*

[3]Rabbinical Council of America, *Bris Milah and Metzitza B'Peh: Policy Statement* (Mar. 1, 2005), *available at* http://www.rabbis.org/news/article.cfm?id=100546.

complications due to the HSV infection.[4] In 2003, another infant had been diagnosed with herpes following a ritual circumcision by the same *mohel*.[5] And in December of 2005, the New York City health department revealed that two more infants were infected with HSV following oral suction rituals. The City's statement did not indicate whether it was the same *mohel* from the earlier three infections.[6] Of the two newly released cases, one of the infants suffered permanent brain damage.[7]

Following the tragic death of this infant and the permanent lifelong infection of the others, New York City officials began to question one *mohel's* HSV status.[8] Some Orthodox *mohels* within the Jewish community still perform the ritual which is loosely referred to as oral-suction.[9] During an inconclusive month-long investigative process in 2005, the New York City health department temporarily enjoined the *mohel* suspected of transmitting herpes to the infants during *metzitzah be'peh*.[10] Compelled by the possibility that the potentially HSV infected *mohel's* continued oral contact with infants' circumcised genitalia could result in the fatal transmission of HSV to more babies, a New York court temporarily ordered the *mohel* to cease and desist from performing *metzitzah be'peh* on anymore infants.[11]

The state action of enjoining the *mohel* from practicing the ancient ritual and mandating medical testing bred vicious First Amendment based attacks against New York officials.[12] The *mohel's* attorney and other advocates adamantly argued that denying or interfering with anyone's right to exercise *metzitzah be'peh*, a religious ritual, directly violates the United States Constitution.[13] After several months of investigation, blood work, medical exams, and splintered political and religious

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[4]Debra Nussbaum Cohen, *Should Mohelim Be Supervised*, NEW YORK JEWISH WEEK, Feb. 11, 2005, *available at* 2005 WLNR 4709743.

[5]*Id.*

[6]Thomas R. Frieden, *An Open Letter to the Jewish Community from the New York City Health Commissioner* (Dec. 13, 2005), *available at* http://www.nyc.gov/html/dohdowloads/pdf/cd/05md46.

[7]*Id.*

[8]Joyce Purnick, *Metro Matters; Taking a Stand on a Rite with Hazards*, N.Y. TIMES, Jan. 9, 2006, *available at* 2006 WLNR 448719.

[9]*See* Andy Newman, *City Questions Circumcision Ritual After Baby Dies*, N.Y. TIMES, Aug. 26, 2005, *available at* 2005 WLNR 13434866. The subject of the investigation is renowned and trusted Rabbi Yitzchok Fischer.

[10]*Id.*

[11]*Id.*

[12]Debra Nussbaum Cohen, *City Risking Babies' Lives with Brit Policy: Health Experts*. NEW YORK JEWISH WEEK, Oct. 14, 2005, *available at* 2005 WLNR 20900436. The city later withdrew its lawsuit on September 15, 2005 and assigned the investigation to an Orthodox rabbinical court.

[13]Protesting any government action, Rabbi David Niederman, a member of the United Jewish Organization, asserts there is insufficient medical evidence to "justify" even so much as a public warning when the challenged ritual is performed thousands of times and has only resulted in 5 documented cases since 2003. *See* David B. Caruso, *Jewish Rite Death Spurs Guidelines*, JOURNAL GAZETTE, Feb. 4, 2006, *available at* 2006 WLNR 2087582.

debates both within and outside of the Jewish community, the county, the state and the city moved to dismiss all outstanding court orders and its pending civil lawsuit.

The underlying issue in the New York *mohel's* case has yet to be resolved. The infected infants are not the first instances to prompt questions regarding health and safety concerns surrounding *metzitzah be'peh*.[14] The city-wide statement issued by the health department in December 2005 acknowledged other instances of infants becoming infected with HSV in connection with *metzitzah be'peh*.[15] In particular, the statement cites to the recently released medical study confirming the high risk of HSV associated with oral-genital suction.[16] Thus, until *mohels* cease to apply direct mouth to penis contact during the ritual, this highly disturbing and controversial issue will remain unresolved and continue to generate heated debate.

The Free Exercise Clause of the United States Constitution's First Amendment protects the free exercise of religion, and the United States Supreme Court has included within the clause's scope the repugnant practice of animal sacrifice.[17] As such, cities cannot even ban the distasteful religious practice of slaughtering innocent animals when it is part of a religious sacrament.[18] On the other hand, Congress has enacted a federal statute banning female circumcision, a heinous procedure performed by certain cultural and religious groups.[19] And some states are beginning to eliminate religious shield laws which have had the effect of insulating parents from criminal abuse and neglect prosecution when denial of medical treatment for their children is grounded within their religious beliefs.[20]

In the future, individual cities or states should combat the significant health risk posed to infants by *metzitzah be'peh* by enacting affirmative statutes similar to the Federal Prohibition of Female Genital Mutilation Act of 1996. It should be expected that parents may desire to bring tort claims against infected *mohels* who permanently injure or kill their children by negligently or intentionally performing oral suction

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[14]Jim Rutenburg & Andy Newman, *Mayor Balances Hasidic Ritual Against Fears for Babies' Health*, N.Y. TIMES, Jan. 6, 2006, *available at* 2006 WLNR 326275. The civil suit initiated in a New York court by the State of New York Health Department was dismissed just prior to the mayoral election in 2005. The Orthodox Jewish community is a large voting bloc, and it has been rumored that the State's agreement to dismiss the pending action in September and turn the investigation and regulation of the issue over to the Jewish community was politically grounded. Since Mayor Bloomberg's re-election, the failure of the Rabbis to meet a December deadline to provide the New York City health department with results from their investigation has prompted the city's renewed vigor against *metzitzah be'peh.*

See also Purnick, *supra* note 8 for further discussion on the political situation.

[15]*See infra* Sect. IV. A 2004 medical study published in Pediatrics identified the growing concerns and correlations between metzitzah be'peh and HSV infection.

[16]Frieden, *supra* note 6.

[17]*See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[18]B. Gesundheit *et al., Neonatal Genital Herpes Simplex Virus Type I Infection After Jewish Ritual Circumcision: Modern Medicine and Religious Tradition*. 114 PEDIATRICS 259 (2004), *available at* http://pediatrics.aappublications.org/cgi/content/full/114/2/e259 (last visited Dec. 15, 2006).

[19]U.S. CONST. Amend. I; *see also Hialeah*, 508 U.S. at 531.

[20]18 U.S.C.S. § 116 (2005). *See also infra* Sect. IV for further discussion.

despite HSV status.[21] Does the Constitution absolutely protect the free exercise of oral-genital suction when it threatens the health and safety of human beings, particularly infants? And does the Constitution bar parents from having any remedy for the lifelong physical, emotional, and financial damage that may potentially result from the negligent HSV transmission through *metzitzah be'peh*?

This article focuses on the controversial issue of state interference with the Orthodox Jewish practice, a topic recently at the forefront in New York City. Until the government recognizes its duty to provide affirmative regulation of *metzitzah be'peh* to protect the compelling health interest of infants, thousands of infants will continue to be at risk of contracting potentially fatal neonatal HSV without any available remedy or criminal liability. In section II, the history and religious significance of *metzitzah be'peh* is summarized for a better understanding of the strong religious beliefs protected by the Free Exercise Clause. Section III identifies the damaging and permanent nature of HSV by illustrating the range of symptoms, detrimental effects, and virulence of the virus. Section IV offers a short discussion of the relatively recent medical studies which conclusively correlate a high risk of HSV infection with *metzitzah be'peh*, evidence of New York City's compelling interest to affirmatively regulate or ban the religious ritual of oral-genital suction.

Next, section V explores the present state of the case law surrounding the First Amendment's Free Exercise Clause. This section addresses the analogous judicial fork in the road where the current issue has been temporarily left to idle based on two very different directions taken in the most recent Free Exercise cases from the United States Supreme Court. Section VI discusses how the modern trend of governmental regulations intersecting with religious freedom offers insight to support necessary government regulation of *metzitzah be'peh*. In conclusion, section VII explores the city's proposed solution and the solution's ineffectiveness and inability to protect infants from the incurable and potentially fatal herpes virus.

II. *METZITZAH BE'PEH*: THE ANCIENT ORTHODOX JEWISH RITUAL

Berit milah is a traditional Jewish circumcision ritual.[22] The ritual is symbolic of a covenant with God.[23] Circumcision itself is a prehistoric procedure, one of the oldest operations on record performed by man that was only later adopted for medical purposes.[24] After circumcising himself, the biblical Abraham then performed the procedure on all of the males in his household, his sons Ishmael and Isaac, and his slaves.[25] The *Encyclopaedia Judaica* references Genesis 17:11-12 as the originating source of the ritual; the section reads: "Every male among you shall be circumcised. And ye shall be circumcised in the flesh of your foreskin, and it shall be a token of a covenant betwixt Me and you. And he that is eight days old

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[21]*See infra* Sect. VIa.

[22]As of June 8, 2006, there is no indication or evidence as to whether or not parents of infected Jewish infants have raised private claims for injuries or wrongful death.

[23]*See generally* ENCYCLOPAEDIA JUDAICA, *supra* note 1. This source provides a detailed history of circumcision as it originated throughout early history.

[24]*Id.* at 567.

[25]*Id.* It should be noted that circumcision is a widely debated procedure throughout the world.

shall be circumcised among you, every male throughout your generations."[26] Failure to observe the command is believed to result in the punishment of being "cut off" from one's kind.[27]

Reformed Jewish believers (non-orthodox) may still have their sons circumcised, but the procedure is typically done by a surgeon in a hospital, sometimes with a Rabbi present to say the appropriate prayers to complete the ritual, or for some without a Rabbi or ceremony at all.[28] The more traditional orthodox *bris* takes place in the home, hospital, or synagogue, and is performed by *mohelim*, rabbis specially trained in aseptic techniques, the circumcision procedure, and who have received rabbinical recognition.[29] There are a number of specific rules that relate to the timing of the circumcision for healthy babies, babies born via cesarean section, infants without foreskins, *etc*., and the elaborate rules demonstrate the importance and depth of the rooted tradition.[30]

Circumcision is not a procedure limited to the Jewish culture.[31] In fact, parents of children in American hospitals are presented with the option of circumcising their sons or not.[32] The common medical procedure has no religious basis and is performed by doctors with the assistance of anesthesia, acetaminophen, and sterile medical equipment. However, circumcision is not viewed by the majority of Jewish believers as a medical procedure.[33] *Berit milah* has an established ancient religious foundation and is intended to perpetuate the bond between God and the Jews.[34] In addition to the *bris*, some Orthodox Jews still perform *metzitzah be'peh*, commonly described as "oral-genital suction," as a means to stop the bleeding of a circumcised infant's penis.[35]

The ritual *Berit milah* has three distinct components.[36] First, the *mohel* excises the outer part of the prepuce.[37] Second, the inner lining of the foreskin is cut.[38] And

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[26]*Id*.

