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Dena S. Davis

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MALE AND FEMALE GENITAL ALTERATION: A COLLISION COURSE WITH THE LAW?

Dena S. Davis[†]

I. INTRODUCTION

IN MARCH OF 1999, the American Academy of Pediatrics (AAP) released a policy statement on the circumcision of newborn males, stating that the practice does not have health benefits strong enough to warrant recommendation as a routine procedure.¹ This withdrawal of medical support for routine circumcision requires us to face some uncomfortable facts, and raises intriguing constitutional questions.

It is now illegal in the United States to perform genital alteration on female minors, no matter how minimal the surgery or how safe and sanitary the procedure. Newborn male genital alteration, however, is an accepted procedure in the U.S. Although there is some controversy over this practice, for most people it is a familiar part of life in America. The law takes no cognizance of the male procedure, with no records kept of circumcisions performed outside of hospitals, and with no oversight or licensing of ritual practitioners.

Why does the law turn a blind eye to one procedure and criminalize the other? Two possible answers present themselves. The first answer claims that male genital alteration is medically beneficial, whereas female genital alteration is purely "cultural." As I will show later in this article, this is a weak argument. There are no health benefits to the female procedures, certainly, but the health benefits for males are contested and tenuous.

[†] Professor, Cleveland-Marshall College of Law. B.A., Marlboro College; J.D., University of Virginia; Ph.D. (Religion), University of Iowa.

¹ See Task Force on Circumcision, American Academy of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS 686 (1999) [hereinafter AAP, *Circumcision Policy Statement*] (reviewing medical literature concerning circumcision).

The second answer points to the relatively minor and low-risk character of newborn male circumcision, contrasted to the pain, suffering, morbidity, and death associated with female genital alteration. With regard to the most common practices of female alteration, this is a good answer. The practice as carried out in most countries well deserves the name "female genital mutilation." It is emphatically not my goal here to defend that practice nor to weaken the international movement to eradicate it. However, the federal and state laws criminalizing genital alteration on female minors are so broad that they cover even procedures significantly less substantial than newborn male circumcision. One consequence of these laws' wide sweep is that they block the efforts of compassionate and creative physicians who want to attempt to offer a compromise to immigrant parents from countries where female genital alteration is the norm. By offering a tiny, safe procedure, these physicians hope to dissuade parents from sending their girls back to Africa for the procedure or from employing a local traditional practitioner.

When one begins to question the normative status of male newborn alteration in the West, and when one thinks of female alteration as including even an hygienically administered "nick," one sees that these two practices, dramatically separated in the public imagination, actually have significant areas of overlap. In this article I will show that the two practices lack a legally defensible distinction, given the current wording of state and federal statutes. Thus, a complete *laissez-faire* attitude toward one practice coupled with total criminalization of the other, runs afoul of the "free exercise" clause of the First Amendment. There are also troubling implications for the constitutional requirement of equal protection, because the laws appear to protect little girls, but not little boys, from religious and culturally motivated surgery.

In Part II, I give a brief description of the medical facts and geographical sweep of female genital alteration, a topic that has been covered in great detail by many other articles in the legal literature and elsewhere. Part II also discusses the legal and educational initiatives against female genital alteration in developing countries, in the West, and specifically in the United States. Part II concludes with a description of the experience of Seattle physicians who attempted to provide a compromise acceptable to their Somali immigrant consumers by offering a small "genital nick" in place of traditional genital alteration.

Part III looks at the medical facts and statistical instances of male genital alteration, with an analysis of medical arguments for and against the practice. Part IV explores the meanings of male and female genital alteration, including religious, cultural, social and economic motivations. Part V discusses the "free exercise" issues, concluding that it is not constitutionally acceptable to criminalize all female genital alteration while retaining a *laissez-faire* legal attitude to male genital alteration. Finally, Part VI offers recommendations for changes in the law that would offer increasing protection to all children and treat different religious traditions with equal respect.

A note on language. Male newborn genital alteration is almost always referred to as "circumcision," a vaguely medical term and one that signals society's acceptance of this procedure. As one commentator noted:

What is familiar becomes a cultural value. Circumcision is familiar. The words we use and the words we avoid when talking about a cultural value like circumcision serve to reinforce the practice For example, the term "uncircumcised" suggests that to be circumcised is the norm, the standard. This is an assumption made by a culture that practices circumcision. However . . . nonreligious circumcision is not "normal" in any culture outside of the United States. From a global perspective, to be "uncircumcised" is to be normal, the way males are born, and the way most of the world's males remain.