[27]*Id.* (citing Genesis 21:4).

[28]ENCYCLOPAEDIA JUDAICA, *supra* note 1.

[29]*Id*. at 571.

[30]*Id.*

[31]*See id*. at 570, describing the various rules, their deviations, exceptions for holidays and variances, etc.

[32]*Id*. at 568-69.

[33]R.S. Van Howe *et al., Involuntary Circumcision: The Legal Issues*, 83 BJU INT'L 63 (1999), *available at* www.cirp.org/library/legal/vanhowe5/ (last visited Dec. 15, 2006). Seventy to ninety percent of neonate males in America are circumcised.

[34]There is an ongoing debate over whether the ritual is required by Jewish law or is merely a medical procedure. The majority of Jewish people have abandoned direct oral-genital suction, but there are still some that believe it is mandated by Jewish law. The debate began in the mid-19th century in Europe when the practice of *metzitzah be'peh* was linked to transmission of tuberculosis via mouth to penis contact. *See* Caruso, *supra* note 13.

[35]*See* ENCYCLOPAEDIA JUDAICA, *supra* note 1, at 567.

[36]*Id*. at 572. The ritual is also representative of a covenant between the male infant and God.

finally, blood is sucked from the wound.[39] Before medical devices and advances in technology, the most appropriate and accepted method for sucking the blood from the wound was with oral-genital contact.[40] This part of the ritual is *metzitzah be'peh*. "Toward the middle of the 19th and the beginning of the 20th century, cases of syphilis, tuberculosis, and diphtheria occurring in infants were ascribed to infection from *mohelim* using this method of suction."[41] Over time, health concerns within the Jewish community has given rise to changes, variations, and added precautions.[42] For example, *mohelim* that still use their mouths to apply oral suction to the wound first rinse their mouths with an antiseptic.[43] Others may use sponges or other medical devices to cleanse the wound and alternatively stop the bleeding.[44] The latest method recently endorsed by the Rabbinical Council of America (RCA) is to suction the blood from the circumcision using a glass tube to prevent direct oral to genital contact.[45]

In a policy published by the RCA in March of 2005 and revised in June of the same year, "the RCA urges its member Rabbis, their congregants, synagogues and institutions, as well as the larger Jewish community, to encourage and where possible necessitate, that *metzitzah be'peh* be fulfilled via a tube."[46] The policy supports the use of a tube as being the optimal method.[47] The published statement further concluded that after diligent review of *halachic* and scientific literature, and reliable *Torah* authorities, the use of a tube "is not only permissible, but is preferred [over direct oral contact] to eliminate any unintentional communication of infectious diseases."[48] In 2002, the Chief Rabbinate of Israel pronounced the legitimacy of "using instrumental suction in cases in which there is a risk of contagious disease."[49]

Irrespective of the specific method, it appears that extraction of blood from the circumcision is a required element for a successful religious *bris*.[50] Hence, there are

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[37]*See id*. at 571-72 for a complete detailed description of the circumcision ritual including the specific technique, tools, and antiseptic precautions to be used for the ceremony. *See also*, Gesundheit, *supra* note 17.

[38]Gesundheit, *supra* note 17.

[39]*Id*.

[40]*Id.*

[41]ENCYCLOPAEDIA JUDAICA, *supra* note 1, at 572. It was believed that the saliva of the human mouth was a sterile agent before modern science and advances in technology.

[42]*Id*.

[43] *Id*.

[44] *Id*.

[45]*Id.*

[46]Rabbinical Council of America, *supra* note 3.

[47]*Id*.

[48]*Id*.

[49]*Id.*

[50]*Id.*

four different viewpoints concerning the ritual of *metzitzah be'peh*.[51] The first approach considers the procedure to be a "medical matter."[52] The theory interprets the Talmud as requiring the ritual procedure to avoid medical problems.[53] Proponents of this theory acknowledge that the act may pose a potential danger to the child but suggest that it also provides a medical benefit to the child.[54] The second approach is founded upon the simple belief that the ritual is required, but its method can be performed using any device (sponge, tube, mouth, etc.).[55] Similarly, the third viewpoint also hinges on the fact that the ritual is required.[56] However, the method of oral suction is limited to either the mouth or a tube.[57] And finally, the fourth approach is that the ritual is not only required, but must be done using direct oral-genital suction.[58]

Yet, nowhere in the Talmud does the text expressly require mouth to penis oral suction.[59] It was once recognized as the method of choice when the saliva was believed to be a disinfectant.[60] Alternatively, the Talmud does expressly indicate that *metzitzah be'peh* be performed only in such a way "so as not to bring on risk."[61] Like any other text, the words are open to interpretation. One suggested interpretation of the Talmud's language is to actually *prohibit* oral-genital suction in light of the risks presented.[62] However, a Jewish minority does not apply this interpretation and continues to advocate for strict oral suction.[63] As a result of the combination of increased medical technology and heightened awareness of risks of communicable diseases, most Jews have moved away from directly applying mouth to penis oral suction.

III. THE HERPES SIMPLEX VIRUS: A SCIENTIFIC GLANCE AT THE POOR PROGNOSIS

The incurable Herpes Simplex Virus affects the genitalia and/or the mouth and lips of men and women.[64] Between the late 1970's and the early 1990's, HSV

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[51] Gesundheit, *supra* note 17.

[52] Rabbinical Council of America, *Regarding Metzitzah Be'Peh, RCA Clarifies Halachic Background to Statement of March 1, 2005,* (July 7, 2005), *available at* http://www.rabbis.org/news/article.cfm?=100605

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id.*

[57] Rabbinical Council of America, *supra* note 52.

[58] *Id*.

[59] *Id.*

[60] Gesundheit, *supra* note 17.

[61] ENCYCLOPAEDIA JUDAICA, *supra* note 1, at 572.

[62] Gesundheit, *supra* note 17.

[63] *Id*.

[64] MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 189 (2005), *available at* http://www.merck.com/mmpe/sec14/ch189/ch189d.html (last visited Dec. 15, 2006).

incidence within the United States increased by thirty percent. Statistics indicate that today at least one in five adults is infected with some form of HSV.[65] The virus is considered to be the most common ulcerative sexually transmitted disease (STD) in developed countries.[66] Although sexual transmission is the most common mode of transmission, the virus can also be passed through oral contact or general physical contact with a person who may have the virus on their hands, fingers, or skin.[67]

Oral HSV (HSV-I) is commonly identified as "cold sores."[68] The virus causes small blisters, or sores, on the oral mucosa, lips, or skin surrounding the lips.[69] It is estimated that approximately ninety percent of adults have been exposed to HSV-I.[70] This form of the virus is transmitted through such ordinary examples as oral secretions including kissing, sharing utensils, and spitting.[71] The recurrence rate of those infected with oral herpes is fifty percent.[72] The trigger for, and frequency of, recurrences is unpredictable and unknown.[73] However, once the virus has infected a body, it remains dormant within the nerve cells between outbreaks and can still be transmitted absent obvious signs and symptoms.[74] Oral-genital contact with a person who has oral herpetic blisters can lead to genital herpes (HSV-II).[75]

About twenty-five percent of the adult population has been exposed to genital herpes.[76] Genital HSV (HSV-II) is very cumbersome and typically manifests itself as tiny clusters of painful sores that eventually develop into fluid filled blisters.[77] The fluid inside the blisters is a clear or yellowish color packed with viruses.[78] A few painful days after the blisters form, they break and the virus filled fluid is released.[79] After the small ulcers shed the viruses, the blisters become "crusted"

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[65]Department of Health and Human Services, Center for Disease Control and Prevention, *Genital Herpes: CDC Fact Sheet* (2006), *available at* http://www.cdc.gov/std/Herpes/STD Fact-Herpes.htm (last visited Dec. 15, 2006).

[66]*Id.*

[67]MERCK MANUAL OF DIAGNOSIS AND THERAPY, *supra* note 64, at 13.

[68]*Id.*

[69]National Institutes of Health, MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *Herpes Genital* (2005), *available at* http:// www.nlm.nih.gov/medlineplus/ency/article/000857.htm (last visited Dec. 15, 2006).

[70]*Id*.

[71]*Id.*

[72]*Id*.

[73]*Id*.

[74]MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *supra* note 69, at 14.

[75]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 189, *supra* note 64, at 13.

[76]MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *supra* note 69, at 14.

[77]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 189, *supra* note 64, at 13.

[78]*Id*.

[79]*Id*.

healing over a period of one to two weeks.[80] Other signs and symptoms associated more commonly with the initial outbreak of a herpes infection include fever, malaise, and adenopathy (swelling of the glands).[81] During initial herpetic outbreaks, some individuals report dysuria (difficulty urinating) and neuropathic symptoms of pain to the hips or legs.[82] The recurrence rate for HSV-II is 80%.[83] The symptoms of recurrences may be more or less severe than those associated with the initial outbreak, but annoyances such as itching, tingling, or burning may signal the onset of an outbreak.[84]

Little is known about how to predict HSV recurrences, but modern medicine has yielded new medications to help relieve symptoms of recurrent outbreaks in adults. To date, no known cure exists. The virus is extremely virulent and can be transmitted from contact even with the use of a condom.[85] STD awareness has become part of the mainstream of our society, but the exposure risks remain high in part because of the virulent nature of HSV. While most adults engaging in sexual and oral contact with other adults are aware of the burdensome consequences of "catching" herpes, innocent infants who contract the virus from a reckless or negligent individual performing an outdated religious ritual are not making the conscious choice to risk death or permanent injury, or experience a lifetime of inconvenience and humiliation.

Because of HSV's close link with the nervous system, the virus poses a significant threat of complications in neonates.[86] Some individuals infected with HSV are asymptomatic, which means their bodies will harbor the virus, but they will not notice or exhibit any physical symptoms.[87] HSV hides in human nerve cells.[88] The human immune system cannot effectively detect and destroy the virus because of its discrete location within these nerve cells.[89] The virus can reactivate at anytime during a person's lifetime.[90]

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[80]*Id.*

[81]*Id.*

[82]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 189, *supra* note 64, at 13.

[83]*Id.*

[84]*Id.*

[85]Center for Disease Control and Prevention, *supra* note 65, at 15.

[86]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 279 (2005), *available at* http://www.merck.com/mmpe/sec19/ch279/ch279h.html (last visited Dec. 15, 2006).

[87]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 189, *supra* note 64, at 13. This point is particularly important with regards to *metzitzah be'peh.* Assuming that *mohels* can be asymptomatic, there is no way of knowing that they may transmit the virus to infants during the ritual. One possible solution is to mandate all *mohels* obtain and continuously repeat HSV testing. This solution would place an economic and physical burden on the many *mohels* that do oral-suction, and therefore, should not be considered an acceptable alternative solution.

[88]MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *supra* note 69, at 14.

[89]*Id.*

[90]*Id.*

Neonatal HSV is particularly dangerous because infants are immunodeficient (underdeveloped weak immune systems).[91] HSV can be transmitted to infants through a mother's vaginal fluid during delivery, from caregivers who fail to practice good hygiene, and from oral-genital contact through the Jewish religious ritual, *metzitzah be'peh*.[92] Unlike adults, who do not risk death by contracting HSV-I or II, there is a high mortality rate for infants with HSV.[93] Recognizing the lethal potential of HSV, medical practitioners generally exercise extreme caution when delivering babies of HSV infected mothers. During an outbreak, the riskiest period when the virus is shed through the fluid from the blisters, doctors perform Cesarean births to avoid transmitting the virus to the neonate. Infants infected with HSV may experience a wide range of symptoms. Temperature instability, lethargy, difficulty breathing, shortness of breath, convulsions, hepatitis, and disseminated intravascular coagulation are potential symptoms, all of which are themselves individually life threatening to infants.[94]

Neonatal HSV has three classifications: (1) disseminated, (2) localized with the central nervous system affected, and (3) localized without the central nervous system being affected.[95] Disseminated HSV poses the greatest threat to infants, as its mortality rate is eighty-five percent if left untreated.[96] Infants within this classification typically have the herpes virus spread throughout their organs and the central nervous systems are attacked, impaired, and potentially damaged.[97] Herpetic encephalitis (inflammation of the brain) is often the end result which causes death or permanent brain damage to the infants.[98]

Infants with localized HSV affecting the central nervous system have a mortality rate of fifty percent without treatment.[99] Unlike those with disseminated HSV, the organs are not affected.[100] However, their skin may be affected and encephalitis is again the threatening complication within this classification.[101] Neonates who experience the least amount of complications and symptoms are those within the localized category without central nervous system involvement.[102] Their symptoms are localized as the classification implies and include outbreaks affecting only the skin, eyes, and mouth.[103] Although infants within this category are not likely to die,

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[91]*Id.*

[92]*Id.*

[93]*Id.*

[94]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 279, *supra* note 86, at 17.

[95]*Id.*

[96]*Id.*

[97]*Id.*

[98]*Id.*

[99]MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 279, *supra* note 86, at 17.

[100]*Id.*

[101]*Id.*

[102]*Id.*

[103]*Id.*

thirty percent will suffer some form of neurological impairment that develops before the ages of two or three.[104]

IV. *METZITZAH BE'PEH* GREATLY INCREASES THE RISK OF NEONATAL HSV TRANSMISSION

Results of a medical study published in 2004 reveal the high risk of HSV infection correlated between HSV and the oral-genital suction ritual.[105] Objectives of the study were: 1) to "describe neonate genital HSV-I infection after ritual circumcision" and 2) to "investigate the association between genital HSV-I and the practice of the traditional circumcision."[106] To date, there is minimal research that is as specific and relevant to the issue at hand, and New York City's health department based a considerable amount of its investigative conclusions on this study along with the results of two others.[107]

In concluding that oral suction is "hazardous to the neonate," Gesundheit's research finds "ritual Jewish circumcision that includes direct oral-genital contact carries a serious risk for transmission of HSV from *mohels* to neonates which can be complicated by protracted or severe infection."[108] The study was based on eight documented incidences of newborns with herpetic infections following *metzitzah be'peh*.[109] Information describing the HSV in the infants following ritual circumcision shows that the infections averaged 7.25 days to manifest themselves.[110] Of the subjects, four had episodes that were recurrent, meaning there were more symptomatic periods after the initial outbreak.[111] One of the infants developed HSV encephalitis.[112] And all of the *mohels* tested for HSV antibodies were found to be seropositive.[113] Because *metzitzah be'peh* is a private Orthodox ritual, the researchers were unable to statistically evaluate the percentage of ritual circumcisions that use alternative instrumental suction over direct oral suction.[114]

Circumcision rituals generally take place when an infant is eight days old generating the necessity to rule out the possibility that the virus was transmitted from the mother's genital secretions during a vaginal delivery.[115] The study reports the

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[104] *Id.*

[105] MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 279, *supra* note 86, at 17.

[106] *Id.*

[107] Frieden, *supra* note 6, at 2.

[108] Gesundheit, *supra* note 17, at 5.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Gesundheit, *supra* note 17, at 5. The study also notes that due to the nature of the procedure and its highly religious basis, there may be many more unreported cases of infection.

[115] *Id.*

general incidence rate of HSV ranges from one to six per 20,000 live births.[116] Of those reported infections, most result from the transmission between mother and infant during natural vaginal delivery.[117] In rare cases, an infant may contract the virus postnatal from exposure to child care providers, caregivers, or parents during oral herpes outbreaks.[118] In Gesundheit's study, none of the mothers presented any clinical evidence of either oral or genital herpes, thus limiting the source of the herpetic infections to postnatal exposure.[119]

The conclusion that these eight subjects most likely contracted HSV from oral-genital suction during ritual circumcision is based on the following distinct elements: 1) "exclusive genital distribution" of the herpetic sores, 2) the timing of the outbreak's onset, 3) isolation of HSV-I (oral herpes virus) as opposed to HSV-II (genital herpes virus), 4) the negative HSV exposure of the subjects' mothers, and 5) the absence of signs and symptoms associated with herpes among any family members or caregivers.[120] From these findings, researchers correlated a direct nexus between the ritual circumcision of the subjects and their oral herpetic infections on their genitalia (which for some subjects became systemic).[121] The study further reported that since the virus is at times shed in the saliva of *both* symptomatic and asymptomatic individuals, oral-genital suction during ritual circumcision "represents a potential source of orogenital transmission to the nonimmune infant whose skin integrity was disrupted by circumcision."[122]

In addition to the medical findings, Gesundheit acknowledges that the ritual circumcision "is a sign of eternal covenant between God and the Jewish people."[123] However, the study also notes the Talmud lacks an express requirement of the use of oral suction for *metzitzah be'peh*.[124] Conversely, a popular interpretation of the Talmud implies that *metzitzah be'peh* should be performed "so as not to bring on risk."[125] The medical findings of this study conclusively indicate a significant correlation between the risk of HSV transmission to infants and oral suction, and accordingly, the study strongly discourages oral suction.[126]

A similar medical study published in 2000 also explored a potential connection between HSV and oral suction after investigating only two subjects.[127] The findings

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[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Gesundheit, *supra* note 17, at 5.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] L.G. Rubin & P. Lanzkowsky, *Cutaneous Neonatal Herpes Simplex Infection Associated With Ritual Circumcision*. 19 PEDIATRIC INFECTIOUS DISEASES J. 259 (2000),

and conclusions mirror those of Gesundheit's 2004 study except that the number of subjects in the earlier study was only two instead of eight.[128] A review of the medical literature reveals that this was the first medical study relating to HSV and Jewish ritual circumcision practices. However, medical practitioners as early as 1946 identified the risk of transmitting infectious agents through general oral contact with the penis.[129] The research in 1946 reported an alarming seventy-two cases involving tuberculosis on the penis following ritual circumcision including *metzitzah be'peh*.[130] Oral-genital suction greatly increase neonates' risk of not only contracting HSV, but also contracting many other infectious agents like Hepatitis C, Hepatitis B, and the Human Immunodeficiency Virus (HIV).[131]

V. THE FREE EXERCISE CLAUSE: THE JUDICIAL FORK IN THE ROAD

HSV is an incurable plague especially dangerous and posing a high risk of mortality to neonates. Studies clearly indicate that the virus can be easily transmitted during the Jewish oral-genital ritual, even where a trained *mohel* does not exhibit any signs or symptoms of the common oral herpetic infection. And while *metzitzah be'peh* is a highly valued and protected ritual amongst a minority of Orthodox Jews, the use of direct mouth to penis contact is not mandated by any Jewish law authority. The question now becomes whether the Constitution's Free Exercise Clause protects the ancient tradition that has been widely abandoned in light of the compelling medical evidence.

Attached to the Constitution as part of the Bill of Rights, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[132] Like most of the words and provisions of the United States Constitution, the Free Exercise clause of the First Amendment is subject to the Court's interpretation.[133] Is the freedom of religion absolute?[134] Can a priest molest a child and hide behind the cloak of religion? Can a preacher slaughter

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available at http://www.pidj.org/pt/re/pidj/abstract.00006454-200003000-0025.htm (last visited Dec. 15, 2006).

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] U.S. CONST. amend. I. *See also* Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah, 1992) (defining free exercise to mean the right to believe and profess whatever religious doctrine one desires). U.S. CONST. amend XIV extends the First Amendment to the states and prohibits state governments from enacting laws that interfere with the free exercise of religion. *See* Cruz v. Beto, 405 U.S. 319 (1972).

[133] The purpose of the Free Exercise clause was to secure religious liberty in the individual by prohibiting any governmental interference thereof. *See generally* Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

[134] Free exercise includes the freedom to believe and the freedom to act upon those beliefs. Individuals have an absolute right to freely believe. However, the freedom to act upon those beliefs has not been given total immunity from legislative restrictions. [*See* Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist., 635 F.2d 971 (2d Cir. 1980) (N.D. NY, 1980)], *cert. denied*, 454 U.S. 1123 (1981).

an innocent animal as an offering to a higher spiritual power?[135] Does a person's religious use of Peyote immunize him or her from penalty for using illegal substances?[136] Does the Free Exercise clause protect a *mohel* with HSV who transmitted the virus to an infant during a widely abandoned ritual effectuating a covenant with God? This list of questions covers a broad range of facts and circumstances and is by no means exhaustive of the issues that have faced the Supreme Court or will one day be before the Bench. But the Court has offered some relative guidance in addressing the answers to some of these questions.