As the American debate about circumcision develops, the words "intact" and "natural" are being used in place of "uncircumcised" to reflect this global view.²

When writers have used "circumcision" to refer to the female procedure there is often an outcry; opponents of the female procedure and defenders of the male procedure alike object to casting them in the same light. I agree that calling both procedures "circumcision" tends to trivialize the horrors of the female procedures as they are commonly practiced. On the other hand, "female genital mutilation," the term preferred by many of its opponents and officially adopted by the World Health Or-

² RONALD GOLDMAN, QUESTIONING CIRCUMCISION: A JEWISH PERSPECTIVE 5 (1998).

ganization,³ has its own problems. “[M]utilation implies removal or destruction without medical necessity,”⁴ which logically ought to cover routine male circumcision as well. Further, the term completely ignores the meanings of female genital alteration in the cultures in which it is practiced, in which *not* to be circumcised is to look weird and disgusting.⁵ Finally, the term polarizes people rather than inviting discussion. To quote two anthropologists:

The extreme language used by Western authors to describe female circumcision is perceived by Arab and African people as a continued devaluation of themselves and their entire cultures. To put the matter quite bluntly, if we care about the genitals of the women in those cultures, we need also to care about their feelings.⁶

On the other hand, I reject the term “traditional female genital surgeries” because it suggests a procedure that, even if medically indefensible, is at least carried out in a medical context. In most cases, nothing could be further from the facts. Most of these genital “surgeries” are done by traditional practitioners or by female members of the girl’s family; the most common tools are cut glass, a sharp rock, fingernails, a razor blade or unsterile medical instruments.⁷ (I have some sympathy, however, with the argument that calling it “female genital surgery” is worthwhile because it invites comparisons with other forms of cosmetic surgery on women which are not generally greeted with horror and mass condemnation.⁸ This point is es-

³ See generally WHO Leads Action Against Female Genital Mutilation, 15 WORLD HEALTH F. 416 (1994).

⁴ Sandra D. Lane & Robert A. Rubinstein, *Judging the Other: Responding to Traditional Female Genital Surgeries*, HASTINGS CENTER REP., May-June 1996, at 35 (discussing female genital surgeries in non-Western cultures and Westerners’ reactions to them).

⁵ See *id.*

⁶ *Id.* at 38.

⁷ See American Academy of Pediatrics, Committee on Bioethics, *Female Genital Mutilation*, 102 PEDIATRICS 153, 153 (1998) [hereinafter Committee on Bioethics] (explaining the four types of FGM, its prevalence, and stating the American Academy of Pediatrics’ opposition to any form of FGM); DAVID L. GOLLAHER, *CIRCUMCISION: A HISTORY OF THE WORLD’S MOST CONTROVERSIAL SURGERY* 190 (2000) (providing as illustration the practice of scratching a girl’s labia majora with sharp tools in certain areas of Indonesia).

⁸ See Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995)

pecially appropriate in countries such as Britain and Canada, where female genital surgery is illegal even when performed on adult women.⁹)

Because my goal in this article is to convince readers that there is legally significant overlap between the male and female procedures, I will resort to the cumbersome but assertively neutral term, "genital alteration" for all practices that surgically change the appearance or function of the male or female genitalia without medical reason. Within certain contexts, however, I will also use the more common terms.

II. FEMALE GENITAL ALTERATION (FGA)

A. Description and Epidemiology

The scope and consequences of female genital alteration (FGA) have been well rehearsed in the legal and medical literature. The practice affects between 80 to 110 million women now living worldwide, especially, but not exclusively, in Muslim cultures.¹⁰ Annually, FGA is performed on about 4 to 5 million female infants and girls, most commonly on children between the ages of 4 and 10.¹¹ Doctors categorize FGA into four general types:

Type I, often called "clitoridectomy," involves excision of the skin around the clitoris. It may also involve excision of all or part of the clitoris.

Type II, called "excision," involves the removal of the entire clitoris and part or all of the labia minora. Bleeding from this procedure may be staunched with stitches of catgut or thorns; mud poultices may be applied directly to the wound.

In Type III, known as "infibulation," the girl not only loses her clitoris and labia minora, but the outer labia are first cut and then stitched together, to create a permanent closure with only a small opening for urine and menstrual flow. Women who have been subjected to this procedure must then be cut open before

(discussing how to address female genital mutilation through human rights and feminism).

⁹ See J.A. Black & G.D. Debelle, *Female Genital Mutilation in Britain*, 310 BRIT. MED. J. 1590 (1995).

¹⁰ See Efua Dorkenoo, *Combating Female Genital Mutilation: An Agenda for the Next Decade*, 49 WORLD HEALTH STAT. Q. 142, 142-47 (1996).

¹¹ See Committee on Bioethics, *supra* note 7, at 153.

intercourse, and require episiotomies to avoid tearing of the vulva during childbirth. (This is also sometimes referred to as "pharaonic circumcision.")