In Oregon Employ Div. v. Smith, the Supreme Court's opinion succinctly summarizes the interpretive case law behind the First Amendment's Free Exercise Clause.[137] Free exercise is defined as the "right to believe and profess whatever religious doctrine one desires" without interference from governmental regulation.[138] A particular faith cannot be endorsed by the government or forced upon anyone,[139] and the government cannot punish people for practicing beliefs that it believes to be false,[140] award accommodations on the basis of preferred religious beliefs,[141] or take sides and provide assistance in a dispute based on religious differences.[142] These are the interpretations that have been adopted through established case law.

Additionally, encapsulated within the language of the First Amendment is the Free Speech Clause.[143] Precedent has determined that the constitutionally protected right of free speech is not absolute.[144] The Supreme Court decisions in *Lloyd Corp. v. Tanner* and *Lebron v. NRPC* limit the amendment's reach to state action.[145] The

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[135]*See generally* Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520 (1993).

[136]Oregon Employment Div. v. Smith, 494 U.S. 872 (1990).

[137]*Id*. at 876-77.

[138]*Id*. at 877 (*citing* Sherbert v. Verner, 374 U.S. 398, 402 (1963)). For a general discussion of the Court's acknowledgement that intrusion of church and state into the precincts of one another cannot be completely prevented, *see* Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997). The *Tanford* court goes so far as to note that all pervasive attempts to exclude religion from every aspect of public life could be unconstitutional in itself.

[139]*See* Torcaso v. Watkins, 367 U.S. 488 (1961).

[140]*See* United States v. Ballard, 322 U.S. 78 (1944).

[141]*See* McDaniel v. Paty, 435 U.S. 618 (1978).

[142]*See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

[143]U.S. CONST. amend. I.

[144]*See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (holding that the constitutional protections under the First Amendment are not extended to speech regulations imposed by private actors). *But see* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) (finding that private regulations could be encompassed under the purview of the First Amendment if the regulation was deemed to be State action). For a discussion of whether religious freedom is absolute, *see also* Baxley v. United States, 134 F.2d 937 (4th Cir. 1943) (holding that although the First Amendment guarantees freedom of religion, the rights of individuals are neither absolute nor limitless).

[145]*Tanner*, 407 U.S. at 567; *Lebron*, 513 U.S. at 374.

implication of such findings is that private rules regulating free speech are outside the purview of Constitutional protection.[146]

Although ritual circumcision and the associated component of *metzitzah be'peh* date back to ancient times, neither the framers of the Constitution nor the collective citizens of the United States who ratified the First Amendment could have anticipated the legal issue focused upon here. Presumably, the early American settlers and colonies were primarily composed of western Europeans not of the Jewish faith who were fleeing from religious persecution. It is not surprising then that Jewish rituals and practices were not at the forefront of the developing way of American life. As such, the earliest citizens of the United States and their representatives could not have reasonably anticipated *metzitzah be'peh* becoming a legal concern.

During the first half of the twentieth century when more Jewish individuals immigrated to America, attention within the medical community was drawn to the ritual practice of oral suction in 1946 when E.L. Lewis published a study that correlated *metzitzah be'peh* with the transmission of infectious diseases.[147] In the 1940s, incidences of primary tuberculosis of the penis increased. And, seventy-two of eighty-nine reported incidences of infection followed the Jewish ritual circumcision procedure which included the practice of oral suction.[148] The study also noted that diphtheria and syphilis in infants were two other highly contagious infectious agents that afflicted neonates following the ritual.[149] Based on a review of the literature, Lewis revealed that by the turn of the 20th century, the Jewish majority had stopped the practice of *metzitzah be'peh* altogether.[150] Customs and rituals are sometimes subject to change over time like anything else, but there is still a small minority of Orthodox Jewish families that adhere to the belief that direct oral suction

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[146]The validity of private tort claims is not an issue of discussion within this note but the following is worth noting for future reference. When addressing the issue of whether or not courts should recognize private tort claims when the tort in question is related to a religious ritual, courts are likely to impose limitations similar to those regarding Free Speech on the First Amendment's scope. The free exercise of religion should not be absolute where the religious act results in a private wrong. Constitutional precedent limits interference with First Amendment rights, but between two private parties where one is seeking redress for injuries, Free Exercise protection should not be invoked and the courts should be permitted to address private torts claims. By denying a private tort claim to proceed on the grounds that the Free Exercise Clause bars the judiciary from interfering because it would then be a state actor, the provision places greater importance on religious freedom over the just compensation for injurious actions between two private parties. The end result of denying religious based tort claims can potentially lead to intentional and negligent tortious conduct without an avenue for just compensation.

[147]Rubin, *supra* note 127. The study uses information from E.L. Lewis, *Tuberculosis of the Penis: A Report of 5 New Cases, and a Complete Review of the Literature*, 56 J. UROLOGY 737 (1946).

[148]Rubin, *supra* note 127.

[149]*Id.*

[150]*Id.*

is a necessity to accomplish the eternal covenant between the human being and God.[151]

It is estimated that only about 4000 ritual circumcisions are performed each year in the city of New York with direct mouth to penis *metzitzah be'peh*.[152] Even in Israel, the heart of the Judaic people, the Chief Rabbinate promotes the use of an intermediate device to suction the blood from the wound.[153] Despite the near voluntary abandonment of oral suction amongst most Jewish families, these 4000 rituals performed each year still pose a significant risk of harm as evidenced by scientific literature and documented medical evidence. For this reason, the Courts may be called upon in the future to address state interference with the religious ritual, in the form of either regulation or prohibition, and also to address the viability of private tort claims of parents seeking remedies for the negligent injury or death of their infants following *metzitzah be'peh*.

A. Metzitzah be'peh: Following the Supreme Court's Path from Hialeah

Any proposed governmental regulation or state interference with the Jewish ritual *metzitzah be'peh* places the Court at an important juncture in the road. The Supreme Court in *Oregon Employment* and *Hialeah*, two distinctly different cases, paved the precedent for interpretation of state action[154] as applied to First Amendment complaints. If faced with a question regarding government interference with *metzitzah be'peh*, the Court must determine whether the issue should be analyzed under the rational basis approach of *Oregon Employment* subject to the restraints of the Religious Freedom Restoration Act of 1993, or whether this issue meets the compelling interest**,** strict scrutiny test as applied in *Hialeah*.

In 2005, New York City governmental officials took action against the *mohel* accused of transmitting herpes to three infants after *metzitzah be'peh*.[155] The city's health commissioner filed a civil suit in a New York state court, and the *mohel* was temporarily enjoined from performing oral suction pending the outcome of an investigation by health officials.[156] The Court also ordered the *mohel* to submit to

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[151] *Id.*

[152] *See* Purnick, *supra* note 8, at 3. Due to the private nature of the practice, exact statistics are not available throughout the United States. There is a presumption that New York has the largest ultra Orthodox community, and it can perhaps be logically concluded that the majority of oral-genital *bris* rituals take place in New York.

[153] Gesundheit, *supra* note 17. Chief Rabbinate of Israel in 2002 pronounced the legitimacy of "using instrumental suction in cases in which there is a risk of contagious disease." Note, however, that the statement seems to indicate that where there is no indication of risk, oral suction would be appropriate using the mouth. Given the medical evidence suggesting that direct oral suction itself presents a risk, the statement could be interpreted to apply to all rituals. The exact intent of the Rabbinate is unknown.

[154] For purposes of this article, State action refers to any type of governmental regulation, prohibition, or affirmative statement of position on an issue. Acts of the judiciary, such as mandating medical testing, issuing temporary restraining orders, and enjoinment of activities also fall under the category of state action. *See* Patruska v. Gannon Univ., 350 F. Supp.2d 999 (W.D. Wis. 2004) (finding that First Amendment prescriptions extend to the judiciary).

[155] *See supra* Sect. I.

[156] *Id.*

medical testing to determine his HSV status.[157] The *mohel's* legal counsel, the immediate Jewish community, and First Amendment advocates sounded the alarm that the state interfered with Constitutionally protected free exercise rights. The Rabbinical Council of America declined to advocate a ban on direct oral-genital suction but did release a policy statement encouraging *mohelim* to use an instrument, such as a glass tube, in lieu of direct oral contact so as to eliminate the potential health risk to infants.[158] Currently, New York does not have a statue that specifically criminalizes either the ritual of oral suction or the transmission of herpes.

Although New York's health department dismissed its action in September of 2005 and turned over the investigation and regulation of the questionable religious ritual to the Jewish community,[159] the issue is still at the center of debate. New York health officials have taken a stance against oral suction by issuing a policy statement and implementing programs to increase the Jewish community's awareness of the risks involved with *metzitzah be'peh*.[160] Given the limited but credible medical evidence that *metzitzah be'peh* poses a significant health risk to infants,[161] coupled with the reported fact that approximately 4,000 rituals with oral suction are still performed yearly,[162] future incidences of infants contracting HSV following *metzitzah be'peh* are highly probable.

New York City is now faced with the challenge of enacting legislation to protect the health and safety of infant citizens. The fierce opposition to legislative or judicial interference is hiding behind the Free Exercise Clause of the First Amendment. New York City's Health Commissioner, Dr. Thomas Frieden, believes "a ban would be unenforceable."[163] However, in light of the United States Supreme Court's decision in *Hialeah*, the city can and should take necessary action to protect the compelling interest of its citizens. Supporters of the outdated and dangerous ritual should not successfully continue to hide behind the First Amendment.

In contrast to *Hialeah*, the *Oregon Employment* court decided that Oregon's action was neutral on its face and generally applicable to everyone within Oregon's borders.[164] Accordingly, it was not necessary for the Oregon Employment Division to prove a compelling governmental interest. The Court does not require a strict scrutiny balancing between compelling state interest and private interests in exercising religion where the action is otherwise Constitutional. Using a rational basis analysis, the Court held that although Smith and Black's religious exercise was

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[157]*Id.*

[158]Rabbinical Council of America, *supra* note 3.

[159]Cohen, *supra* note 12.

[160]Purnick, *supra* note 8; *see also* Frieden, *supra* note 6.

[161]Gesundheit, *supra* note 17.

[162]Purnick, *supra* note 8.

[163]*Id.*

[164]Oregon Employment Div. v. Smith, 494 U.S. at 872 (1990). In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006), the court held that the government failed to demonstrate a compelling interest in barring the sect's sacramental use of hoasca. However, the court will recognize a valid compelling interest where the government can meet its burden.

incidentally infringed upon by Oregon's controlled substances and unemployment benefits laws, there was no religious exception, and constitutionally there need be no exception, for the sacramental use of peyote.[165] Even though the two Native Americans had ingested the peyote for religious purposes, they were still legally barred by Oregon law from receiving unemployment benefits.

Unlike the existence of the challenged statute in *Oregon Employment*, there is currently no existing criminal statute in New York that specifically bars the practice of oral suction. Under the state constitution of New York, however,

> "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to exclude acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."[166]

It would be consistent with New York's constitution for the state to enact legislation that furthers the principles set forth in that constitution to prevent the construction of the free exercise of religion to encompass a licentious act or a practice inconsistent with the peace or safety of the state.

Whether *metzitzah be'peh* is morally wrong or not is a question best left untouched because it involves a highly religious question that no court or legislative body has the power to answer.[167] However, since oral suction is a "practice" which is "inconsistent with the safety of the state," it can be, and should be, appropriately excluded from the protection of the freedom of worship section of the New York Constitution's Bill of Rights. Because there is ample evidence linking the significant risks of HSV transmission with oral-genital suction, the state has a compelling interest to protect its citizens. The health risk is a safety concern which falls under the general police powers of all states.

The State of New York does not have a generally applicable criminal statute under which it could likely bring a successful criminal claim against a *mohel* for infecting an infant with the lifelong, incurable herpes disease. In *Oregon Employment*, the First Amendment challenge was raised in response to an existing generally applicable and neutral law that prohibits the use of illegal drugs.[168] One of the associated penalties of drug use is the loss of unemployment benefits following termination from employment based on the misconduct.[169]

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[165] *Id*. at 890.

[166] N.Y. [Article I of State Constitution] § 3 (McKinney 2006).

[167] *See generally* U.S. v. Silberman, 464 F.Supp. 866 (M.D. Fla. 1979) which concluded that the Free Exercise Clause protects all religions, no matter how misguided, intolerant, excessively zealous and fanatical they may be. The same line of reasoning can be applied here. While oral suction of an infant's penis after circumcision may seem misguided, excessively zealous, and perhaps fanatical, the belief in its importance and necessity is absolutely protected by the First Amendment.

[168] *See generally Oregon Employment*, 494 U.S. at 872.

[169] *Id*. at 874.

New York is not likely to present a case in the future which could follow the precedent of *Oregon Employment* because *metzitzah be'peh* cannot cleanly fall under any existing criminal or civil law. The sexual offenses of the New York Penal Code are inapplicable to oral suction because infants' parents, the legal guardians, typically give consent on behalf of the infant.[170] Furthermore, contrary to the challenged law in *Oregon Employment*, any action by the government would be discriminatory and clearly intended to target the religious practice of *metzitzah be'peh*. As the Court in *Hialeah* indicated, the Court has yet to address the rare instance whereby "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny."[171]

In *Hialeah*, the citizens were appalled and distressed by the heinous act of animal sacrifice.[172] Animal sacrifice, however, is an essential cornerstone of the Santeria Church because followers believe that it keeps the mortal spirits alive.[173] Without the spirits, the Santeria faith is void. Therefore, the believers must continue to supply spirits' lifelines by offering the sacramental animal sacrifices.[174] The District Court upheld the constitutional validity of the municipal ordinances citing the government's compelling interests.[175] But the only health interest of concern was the fact that the sacrificed animals were not subject to inspection and were uncleanly kept.[176] The Supreme Court of the United States did not find this to be a compelling interest of the highest order.[177]

But following the precedent set in *Hialeah*, New York *can* enact regulatory measures or prohibitions on oral-genital suction that intentionally interfere with the free exercise of religion and "targets [*metzitzah be'peh*] for distinctive treatment." Any state action would ultimately be subject to strict scrutiny under *Hialeah*, but a governmental body could survive such scrutiny by proving that the compelling interest of protecting the citizens (the infants exposed to HSV and other infectious agents via religious oral suction) far outweighs the religious protection afforded by the First Amendment of the United States Constitution. As the *Hialeah* court determined, the state interest must override the free exercise interest in order to meet strict scrutiny. In other words, a law that is *intended* to restrict free religious practice

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[170]This note does not address criminal or civil liability for parents consenting to *metzitzah be'peh*. If in the future, claims are recognized to remedy injuries resulting from the religious ritual procedure, then the issue concerning parental liability for their consent to ritual procedures resulting in injuries is likely to be strictly scrutinized and will become a subject warranting greater discussion.

[171]Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520, 546 (1993).

[172]*Id*. at 526.

[173]*Id*. at 524-25.

[174]*Id*. at 525.

[175]*Id*. at 528-30.

[176]*Id*.

[177]*Id.* at 546.

must advance "interests of the highest order."[178] The preservation of Jewish infants' health and their potential ability to spread HSV infections within the population in the future are arguably interests of the highest order. The *Hialeah* Court alluded that governmental intervention may be appropriate in rare instances where the Court's strict scrutiny standard is satisfied. *Metzitzah be'peh* is one such rare instance presenting a compelling governmental interest because scientific evidence links the oral suction ritual to the death and infection of infants.

The city of Hialeah failed to prove that a compelling governmental interest outweighed their legislation restricting the Santeria Church from performing their animal sacrifices.[179] Another distinguishing point between *Hialeah* and a potential action regulating or banning *metzitzah be'peh* lies within the nature of the religious rituals. The safety interests of protecting animals, or the mere fact that the animals are not inspected and may pose a health risk to those exposed, are not compelling when compared to the interest in protecting infants from becoming infected with HSV, compelling interest of the highest order.

HSV is a lifelong disease with no known cure. The emotional and psychological effects are also lifelong in addition to the high probability of recurrent outbreaks and the discomfort they create.[180] Infants with HSV may grow to be fully functioning adults, but evidence suggests that the early HSV exposure often lends itself to developmental disabilities which manifest between two and three years of age.[181] The child, therefore, may be developmentally impacted. Regardless of the severity of the impact, the HSV infected infant grows to be either an asymptomatic or symptomatic adult who will always poses a risk to sexual partners. These long term, permanent effects of neonatal HSV infection could easily be avoided by eliminating direct oral-genital contact during *metzitzah be'peh* and encouraging the alternative instrumental method endorsed by the Chief Rabbinate of Israel in 2002 and the Rabbinical Council of America in 2005. The state also has a compelling interest in limiting the perpetual spread of HSV amongst its population.

Hileah strongly concludes in stating, "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religious or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[182] In *Hialeah*, the city merely disapproved of animal sacrifice as a moral activity.[183] While *metzitzah be'peh* may seem immoral to those outside the Jewish religious faith, it is a ritual deeply rooted in ancient

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[178] *Id*. This would also be consistent with the Religious Freedom Restoration Act discussed *infra* note 190.

[179] *See generally id.*

[180] *See supra* Sect. III.

[181] MERCK MANUAL OF DIAGNOSIS AND THERAPY ch. 279, *supra* note 86.

[182] *Hialeah,* 508 U.S. at 547.

[183] *See id*.

Jewish history.[184] Many Jewish followers believe that a child without *metzitzah be'peh* is a child without a covenant with God.[185]

Allowing the continuation of the dangerous ritual, even if it's only performed on approximately 4000 infants per year, is contrary to any government's role in protecting its citizens from health and safety risks. In light of the death of one New York infant, and the permanent effects and lifelong infection of the two other infants, New York City would be neglecting its high duty to its citizens by not protecting their health and safety. The state cannot eliminate the practice altogether, nor has there been any indication of an attempt to do so, but the government can constitutionally express a preference for the use of instrumental suction over oral-suction. The government can even go so far as to prohibit, or regulate, oral-suction because it is within their police power to do so, and because there is a compelling health interest that far outweighs any religious interest.

B. Oregon Employment: Paving the Way for Laws Affecting Religion

The United States Supreme Court adopted the rational basis method of analysis for most First Amendment interpretations of state action in *Oregon Employment*.[186] When state action controversially infringes upon free exercise rights, the Court first looks at the language and intent behind the statute to determine the neutrality of the action.[187] If the statute appears to be neutral and the sole purpose of prohibiting a performance, as an example of a state action, is not "because of [its] religious motivation," then the Court next turns to the general application of the regulation.[188] A law that is not "specifically directed to religious practice and is otherwise constitutional" is determined to be generally applicable even if there is an "incidental effect" on a religious belief or practice.[189] In the *Oregon Employment* case, the Court held that it need not apply a balancing test where a generally applicable law does not have to be supported by a compelling governmental interest.[190]

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[184] ENCYCLOPAEDIA JUDAICA, *supra* note 1, at 560.

[185] *See* Rabbinical Council of America, *Bris Milah*, *supra* note 3; Rabbinical Council of America, *Regarding Metzitzah*, *supra* note 52.

[186] *See Oregon Employment Div. v. Smith*, 494 U.S. 872 (1990). *But see Hialeah*, 508 U.S. at 520 where the court applies strict scrutiny in rare instances where the State deliberately instead of incidentally interferes with religious conduct.

[187] *Oregon Employment*, 494 US at 872.

[188] *Id*.

[189] *Id*. For a more recent application of similar reasoning, *see* Grace United Methodist Church v. City of Cheyenne, 235 F.Supp.2d 1186 (D.C. Wyo. 2002).

[190] *Oregon Employment,* 494 U.S. at 887-89. The Court carefully distinguishes between application of minimum scrutiny in certain First Amendment claims versus strict scrutiny in other First Amendment claims. Justice O'Conner cautioned in that case that strict scrutiny should be applied to all cases where the fundamental free exercise right is interfered with by any State action, but the majority did not agree with this conception where the Oregon state only incidentally interfered with Smith and Blacks' freedom to practice their religion.