Category IV is a catch-all covering other kinds of procedures of various degrees of severity, including piercing of the clitoris or labia, cauterization of the clitoris, and so on.¹²

As would be expected, given the medically primitive conditions in which FGA commonly takes place, the physical consequences can be horrendous. Bleeding to death is the most tragic result of the procedure; no statistics exist as to how often this takes place. Other immediate complications include shock, hemorrhage, infection, damage to the urethra or anus, scarring, and tetanus. The use of unsterilized instruments also provides a pathway for infection from bloodborne viruses such as hepatitis B and human immunodeficiency virus (HIV).¹³

There are long-term health risks as well. New opportunities for infection occur when the scar tissue on infibulated women is opened when they marry or give birth. Tightly infibulated women can only urinate drop by drop, so that it can take between ten and fifteen minutes to void the bladder. Long-term complications of even the less extensive procedures include chronic vaginal, bladder, and uterine infections (often leading to sterility). When infibulated women give birth, failure to cut the scar open in time can lead to fetal damage and death.¹⁴ The very high rates of infant and maternal death in Sudan and Somalia are likely due in part to the fact that FGA in those countries is almost universal.¹⁵

Psychological and emotional damage is less well studied. Obvious sequelae include lack of sexual satisfaction, fear of pain during intercourse, and inability to reach orgasm. Of course, what Westerners would deem a negative side effect proponents of the practice might consider a goal, as one rationale given for FGA is to dull women's sexual drive and keep them

¹² See *id.* at 153-54.

¹³ See Council on Scientific Affairs, American Med. Ass'n, *Female Genital Mutilation*, 274 JAMA 1714, 1715 (1995) (discussing the process and reasons for female genital mutilation, as well as listing recommendations for addressing the relevant issues both in the United States and abroad).

¹⁴ See *id.*

¹⁵ See Lane & Rubinstein, *supra* note 4, at 33.

“pure and obedient.”¹⁶ Some women “report a feeling of permanent loss and of being seriously wounded.”¹⁷ (Interestingly, adult men who bemoan the circumcisions that befell them in childhood often report the same feelings.¹⁸) Because the procedure is often done on small girls, who are grabbed without warning by female family members, lifelong feelings of distrust and betrayal are also common. Girls who receive the Type I procedure in hygienic conditions with the use of anesthesia do not report severe psychological reactions at the time, but may still experience problems in sexual functioning at a later date.¹⁹

Because psychological distress is harder to characterize than physical symptoms, writers describe the emotional consequences of the procedure in widely varying ways, in part due to their own perspectives on how best to approach the problem. One Egyptian woman is quoted as saying:

I was 7 years old when I was circumcised. The women in my village spoke of this operation as if their whole life had stopped then and there. Their descriptions and the subsequent feeling of inescapable doom triggered such a panic in me that . . . I began to vomit. What happened that day is excruciatingly burning in my flesh, and I often wake up in the middle of the night screaming for my mother.²⁰

On the other hand, when anthropologists Lane and Rubinstein interviewed 50 women in rural and urban Egypt, they found only two who were angry at having been circumcised, and the overwhelming majority planned to have the procedure performed on their daughters as well. One African woman, herself circumcised, defended the procedure and wrote that “[t]he circumcision ritual is an enjoyable one, in which the girl is the

¹⁶ See generally GOLLAHER, *supra* note 7, at 198 (reporting that despite Western pressure, women from African countries enthusiastically support the practice).

¹⁷ Elizabeth Thompson Ortiz, *Female Genital Mutilation and Public Health: Lessons from the British Experience*, 19 HEALTH CARE FOR WOMEN INT’L 119, 124 (1998).

¹⁸ See GOLDMAN, *supra* note 2, at 46.

¹⁹ See Ortiz, *supra* note 17.

²⁰ Loleta Thomas Bailey, *Broken Wings: The Tragedy of Female Genital Mutilation*, LIBERTY, July 1997, at 6, 9 (citation omitted).

centre of attention and receives presents and moral instruction from her elders."²¹

B. Legal and Educational Initiatives Against FGA: Outside the West

The last decades have seen a number of legal initiatives against FGA, both internationally and in those countries in which the practice most commonly occurs. The *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* addresses discriminatory traditional practices. Article 24.3 of the *Convention on the Rights of the Child* requires states to act to end traditional practices harmful to the health of children. The *African Charter on Human and People's Rights* and the *African Charter on the Rights and Welfare of the Child* protect children from harmful traditional practices. The *Programme of Action of the International Conference on Population and Development*, held in Cairo in 1994, committed governments to take "urgent" steps to stop the practice, as did the *Platform for Action of the World Conference on Women*.²²

A number of African countries, including Senegal, Ghana, the Central African Republic, Djibouti, Togo, and Burkina Faso, have recently passed laws outlawing female circumcision. Other countries, such as Uganda, discourage it.²³ In Guinea, performing female circumcision carries the death penalty.²⁴ Some of these laws were passed in response to the growing threat of HIV and the evidence that women subjected to genital alteration were at increased risk.²⁵

Passing laws is one thing; enforcing compliance is another. At a 1995 meeting of African health ministers, the group ruled out a ban, saying that "it would be absurd to introduce laws which would not be implemented."²⁶ In Senegal, Moun-taga Tall, spiritual leader of northern Senegal's Tou-cou-leur people,

²¹ GOLLAHER, *supra* note 7, at 198.

²² See Dorkenoo, *supra* note 10, at 144 (noting the international commitment to end female genital mutilation).

²³ See Barbara Crosette, *Senegal Bans Cutting of Genitals of Girls*, N.Y. TIMES, Jan. 18, 1999, at A10.