But see the Religious Freedom Restoration Act (RFRA) of 1993 enacted by Congress to prevent the Federal government from substantially burdening a person's right to exercise their religion. Under this federal statute meant to restore the religious freedom limited by the Supreme Court in *Oregon Employment*, burdens imposed by generally applicable laws cannot

In *Oregon*, when Alfred Smith and Galen Black were denied unemployment benefits because they were terminated from their jobs following work-related misconduct, they brought an action against the state's alleged denial of their free religious exercise.[191] Smith and Black were both members of the Native American Church. One of the religious rituals involves the sacramental use of peyote.[192] Because of Smith and Black's use of the controlled substance, their employment was terminated and they were ineligible to receive unemployment benefits as a result of their "misconduct."[193]

The Oregon Court of Appeals reversed the Oregon Employment Division's determination that their use of peyote constituted misconduct and barred them from receiving unemployment benefits following their termination.[194] The appellate court reasoned that Smith and Black's right to free exercise under the First Amendment was unduly intruded upon by the state's action.[195] Oregon's supreme court "concluded that [the former employees] were entitled to payment of unemployment benefits."[196] Holding that the state court incorrectly balanced the burden on free exercise with the preservation of "financial integrity of the compensation fund" in reaching its conclusion, the United States Supreme Court remanded the case back to Oregon's supreme court.[197] As the United States Supreme Court did not have the authority to intrude upon Oregon's police power, the Oregon Supreme Court was charged with the task of determining whether the use of peyote for religious practice is protected under state law.[198] The Oregon Supreme Court again reached the same conclusion after deciding that Oregon's criminal statute as applied to the use of controlled substances "makes no exception for the sacramental use" of peyote.[199] The United States Supreme Court again granted certiorari.

Smith and Black failed in their attempt to convince the United States Supreme Court "that their religious motivation for using peyote places them beyond the reach of criminal law that is not specifically directed at their religious practice, and that is

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be imposed unless there is a compelling governmental interest to justify substantial burdens. In effect, the RFRA contradicted the *Oregon Employment* precedent by imposing a statutory higher standard of review. *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006), where a generally applicable drug law affected a genuine religious practice of consuming an herbal hallucinogenic tea, but the Court held the government failed to prove a compelling interest to justify the substantial burden on the church under the RFRA.

[191]*Oregon Employment*, 494 U.S. at 884.

[192]*Id.* Peyote is a hallucinogen from the *Lophophora williamsii Lemaire* plant and is classified as a Schedule I controlled substance. Abuse or use of the controlled substance is a felony offense in the State of Oregon. *See generally* OR. REV. STAT. § 475.840 (2006).

[193]*Oregon Employment,* 494 U.S. at 872.

[194]*Id.*

[195]*Id.*

[196]*Id.* at 875.

[197]*Id.*

[198]*Id.*

[199]*Id. (quoting* Oregon Employment Div. v. Smith, 763 P.2d 146 (1988)).

concededly constitutional as applied to those who use the drug for other reasons."[200] The argument sought to construct the First Amendment as encompassing neutral laws that are generally applicable to all individuals when those laws incidentally result in a burden to a religious practice. The Court did not favor this argument and refused to increase the scope of the First Amendment. The idea that an individual can "break" a law that is applicable to everyone merely because his religious practice commands an activity that has been legislated as illegal is not well received by the Court. The Court concluded that "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[201]

In the end, Smith and Black were constitutionally denied unemployment benefits for using peyote, even when that use was for a sacramental purpose. The Court held that they need not apply a balancing test where a law that is generally applicable is unsupported by a compelling governmental interest.[202] While the state action clearly infringes upon the free exercise of their right to use peyote for their ritual, the substance abuse laws are not intended to directly target religious practices. Accordingly, everyone is susceptible to the same rules and penalties as Smith and Black. Interference with their religious practice is only an incidental excess of the general drug laws that apply equally to everyone in the State of Oregon. The Court refused to grant Smith and Black an exception to the state's constitutional law simply on the grounds that their constitutional free exercise right was indirectly infringed upon. This decision arguably undermines the potency of the First Amendment protection of free religion.[203]

C. Hialeah: The Supreme Court Takes a Different Direction

Three years after the Court's decision in *Oregon Employment*, and in the same year that Congress passed Religious Freedom Restoration Act, the Court granted a religious organization's petition for certiorari in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[204] In *Hialeah*, The petitioners claimed a violation of their First Amendment right to freely exercise their religious beliefs and rituals.[205] In deciding that case, the Court departed from the rational basis analysis test used in *Oregon Employment* and alternatively relied upon a strict scrutiny analysis because

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[200]*Oregon Employment*, 494 U.S. at 878.

[201]*Id*. at 879 (*quoting* Reynolds v. United States, 98 U.S. 167 (1879)).

[202]*Oregon Employment,* 494 U.S. at 887-89. The Court carefully distinguishes between application of minimum scrutiny in certain First Amendment claims versus strict scrutiny in other First Amendment claims. Justice O'Conner cautioned that strict scrutiny should be applied all cases where the fundamental free exercise right is interfered with by any State action, but the majority did not agree with this conception where the Oregon state only incidentally interfered with Smith and Blacks' freedom to practice their religion.

[203]Congress enacted the RFRA of 1993 in the wake of the *Oregon Employment* decision to remedy for this diminished potency.

[204]*See* Church of the Lukumi babalu Aye, Inc., v. Hialeah, 508 U.S. 520 (1993).

[205]*Id.*

of the discriminatory nature of the state's action and its limited applicability to the Santeria believers.[206]

In *Hialeah*, members of the Santeria religion sought to protect their right to sacrifice animals, such as chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles for the purpose of keeping the mortal spirits, (based on Catholic saints) alive.[207] Originating in Cuba amidst the Yoruba people, descendents of the West Africans condemned to slavery in Cuba during the period of the slave trade, Santeria is a combination of traditional West African religion and Roman Catholicism.[208] As civil unrest ripped through the island of Cuba, several of the Yoruba people came to the United States, specifically southern Florida, to escape continued cultural and religious persecution.[209] Within the borders of the United States, most of the people practicing Santeria continue to do so discretely, perpetuating the habit of hiding their religious beliefs in Cuba.[210]

In 1973, one Santeria church became organized as a non-profit organization under Florida state law.[211] Then in 1987, the Santeria Church of the Lukumi Babalu Aye through its highest priest and incorporation's president, leased a parcel of land in the city of Hialeah.[212] In addition to constructing a church, they openly expressed their intent to build a school, cultural center, and museum in an effort to "bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open."[213] In August of 1987, the Church successfully obtained the necessary licenses and permits required to proceed with their plans.[214]

While the Santeria Church was attempting to obtain permits and licenses, the city council met during an emergency meeting and passed a number of municipal resolutions directed at the Santeria Church.[215] Prompted by the "distress" of Hialeah residents, the proposed ordinances were enacted in September of 1987 to quench the general population's concerns that the practices of Santeria not only failed to conform to "public morals, peace or safety" but the animal sacrifices might also be brought out into the open public.[216] In particular, the city passed an animal cruelty ordinance fully incorporating Florida state law but additionally subjecting anyone who "unnecessarily or cruelly . . . kills any animal" to criminal punishment.[217] The

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[206]*See generally id.* The majority of the opinion discusses why the Court applied a strict scrutiny test.

[207]*Id*. at 525.

[208]*Id*. at 524.

[209]*Id*. at 525.

[210]*Id*.

[211]*Hialeah*, 508 U.S. at 525.

[212]*Id*. at 525-26.

[213]*Id*. at 526.

[214]*Id*.

[215]*Id*.

[216]*Id*.

[217]*Hialeah*, 508 U.S. at 526.

penalties for violating any of Hialeah's four newly adopted ordinances included fines of up to $500 and/or a jail sentence of up to 60 days.[218] In response to these ordinances, the Santeria Church filed a cause of action alleging a violation of their First Amendment right to freely practice their religion.[219]

For the majority of Americans who do not practice Santeria, it is difficult to comprehend the religious necessity of animal sacrifice to keep the mortal spirits alive. In fact, for most people the concept of slitting the throat of an innocent sheep, pigeon, turtle, goat, or any other harmless animal, is foreign, immoral, and perhaps downright disgusting. For the citizens of Hialeah, Florida, Santeria ritual animal sacrifice was not only distressful, but immoral, not peaceful, and unsafe.[220] But the United States Supreme Court has recognized that regardless of the barbaric nature of certain religious beliefs and practices, the Free Exercise Clause constitutionally guarantees the freedom of religion of even those religious beliefs, like Santeria, that are not "acceptable, logical, consistent, or comprehensible to others."[221] The First Amendment does not expressly restrict the application of the Free Exercises clause.[222] The Supreme Court in *Hialeah* reversed the District Court and Court of Appeals findings by including the Free Exercise clause's protection to Santeria's animal sacrifice rituals.[223]

The District Court in *Hialeah* applied a strict scrutiny analysis.[224] In upholding the validity of Hialeah's ordinances, which were determined to be neutral "on their face," the court decisively recognized the city's compelling interest to justify the incidental interference with the free exercise of Santeria's religious ritual sacrifice.[225] "Four compelling interests" were identified that tipped the scales of justice in the city's favor.[226] First, "animal sacrifices present a substantial health risk" because they are "kept in unsanitary conditions" that are not inspected, and their parts are "found in public places."[227] Second, there is a risk of "emotional injury to children who witness" the ritual.[228] Third, the city has a compelling interest to protect animals from cruelty.[229] And finally, the city did have a compelling "interest in restricting the slaughter" of animals to "areas zoned to allow for slaughterhouse" purposes.[230]

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[218]*Id*. at 528.

[219]*Id*.

[220]*Id*. at 526.

[221]Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 713-14 (1981).

[222]U.S. CONST. amend. I.

[223]*Hialeah*, 508 U.S. at 520.

[224]*Id*. at 529.

[225]*Id*.

[226]*Id*.

[227]*Id*.

[228]*Id*.

[229]*Hialeah*, 508 U.S. at 529-30.

[230]*Id*. at 530.

Oregon Employment set one precedent for free exercise claim analyses.[231] Generally, even though a law may incidentally burden a particular religious practice, if the law is 1) neutral on its face and 2) generally applicable, the challenge need not be analyzed by strict scrutiny because there is no need for a "compelling governmental interest."[232] The animal cruelty ordinances passed as emergency measures while the Santeria Church sought licenses and permits to begin construction on their church in the city were far from neutral.[233] Their sole purpose and "object" was to suppress the Santeria religion within the city's borders.[234] The Court references existing animosity at the time of their enactment and the direct targeting of the Santeria religion.[235] In addition to not being neutral, the ordinances do not appear to be generally applicable, but instead apply only to those individuals who practice Santeria.[236] The District Court correctly applied strict scrutiny in *Hialeah* because the law failed neutrality and general applicability.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[237] The Court in *Wisconsin v. Yoder* established a free exercise clause balancing test based on strict scrutiny.[238] The state interest must override the free exercise interest to meet strict scrutiny.[239] In other words, a law that is intended to restrict free religious practice "must advance interests of the highest order."[240] The *Hileah* court stated in its opinion that "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[241] The city of Hialeah failed to demonstrate that its interests were compelling and outweighed the free exercise of Santeria's animal sacrifices.[242] The Court accordingly acknowledged the *potential* for state action which intentionally infringes upon the freedom of religion, but only in rare instances where the governmental interests are adequately proven to be of the "highest order."[243]

The opinion in *Hileah* strongly concludes with a powerful statement. "The Free Exercise clause commits government itself to religious tolerance, and upon even

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[231]*Id*. at 531.

[232]Oregon Employment Div. v. Smith, 494 U.S. 872, 873 (1990).

[233]*Hialeah*, 508 U.S. at 542.

[234]*Id*.

[235]*Id*.

[236]*Id*. at 545.

[237]*Id*. at 546.

[238]Wisconsin v. Yoder, 406 U.S. 205 (1972).

[239]*Hialeah*, 508 U.S. at 546.

[240]*Id.*

[241]*Id*.

[242]*Id*. at 546-47.

[243]*Id*. at 547.

slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[244] The Court left enough room for intervention but only if such intervention meets strict scrutiny. *Metzitzah be'peh* directly threatens the health and safety of infants. It is the government's duty to interfere where tolerance must give way for the health and safety of citizens.

VI. THE MODERN TREND: GOVERNMENT REGULATION AFFECTING RELIGIOUS RIGHTS

While the First Amendment guarantees individuals the absolute freedom of religious belief, religious conduct based on such beliefs is undeniably recognized as being less than absolute where a government has a compelling interest to protect the health and welfare of citizens.[245] Weighing religious rights in the balance during the 1970's, the scales temporarily tipped in favor of religious rights advocates and accordingly a number of state religious exemption laws were enacted to protect religious freedom.[246] The scales, however, are adjusting to weigh the health and welfare interests of children and the government's duty to protect those interests.

The trend of repealing exemption laws reflects the general consensus of the United States Supreme Court as opined in *Oregon Employment* and *Hialeah*. The government has a duty to protect the health and well-being of individuals when those needs are compelling and outweigh religious freedom. The duty is more than just an interest, even if it is a compelling interest. In 1996, the federal government enacted a statutory ban on female genital circumcision (also known as female genital mutilation) to protect the heavily impacted health interests of women being mutilated on cultural or religious grounds. And more and more states are repealing religious shield laws recognizing the overriding duty owed to children when their parents refuse them treatment for serious medical emergencies and illnesses.

A. Gradual Abandonment of Religious Shield Laws Protecting Parents from Criminal Liability

Every year throughout the world, children die of treatable illnesses, diseases, and injuries because parents or guardians refuse to seek medical treatment in furtherance of their own religious beliefs.[247] Several religions, most notably Christian Science and Jehovah's Witnesses, discourage the use of chemicals and modern medicine.[248] In lieu of medical treatment, some parents faithfully adhere to strict, and arguably

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[244] *Id.*

[245] *See generally id.*

[246] *See generally* Janna C. Merrick, *Spiritual Healing, Sick Kids, and the Law: Inequities in the American Healthcare System.* 29 AM. J. L. & MED. 269 (2003).

[247] *Id.* at 298. Merrick's article broadly approaches religious exemption laws and proposes that exemptions should be modified to give citizens clear notice that the exemptions cease to be applicable when the risk of harm to the child is serious, and/or the child is at risk of irreparable harm or death.

[248] Davida A. Williams, *Punishing the Faithful: Freud, Religion, and the Law*, 24 CARDOZO L. REV. 2181, 2185-86 (2003). *See also* Merrick, *supra* note 246, at 271-72. For a history and general overview of Christian Science.

extreme, religious beliefs and rely upon the power of prayer to heal their illnesses, diseases, ailments, and injuries.[249] People with a preference for spiritual healing contest any state action requiring a person to seek medical treatment on the grounds that such action interferes with the First Amendment free exercise guaranty.[250] At the other end of the debate, children's rights advocates place the interests and rights of children above the religious interests of their parents.[251] Their arguments in support of all necessary governmental actions are based on the government's duty to protect the health and welfare of children, regardless of the parents' religious preferences.[252]

Religious shield laws first came to fruition in 1974 when the federal government offered funding for state child protection programs.[253] Eligibility for the funding was based on a state's participation in the program by effectively shielding parents from prosecution under child abuse and neglect statutes if they refused to seek medical "treatment for their child based on religious" convictions.[254] This mechanism serves as a religious defense. While parents are shielded from these abuse and neglect laws in more than forty states, most of those states have denied the inclusion of any such exemption in manslaughter or child endangering cases, and parents have been successfully prosecuted in those instances.[255]

Since the federal program began in 1974, high powered religious groups have successfully lobbied their legislatures to incorporate immunities from criminal liability when religious beliefs are intertwined.[256] Depending on the jurisdiction, parents who fail to obtain medical care for their sick and ailing children may be shielded from prosecution under child abuse and child endangering statutes.[257] But

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[249]*See* Williams, *supra* note 248, at 2186.

[250]Cassandra Terhune, *Cultural and Religious Defenses to Child Abuse and Neglect*, 14 J. AM. ACAD. MATRIM. LAW 152, 170-73 (1997). Faith healing "is the practice of using one's religious beliefs to cure physiological, as well as psychological, sickness through prayer."

[251]*Id*. at 172.

[252]*Id*.

[253] *Id*. at 174.

[254]*Id*.

[255]For two examples of such convictions, *see* Hall v. State, 493 N.E.2d 433 (Ind. 1986), affirming convictions of parents for reckless homicide after son died of pneumonia. The parents refused to seek medical treatment for his condition based on their faith in religious healing and prayer; *See also* Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985) (affirming convictions of parents for involuntary manslaughter after two year old son died from cancerous tumor. The parents did not seek medical treatment for their son because of their religious beliefs in spiritual healing).

[256]American Academy of Pediatrics, Committee on Bioethics. *Religious Objections to Medical Care*. 99 PEDIATRICS 279 (1997), *available at* www.cirp.org/library/ethics/AAP3 (last visited Dec. 18, 2006). "Through legislative activity at the federal and state levels, some religious groups have sought, and in many cases attained, government recognition in the form of… exemption from child abuse and neglect laws when children do not receive needed medical care."

[257]Although there have been some convictions under murder statutes as noted *supra* note 255, several child abuse and neglect laws contain exemptions to shield parents acting based on

the liberal encouragement of religious exemption clauses within state criminal abuse and neglect statutes was short lived.[258] Not even ten years later in 1983, the federal Department of Health and Human Services required states to report any and all cases of child neglect, and also "required states to amend their definitions of neglect to include failure to provide medical care."[259] The federal government's shifted support for religious exemption clauses was accompanied by a coercive tactic to withhold child-abuse program grants from states not complying with the new federal initiative.[260]

There remains a slow-moving push against the high-powered, financially backed religious lobbyists to eliminate these shield laws altogether.[261] The American Academy of Pediatrics' Committee on Bioethics, the National Committee for the Prevention of Child Abuse, the National District Attorney's Association, the American Medical Association, parents, and other supporters of child's rights have all joined the movement to repeal existing state religious exemption statutes.[262] If the laws are blocked from repeal by strong lobbyists, the exemption laws may be subjected to constitutional challenges "on the grounds that they deprive . . . children of equal protection [and] due process."[263]

In 1974, the federal government created a maelstrom by allowing and encouraging religious exemption statutes. Instead of the ever feared "chilling effect" that occasionally results from the enactment of certain laws, these shield laws had the opposite impact on children's rights. Where parents may have felt legally obligated to seek treatment despite their strong religious convictions, they were now encouraged to test their faith in spiritual healing and legally protected when acting on those beliefs when it came to the health of their children. Fortunately, the shield laws did not reach manslaughter statutes. In an era where Congress sought to afford greater religious freedom to citizens, the religious shield laws took that liberty too far. Congress temporarily displaced some of the government's authority to act upon compelling health interests of children in lieu of greater religious freedom. But as more states repeal their exemption clauses and hold parents criminally liable under

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religious beliefs from prosecution when a child suffers substantial harm; *see* Williams, *supra* note 248, at 2186-87. "As of 2002, over fourty states and the District of Columbia have included such exemptions in their child abuse and neglect laws."

[258]Terhune, *supra* note 250, at 174.

[259]*Id*.

[260]*Id*. at 174-75.

[261]Although this topic is not at issue in this article, it should be noted that these exemptions can be easily overturned and eliminated using the United States Supreme Court's ruling in *Oregon Employment*. Criminal laws are generally applicable and do not target religious beliefs or practices. That religious beliefs are incidentally impacted by any criminal law is of no consequence to the validity of the criminal statutes. It would be entirely appropriate and ethical to revoke existing exemptions. In *State v. Miskemins*, 490 N.E.2d 931 (Coshocton C.P. 1984), the common pleas court held the religious exemption clause in OHIO REV. CODE ANN. §2919.22(A) to be unconstitutional. Note, however, that the holding is only applicable within that jurisdiction.

[262]Terhune, *supra* note 250, at 175.

[263]*Id*.

neglect and child abuse statutes, the proper balance between religious freedom and appropriate government regulation where interests are compelling is gradually being restored.[264]

B. Federal Prohibition of Female Genital Circumcision: A Model for New York

One example of an existing statutory federal regulation of a procedure that is arguably associated with religion is the statue prohibiting female genital mutilation (FGM). In 1996, Congress passed legislation prohibiting FGM.[265] FGM is an act which involves the circumcision of the whole or any part of the labia or clitoris of another person who is not eighteen years old.[266] Unique to this statute is section (c) which reads, "No account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual."[267] To this date, there have been no recorded challenges to the federal statute.[268]

The first reported Congressional finding is that "the practice of female genital mutilation is carried out by members of certain cultural and religious groups."[269] Although Congress acknowledged that some groups carry out the procedure under the pretext of being mandated by a religion or religious purpose, nothing indicates that Congress targeted the procedure as a religious practice. The debate is continuing over the purposes and rationales of FGM.

As travel has become more accessible to people of all different races, religions, and cultures throughout the world, their customs, rituals, and beliefs have also been transported, disseminated, and practiced throughout the world. The ritual of FGM is most commonly practiced in many countries in Africa and the Middle East.[270] As FGM is performed by many different religious and cultural groups, "the underlying rationales for its practice . . . vary greatly."[271] Women from many different religions,

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[264]*See generally id.* for an excellent discussion of spiritual exemption laws as they stood in 2003.