²⁴ See *Female Genital Mutilation. Is It Crime or Culture?*, ECONOMIST, Feb. 13, 1999, at 45.

²⁵ See Hassan Mekki, *Impossible to Ban Female Circumcision, African States Say*, AGENCE FRANCE PRESSE, Apr. 29, 1995.

²⁶ *Id.*

vowed to die rather than supporting the ban; just before the 1999 law was passed, one village reportedly circumcised 120 girls en masse, to express their defiance. Senegalese critics charge that the law was passed only to cater to American sensitivities and to woo American grant money. The Senegalese law was passed one month before the U.S. State Department's annual report on human rights was released, a report that is used as a guide to allocating aid.²⁷ In Sierra Leone, where the sequelae of surgical alteration include one of the highest rates of miscarriage and pregnancy-related deaths in the world, public controversy about the practice sparked a huge march of women on the capital city, to defend the custom. "I am only doing this to protect our culture," said Mrs. Haja Sasso, leader of the National Council of Muslim Women. "I don't want to see this ceremony eradicated, because it binds us, we the women, together. We respect each other in this way, and we feel free together because of it."²⁸

Some anthropologists and activists, both Western and from developing countries, are appalled by the arrogant, colonialist manner in which Westerners often frame their opposition to the practice. Ellen Gruenbaum says that, "international efforts to 'eradicate' female circumcision (as if it were a disease), though often couched in seemingly progressive feminist rhetoric, sound condescending to many African women. The response has often been a cultural backlash, characterized by a defense of traditions by African women against what is perceived as Western cultural imperialism."²⁹ Nahid Toubia, a widely quoted activist against the practice, nonetheless observes:

The West has acted as though they have suddenly discovered a dangerous epidemic which they then sensationalized in international women's forums creating a backlash of over-sensitivity in the concerned communities. They have portrayed it as irrefutable evidence of the barbarism and vulgarity of underdeveloped countries...It became a conclusive validation to the view of

²⁷ See *Female Genital Mutilation. Is It Crime or Culture*, supra note 24.

²⁸ Howard W. French, *The Ritual: Disfiguring, Hurtful, Wildly Festive*, N.Y. TIMES, Jan. 31, 1997, at A4 (defending the ritual of female genital alteration as a cultural custom).

²⁹ Ellen Gruenbaum, *The Cultural Debate Over Female Circumcision: The Sudanese Are Arguing This One Out for Themselves*, 10 MED. ANTHROPOLOGY Q. 455, 456 (1996).

the primitiveness of Arabs, Muslims and Africans all in one blow.³⁰

By the same token, women from developing countries often bitterly contrast Western obsession with FGA with Western indifference to other factors in women's suffering. Gruenbaum points out:

In Sudan . . . at least a quarter of a million people died of starvation due to drought and war in 1988-89 Although the United States and other countries offered some assistance, it was too little and too late, relating to the "donor fatigue" phenomenon. Thousands of little Sudanese girls died—whether circumcised or not—along with their brothers and elders.³¹

Parasathi Teare writes that "campaigners against female circumcision should put all their efforts into challenging the circumstances that create and perpetuate the harsh everyday lives of people in those developing countries that practice female circumcision."³²

Among those who want to see FGA eradicated, there are different viewpoints on how to achieve that goal. Not everyone agrees that outlawing the practice is the best strategy. Critics argue that, lacking grassroots support and educational infrastructure, laws motivated by outside interests will not be effective. In Ghana, Guinea, and Burkina Faso, the laws have never been applied. Governments fear that draconian efforts to stop the practice will incite a repetition of the rebellions of the colonial period, when female alteration was seen as an emblem of nationalist pride. Groups in favor of female alteration helped build support for the Mau Mau uprising in Kenya. When British law banned traditional cutters from performing the procedure, groups of girls would defiantly conduct "Ngaitana," or "I cut myself."³³

There is some evidence that bans enacted from above, rather than growing out of grassroots movements for change, can actually work to entrench the practice. In Senegal, a group

³⁰ Lane & Rubinstein, *supra* note 4, at 36 (quoting Nahid Toubia, an activist against circumcision).

³¹ Gruenbaum, *supra* note 29, at 471.

³² Parasathi Teare, *Hot Potatoes*, 94 *NURSING TIMES* 34, 35 (1998).

³³ See *Female Genital Mutilation. Is It Crime or Culture*, *supra* note 24.

called Tostan had had some success in educating hundreds of villages about the health risks associated with the practice. Thirty-one villages had announced that they would stop female circumcision and others were poised to follow suit. But when the law was passed, Tostan was forced to suspend its work. "Villagers say the ban has turned friends and relations into criminals, and fiercely resist the idea that they are being forced into giving up the practice." One reporter says that the issue has "exposed a split" between aid workers in the field, who oppose the law, and people in distant Western capitals, who back it.³⁴

Many activists argue that the best approach is to avoid cultural judgment and concentrate on the risks to women's health,³⁵ in part because the cultural meanings vary widely across countries while the health risks are universal. The World Health Organization takes the tack that "[female genital mutilation (FGM)] is an issue that cuts across both health and human rights and a major lesson learned from past community actions is that efforts to stop the practice need to go beyond the medical model of disease eradication."³⁶ "Medicalization" of the practice, i.e., avoiding the worst harms by having it done only by qualified medical personnel, is likewise controversial. In the short run, it appears to guard against some of the most serious side effects. On the other hand, medicalization lends a cloak of acceptability to the procedure. Lane and Rubinstein found that in Egypt, among the middle class, modernization had not lessened support for female circumcision. Factors such as increased education and employment outside the home for women, with the resultant impossibility of total chaperonage, had increased parents' interest in having the procedure performed, but performed by physicians, with local anesthesia and less risk of infection.³⁷ The World Health Organization says that "[l]aws and professional codes of ethics should prohibit the medicalization of all the different forms of FGM."³⁸

³⁴ See *id.*

³⁵ See *id.*

³⁶ Dorkenoo, *supra* note 10, at 145.

³⁷ Lane & Rubinstein, *supra* note 4, at 34; see also John H. Douglas, *Female Circumcision, Persistence Amid Conflict*, 19 HEALTH CARE FOR WOMEN INT'L 477 (1998) (describing factors that have increased interest in female circumcision performed by physicians).

³⁸ Dorkenoo, *supra* note 10, at 145.

C. Alternatives to FGA

Because the cultural meaning of the female ritual surgery is complex and multi-layered, there is hope that the procedure can be eradicated gradually by finding less harmful ways to fulfill the same functions. For example, many commentators, from both within and without societies that practice female ritual surgeries, note that the practice serves to bond women together and to cement their identities as members of the group.³⁹ In cultures where the ritual is practiced on older girls, it is seen as the doorway into adulthood.⁴⁰ Thus, some indigenous work against the practice has shown progress by substituting other rituals, or at least by lessening the severity of the procedure. As an example of the latter, Gruenbaum describes what she observed in villages in the Sudan in the 1970s and '80s. In northern Sudan, FGA was virtually universal in the '80s. The most severe form, the "Pharaonic," involving total excision of the clitoris, prepuce, labia minora, labia majora, and infibulation, was practiced by the majority, the Kenana ethnic group. Some others practiced an "intermediate" form, and a small minority, the Zabarma, practiced the "Sunna" form, involving clitoridectomy or partial clitoridectomy only.⁴¹ By 1989, Gruenbaum observed a significant shift from the more severe to less destructive form of the procedure, due to individuals and organizations within Sudan who had spoken out against the pharaonic practice. In Wad Medani, an old city on the west bank of the Blue Nile, the capital of Gezira Province, Gruenbaum interviewed a nurse-midwife, Sister Battool:

Sister Battool is a renowned nurse-midwife who supports the public health education efforts to inform people about the dangers of the pharaonic form and trains other health workers. Sister Battool reported having considerable success in influencing her clients to opt for minimal tissue removal, success that she attributed to

³⁹ See Bonnie Shullenberger, *Africans View Circumcision as Rite*, N.Y. TIMES June 22, 1995, at A26 (stating "[c]ircumcision in both males and females in Africa is a mark of cultural identity; it designates one's membership in one's tribe and participation in its life and assumptions").

⁴⁰ See Teare, *supra* note 32, at 34 (discussing the cultural importance of female circumcision).

⁴¹ See generally Gruenbaum, *supra* note 29, at 458 (considering female circumcision a maladaptive cultural pattern).

changing social attitudes. . . . For those parents who insisted on infibulation, she tried to preserve the clitoris and erectile tissue inside, so as to minimize bleeding and preserve sexual sensitivity.⁴²

Another healthworker, a female physician, has become convinced through study of Islamic texts that no type of FGA was religiously required. However, she observed that the policy of the Sudanese Ministry of Health, which was against any form of the procedure, had met with such widespread popular opposition that she saw no hope for its adoption. Her strategy was to become an advocate for the least destructive form of the surgery which removed only the clitoral prepuce. "That procedure, she felt, might satisfy people's desire to circumcise, yet would leave the clitoris better exposed to sexual stimulation and improve women's sexual response."⁴³

In Sierra Leone, where thousands of women celebrated the end of warfare and their imminent release from refugee camps by circumcising themselves in the communal ritual known as Bondo, anti-circumcision activist and gynecologist Olayinka Kosso-Thomas advocates finding ways to retain the constructive parts of Bondo and women's secret societies, while eradicating the ritual surgery around which they now revolve.⁴⁴ In a small pilot study in Sierra Leone, support for FGA among both men and women was associated with illiteracy, while literate persons "failed to see the rationale of the practice," even though they themselves, in the case of the women, had been subjected to the procedure.⁴⁵

In Kenya, the rate of FGA has dropped substantially. In 1991, a survey of adolescents found that 78% of them had undergone the procedure, compared to 100% of women over the age of 50. A novel alternative rite, involving 13 rural communities as of 1998, is worth describing at length. This rite is called *Ntanira Na Mugambo*, "circumcision through words." Because the key to success is to involve the girl's family and community, the rite is flexible enough to change from one community to another; female adolescents, family members, and others in

⁴² *Id.* at 469.