[265]18 U.S.C. § 116 (2006).

[266]*Id.*

[267]*Id.*

[268]A review of the case law using the Westlaw database revealed no reported cases relating to 18 U.S.C. § 116. However, in North Dakota, mother who refused to consent to her son's circumcision filed an action after the boy's father consented to the circumcision. The mother's action was based on the unequal protection of the federal ban on FGM. She argued that the statute protects females, but does not protect males, and thus by its nature offers unequal protection and is unconstitutional. The plaintiff further contested that either both types of circumcision should be banned or neither should be banned. The case was dismissed. *See* Jeffrey Rosen, *Is Ritual Circumcision Religious Expression*? N.Y. TIMES, Feb. 5, 2006, at 6, *available at* 2006 WLNR 2004559.

[269]18 U.S.C. § 116 (2006).

[270]Erin L. Han, *Legal and Non-Legal Responses to Concerns for Women's Rights in Countries Practicing Female Circumcision: Debating Women's Equality*, 22 B.C. THIRD WORLD L.J. 201, 203 (2002).

[271]*Id.* at 204-05. Rationales include: rite of passage, protection of virginity, to curb woman's sex drive, to enhance aesthetic pleasure of males who prefer smoothness, to enhance

including Muslims, Catholics, Protestants, Copts, Animists, and atheists, have been subjected to FGM.[272]

Contrary to some of the prevalent beliefs within the United States, the majority of Muslims do not practice FGM.[273] Female circumcision is not encouraged by or even mentioned in the Qur'an and is not a religious ritual.[274] Although there are Muslims that do specifically endorse and perform female circumcision based on false religious precepts, the act is more of a cultural rite of passage for women who are subjugated to men.[275] For example, there are Christian cultures in Africa that also practice the procedure.[276] As the fifth Congressional finding states, "the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution."[277] This statute was broadly intended to encompass FGM regardless of any potential religious pretext as a means to protect health interests of women.[278]

No conclusive evidence indicates that FGM is a religious based ritual. Nor is there any suggestion that Congress intended to curtail FGM as a religious belief or practice. Accordingly, the statute is not likely to be overturned as a violation of the First Amendment's Free Exercise Clause.

Recognizing that there may be a small minority group that believes FGM to be a religious-based Islamic rite and accordingly challenge the statute as violating Free Exercise rights, the constitutional challenge could be appropriately rejected using the *Oregon Employment* rationale. In that case, the court upheld the denial of unemployment benefits to two individuals who had been terminated from their jobs for using illegal substances.[279] The Native Americans sought to challenge the state's action on free exercise grounds because their religious beliefs and conduct

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pleasure of males who prefer tightness, and perhaps to a much lesser extent for some groups, religion.

[272] *Id*. at 205.

[273] Muslim Women's League. *Female Genital Mutiliation* (January 1999), *available at* http://www.mwlusa.org/publications#positionpapers/fgm.html. *See also* AHMAD, IMAD-AD-DEAN, MINARET OF FREEDOM INSTITUTE, FEMALE GENITAL MUTILATION: AN ISLAMIC PERSPECTIVE 1 (2000) for a discussion on the weak association between the Islamic religion and female genital mutilation. Although some Muslims conduct the procedure under the guise of religion, the act is more of a cultural identification rite. "People often confuse traditions rooted in local culture with religious requirements;" *see also* Han, *supra* note 270 at 204-05.

[274] *See* AHMAD, *supra* note 273. *But see* Doriane L. Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 730-31 (1998) (discussing the continuing debate as to whether or not female circumcision is a component of the Muslim religion).

[275] *See* Muslim Women's League, *supra* note 273.

[276] AHMAD, *supra* note 273. This fact eliminates the theory that FGM is a Muslim practice; *see also* Han, *supra* note 270, at 205.

[277] 18 U.S.C. § 116 (2006).

[278] Han, *supra* note 270, at 206. Potential health consequences include: pain, shock, hemorrhage, infection, fever, tetanus, sterility, cysts, scarring, obstructed labor, and painful intercourse.

[279] Oregon Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

incorporate the use of peyote.[280] Upon remand from the Supreme Court, the state of Oregon classified the drug as a controlled substance and was within its rights to do so.[281] The United States Supreme Court ultimately concluded that the Oregon law was valid and constitutional, even though the general application of the laws incidentally infringed upon religious rights.[282]

The federal ban on FGM is only perceived as a violation of the First Amendment by those adhering to the common misperceptions regarding FGM's origins and rationales. But even if FGM were found to be a religious ritual, the federal ban was not intended to target any religious group. Furthermore, Congress' purposes in enacting the statute were to protect the health of women which is severely impacted by their genitals being cut. Thus, this statute can serve as a model for New York's legislative bodies. However, it should be re-emphasized that any state or federal ban of oral-suction is going to be a direct hit to the targeted fundamental right of Jews to practice *metzitzah be'peh*, and it should be expected that any state action will be strictly scrutinized by the Court.

VII. CONCLUSION

During an election year, Mayor Bloomberg of New York City temporarily tabled a conflicting issue between the government and a large voting bloc, the Orthodox Jewish community, even after identifying three documented cases since 2003 where Jewish infants had been afflicted with neonatal herpetic infections following *metzitzah be'peh*. After Bloomberg's successful re-election, the city renewed its interest in the ongoing debate over *metzitzah be'peh* and announced the discovery of two more infected infants bringing the total to five babies since 2003.[283] One of these fragile infants died; another infant experienced brain damage. The remaining three infants experienced signs, symptoms, and results of HSV within the possible spectrum of effects.

The common cold sore virus (oral type I Herpes) is seemingly harmless, and for many adults and perhaps even *mohels*, it is an aesthetic nuisance often disregarded. Oral herpes viruses are readily spread through the lesions in and around the lips and mouth, particularly to the freshly cut genitalia of eight-day old infants taking part in the ritual covenant with God. Medical evidence suggests a strong connection between oral-genital suction and the transmission of herpes to Jewish infants.

Herpes is incurable. There may be limited treatments to ease the lifelong recurrent discomfort that many infected individuals will experience, but the infection is permanent. Like a game of chance, there is no way of knowing who will be asymptomatic or how severely a neonate may be affected. The point is simply this: it is the most common ulcerative STD and neonatal infection can range from fatal to asymptomatic with a wide variety of developmental defects and associated ailments in between. Herpes is incurable.

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[280] *Id*. at 878.

[281] *Id*. at 875.

[282] *Id.* 872.

[283] Bloomberg has avidly maintained that the city does not wish to ban oral suction. However, a ban would be constitutionally justified, and it is the city's duty to at least entertain such prohibition of a practice that carries a high risk of infectious disease transmission.

It is estimated that approximately 4000 rituals involving *metzitzah be'peh* are performed each year in highly Orthodox Jewish communities in New York. Those that resist any form of regulation, government interference, or modification of the ancient ritual of oral suction base their claims on two grounds. First, that oral suction is a necessary component to effectuate the bond between the child and God. And second, that the First Amendment of the United States Constitution protects religious freedom. Most Jews have long abandoned *metzitzah be'peh* in the absence any express instruction for the ritual within the Talmud, or have modified the ritual suctioning of blood to be done via a glass tube.

Oral-suction proponents' first argument fails. As evidenced by the majority of Jewish followers that have abandoned direct mouth to penis contact, Judaic Law does not expressly mandate the use of *metzitzah be'peh* to effectuate a covenant between the child and God. Their second argument also fails. While the First Amendment absolutely guarantees freedom of religious belief, religious actions based on those beliefs are not absolutely protected. As the United States Supreme Court held in *Hialeah*, government action that interferes with the free exercise of religion must meet strict scrutiny, and in the rare instance that it does meet this standard, it will be constitutionally valid.

The City of New York can and should ban *metzitzah be'peh*. The city has a compelling interest to protect the health and welfare of the estimated 4000 infants that are at a high risk of exposure to herpes during the oral suction ritual. Since one of five infants has died as a result of neonatal HSV, and a second of the five has experienced brain damage from HSV, the nature of the risk is clear. Furthermore, HSV is permanent and incurable. It will ail these infants for the rest of their lives and potentially impair their early development. These infants will grow into sexually mature adults, running the risk of spreading HSV to others. New York has an interest of the highest order to protect the lives of innocent infants. The interest is compelling and legitimate. New York would be neglecting its duty to regulate for the health and welfare of these infants by turning their backs on the opportunity to end such a dangerous religious ritual.

New York City's health department issued its most recent statement in December warning the community of the dangerous nature of *metzitzah be'peh*. This government action has been attacked by the disappointed voting bloc. Bloomberg assigned the investigation to a Rabbinical Judicial board for further investigating pending an update in early December.[284] When the Rabbis failed to meet Bloomberg's deadline to report their progress and findings with respect to the three HSV cases associated with one particular *mohel*, the statement was released. This preliminary action is to be followed by guidelines that the health department is currently drafting.

Guidelines will not prevent another infected *mohel* from applying his infected mouth to the freshly cut penis of an eight day old baby boy for the purposes of *metzitzah be'peh*.[285] There is no penalty attached and guidelines have no

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[284]Nussbaum Cohen, *supra* note 12.

[285]Steven I. Weiss, *Rabbi Targeted After Call for Bris Change*. FORWARD, Mar. 18, 2005, *available at* http://forward.com/articles/2834. The article cites two Jewish publications, Yated Ne'eman and Der Yid, as vowing that "members of their communities will continue to practice the controversial ritual, even if doing so lands them in prison." This suggests that neither regulation by the Jewish community nor criminal sanctions by the government will

enforcement power. While a city or state ban on oral suction may not permanently end the risk posed to infants, since some traditional Orthodox *mohels'* belief in the practice is so deeply rooted that they will continue to practice it at any cost. But such a regulation will at least establish a recognized penalty or consequence for infecting an innocent infant.[286] It is the duty of New York City to enact legislation that protects the health interests of these at-risk infants. Should the city decide to move beyond the proposed solution of setting forth unenforceable guidelines, the city should be confident that their legislation will meet the requirements of strict scrutiny in the wake of *Hialeah* and the Religious Freedom Restoration Act.

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inhibit the oral suction ritual. However, criminal penalties are traditionally recognized as being deterrents to criminal activity.

[286] *Id.*

[287] As a Mom, I was compelled to face this issue. Zachary and Madeleine, you both inspire me to work hard, and I thank you both for your patience. A special thank you to my parents, Jim and Danielle Cole, who made my journey through law school possible.