⁴³ *Id.* at 470.

⁴⁴ See French, *supra* note 28, at A4.

⁴⁵ OLAYINKA KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY OF ERADICATION* 35 (1987).

the community participate in designing the ceremony. There is also a "family life" educational component in the schools, and a program targeting young males, explaining to them the health risks women face as a result of the procedure and enlisting them in a process that ends with making a vow not to require that their future wives be circumcised. The rite itself typically involves a week of seclusion for the adolescent girls, where they are taught about sexual and reproductive health, bodily anatomy, respect for adults, how to withstand peer pressure, and so on. The week ends with a public celebration in which the girls are the center of attention, receive gifts, and are given certificates. "Because the rite does not exert a blunt prohibition on female genital mutilation being practised in Kenya, but offers an attractive alternative, it is possible that it may become the most successful strategy towards more widespread elimination throughout the world."⁴⁶

In Israel, where Bedouin tribes already practice an extremely mild type of FGA, it has been suggested that the World Health Organization "train medical-religious functionaries to perform a sterile minor incision and then declare [that the] girl [has been] circumcised."⁴⁷

In Indonesia, genital cuttings used to occur but are no longer performed. What persists, for some people, is a ritual form of the practice, consisting of cleaning the clitoris with herbal juice, a symbolic scratch of the girls' labia majora, or a "light puncture of the clitoris."⁴⁸

Accounts exist of women who only pretend to circumcise girls. An African mother says:

Everyone tries to persuade me that it must be done to my daughter, saying that no one will marry her, but I tell them I don't care. Let her get old enough to decide what she wants for herself. In a year or so I will have a

⁴⁶ Cesar Chelala, *An Alternative Way to Stop Female Genital Mutilation*, 52 LANCET 126 (1998) (noting the alternative rite called Ntanira Na Mugambo or "circumcision through words").

⁴⁷ Raphael Cohen-Almagor, *Female Circumcision and Murder for Family Honour Among Minorities in Israel*, in, NATIONALISM, MINORITIES AND DIASPORAS: IDENTITIES AND RIGHTS IN THE MIDDLE EAST 171, 177 (Kirsten E. Schulze et al. eds., 1996).

⁴⁸ WORLD HEALTH ORG., FEMALE GENITAL MUTILATION: AN OVERVIEW 21 (1998); see also GOLLAHER, *supra* note 7, at 190 (describing ritual formalities in Indonesian, Muslim, and African communities).

party for her and pretend that I am going to circumcise her. I will buy her new clothes, paint her hands with henna, and call in the midwife, exactly as I would if I were to have her circumcised. Then I will pay the midwife to do nothing, and tell everyone that it has been done⁴⁹

In Guinea, the chief practitioner of FGA was Aja Toun-kara Diallo Fatimata, who was reviled by Western human rights activists. However, she recently confessed that she had never actually cut anyone. "I'd just pinch their clitorises to make them scream," she said, "and tightly bandage them up so that they walked as though they were in pain."⁵⁰

D. Western Legal and Educational Initiatives Against FGA⁵¹

With increased migration from countries where the practice is common to countries in the West where it was previously unknown,⁵² healthcare workers found themselves giving prenatal or obstetrical care to women whose genitals appeared unlike anything they had ever seen. It is probably in this context that public health officials in European countries first became aware of the extent of the problem. Meanwhile, international activism aimed at eradicating the custom in Africa and elsewhere focused attention on the issue around the globe. Western countries have reacted to the issue with a variety of legal responses, which I sketch only briefly here.

For one example, the city of Cardiff in South Wales is home to substantial numbers of persons from Somalia and Yemen, two countries where forms of FGA are common.⁵³ In other parts of Britain, immigrants who practice the custom may

⁴⁹ Lewis, *supra* note 8, at 26 (citation omitted).

⁵⁰ *Female Genital Mutilation. Is It Crime or Culture*, *supra* note 24.

⁵¹ A related issue, which this article will not address, is whether Western countries will grant asylum to female refugees who claim to be fleeing from the threat of coerced genital surgery in their home countries.

⁵² Of course, medicalized clitoral surgery is not unknown in the West. It was commonly performed in the 19th and 20th centuries on women who were thought to be "oversexed," as a cure for masturbation, and so on. See GOLLAHER, *supra* note 7, at 201-05.

⁵³ See Elspeth Webb & Bryan Hartley, *Female Genital Mutilation: A Dilemma in Child Protection*, 70 ARCHIVES DISEASE CHILDHOOD 441 (1994).

also come from Eritrea or Ethiopia.⁵⁴ The practice (on adult women as well as on minors) was made illegal in Britain in 1985 under The Prohibition of Female Circumcision Act; conviction can carry a sentence of up to five years in prison.⁵⁵ When the object of the surgery is a minor, the 1989 Children Act also applies; relevant professionals have a statutory duty to protect children from harm. Great tension and conflict are experienced when a practice that parents consider to be a responsible act of caring for their daughter's future, is considered by school and health professionals to be a form of child abuse. Further, there is the real possibility that parents can simply send their girls home to have the procedure performed there or use clandestine refugee practitioners in the United Kingdom.⁵⁶

In Canada, the Criminal Code was amended in 1997 to address the issue of FGA. As in Britain, the Code appears to apply to adults as well as minors. The Code also applies to parents who take their children out of the country to have the procedure performed in places where it is legal. However, as of 1998, there were no recorded instances of arrests.⁵⁷ New Zealand's code, amended in 1995 to address this issue, is essentially the same as in Britain; again, so far there have been no arrests.

In France, the Penal Code does not specifically address FGA. However, provisions relating to acts of violence against minors have been enforced against practitioners of ritual genital surgery, and also against the girls' parents. Although France has probably prosecuted more adults than any other Western country, few who are convicted actually go to prison.⁵⁸ France first took official cognizance of the problem in 1978, when an infant died from a ritual surgery. The practitioner received a one-year

⁵⁴ See Black & Debelle, *supra* note 9 (concluding that, although the practice of female genital mutilation will die out within a few generations, and assuming certain ethnic group population trends remain stable, there still is a need to address the current problem).

⁵⁵ The efficacy of the Act is open to question. In London, in 1992, an investigative reporter had no trouble locating a Harley Street physician, Farouk Siddique, who was willing to remove her clitoris when she explained that her fiancé required her to have the operation before their marriage. See GERALDINE BROOKS, *NINE PARTS OF DESIRE: THE HIDDEN WORLD OF ISLAMIC WOMEN* 37 (1995).

⁵⁶ See Dorkenoo, *supra* note 10, at 142-47.

⁵⁷ See *FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE* 120-21 (Anika Rahman & Nahid Toubia eds., 2000) (reviewing Canadian laws against female genital mutilation).

⁵⁸ See *id.* at 152-53 (explaining French efforts against female genital mutilation).

suspended sentence; the parents were not tried.⁵⁹ Since 1978, there have been at least 25 prosecutions of parents and providers. The parents are almost always given suspended sentences. One provider went to prison for five years; in a recent case, a provider, Hawa Greou, was sentenced to eight years in prison for performing surgery on 48 girls.⁶⁰ The case against Greou, who is originally from Mali, was initiated by one of her victims, a Parisian law student from a Malian family, who accused Greou of cutting her and her sisters when they were children. The parents of the 48 girls were tried as accomplices.⁶¹ One commentator points out that immigrant families in France still feel acute social pressure to have their girls cut, "as many families hold on to the idea that one day they will return to the 'home country,' if only to marry off their daughters there. They also hold on to an image of the 'home country' as it was when they left it, so they are often unaware that excision is being challenged as much if not more there than it is in France."⁶²

An irony not lost on French feminists is that it is almost exclusively women who are tried and convicted for this crime, despite universal agreement that FGA is "an expression of male domination...with the primary purpose of controlling women's sexuality for the benefit of men."⁶³ Some feminists have argued against using the legal system to fight the practice, as only women are caught in its nets--often women with no support networks, no independent source of income, little fluency in French, and so on.⁶⁴ Others have tried to get magistrates to charge the fathers in the case as well. "However, as the husbands continue to plead their innocence, pointing out that they were at work or even overseas at the time, the wives continue to support their husbands' stories, and both husbands and wives

⁵⁹ See Bronwyn Winter, *Women, the Law, and Cultural Relativism in France: The Case of Excision*, 19 SIGNS: J. WOMEN CULTURE & SOC'Y 939, 944 (1994) (noting the first trial in France regarding excision).

⁶⁰ See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE, *supra* note 57, at 152 (describing the mixed enforcement of laws against this practice).

⁶¹ See Marlise Simons, *8-Year Sentence in France for Genital Cutting*; N.Y. TIMES, Feb. 18, 1999, at A3 (describing a criminal case where a provider of female genital alteration was sentenced to eight years in prison).

⁶² Winter, *supra* note 59, at 942.

⁶³ *Id.* at 962.

⁶⁴ See *id.* at 963 (stating that women are often isolated and disadvantaged in the legal process).

maintain that excision is 'women's business'... the law cannot—or will not—recognize the husbands as accessories to the fact."⁶⁵ Bronwyn Winter comments that:

[I]t is the women who not only are the vehicles of their own oppression but also who end up paying for it doubly in the name, paradoxically, of their own "liberation." Moreover, the women being tried are not those who have grown up in France with knowledge of French language, customs, and law but those who have been brought to France (often as a second or third wife, in which case they basically have no social or legal status) and who often are very young, do not speak the language, and have been educated into believing that excision is necessary for their daughters' future psychological, physical, and social development.⁶⁶

E. The United States Legal Situation

1. Federal

In 1997, Congresswoman Pat Schroeder finally succeeded in having opposition to FGA on minors encoded in the criminal law.⁶⁷ With a couple of minor exemptions to address situations of medical necessity (e.g., de-infibulation of women in childbirth), the law states:

(a) ...whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.

(c) [N]o 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.

⁶⁵ *Id.* at 964.

⁶⁶ *Id.* at 970.

⁶⁷ See 18 U.S.C.A. § 116 (West 2000).

The 1995 version of the Act had directed the Secretary of Health and Human Services to compile data on females, both adults and minors, living in the United States who have been subjected to the surgery, and to carry out outreach and educational initiatives to those communities within the U.S. who traditionally practice the custom, but that provision did not survive.⁶⁸ However, the 1997 version is partnered with a law requiring the Immigration and Naturalization Service to hand out materials on the ill effects and legal consequences of female genital mutilation to immigrants from countries where it is commonly practiced.⁶⁹

Unlike some of the state laws, the federal law does not speak to the legality of *causing* a child to be surgically altered; practitioners, but not parents, are at legal risk.

2. States

Fifteen states have criminalized female genital mutilation.⁷⁰ Illinois, Minnesota, Rhode Island and Tennessee prohibit the practice on adult women as well as minors⁷¹ (giving rise to provocative questions about why other forms of cosmetic surgery, such as breast enlargement, are not within the purview of the law⁷²). Six states explicitly hold parents or legal guardians of minors criminally liable if they consent to or initiate the procedure.⁷³ It is not clear what constitutes "allowing" or "permitting" the procedure to take place. One commentator wonders if a woman who would like to oppose FGA, but feels powerless to protest against her husband's wishes, would be liable under this language.⁷⁴

⁶⁸ 1995 H.R. 941.

⁶⁹ 8 U.S.C.A. § 1374 (West 1999).

⁷⁰ The states are: California, Colorado, Delaware, Illinois, Maryland, Minnesota, Nevada, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin. See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE, *supra* note 57, at 236-37 (describing provisions of United States law).

⁷¹ See *id.*

⁷² See generally Sally Sheldon & Stephen Wilkinson, *Female Genital Mutilation and Cosmetic Surgery: Regulating Non-Therapeutic Body Modification*, 12 BIOETHICS 263 (1988).

⁷³ See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE, *supra* note 57, at 237.

⁷⁴ See Frances L. Key, *Female Circumcision/Female Genital Mutilation in the United States: Legislation and Its Implications for Health Providers*, 52 J. AM. MED.

Although most state laws track the language of the federal statute, some, such as North Dakota, give a more explicitly sweeping description of what constitutes the criminal act: “[A]ny person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony.”⁷⁵ All the state laws echo the federal clause making clear that religious or cultural beliefs are not to be taken under consideration when applying the law.

3. The Seattle Experience

In 1996, physicians at Harborview Medical Center in Seattle decided to try a novel approach to save young girls from the horrors of traditional genital alteration. Harborview is situated in a neighborhood with a large and varied immigrant population, including a substantial number of Somali people.⁷⁶ The Center had a strong tradition of trying to be seen as sensitive to the cultural situation of the clients it served, and to be perceived as trustworthy and helpful by the people in its catchment area.⁷⁷ Doctors and nurses in obstetrical practice had been startled by pregnant Somali women who, when asked if they wanted their baby circumcised if it was a boy, responded, “Yes, and also if it’s a girl.”⁷⁸ In addition, Somali mothers were asking physicians to perform minimalist procedures on their adolescent daughters’ genitals. The women explained that, if they could not have some form of the procedure done safely in the U.S., they would take their girls back to Somalia, where in all likelihood they would be subjected to the most severe pharaonic procedure,⁷⁹ or have the procedure done in the U.S. by an imported

WOMEN’S ASS’N 179-80 (1997) (describing the possible effect of legislation governing FGM).

⁷⁵ N.D. CENT. CODE § 12.1-36-01(1)(1997).

⁷⁶ See Tom Brune, *Refugees’ Beliefs Don’t Travel Well; Compromise Plan on Circumcision of Girls Gets Little Support*, CHI. TRIB., Oct. 28, 1996, at 1 (claiming that Seattle is home to a fast-growing Somali community of approximately 3,500).

⁷⁷ See Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 739 (1998).

⁷⁸ *Id.* (citing Tom Brune, *Refugees’ Beliefs Don’t Travel Well; Compromise Plan on Circumcision of Girls Gets Little Support*, CHI. TRIB., Oct. 28, 1996, § 1, at 1.)

⁷⁹ See Carol M. Ostrom, *Harborview Debates Issue of Circumcision of Muslim Girls*, SEATTLE TIMES, Sept. 13, 1996, at A15 (considering policy allowing female circumcision at Harborview Medical Center).

traditional practitioner.⁸⁰ Parents gave an array of reasons for wanting to have the procedure done, including religion, preservation of culture, making sure their daughters are marriageable, and protection against what they perceive as the immoral, eroticized American culture that surrounds them.⁸¹

The idea of a symbolic cut, a tiny bloodletting under hygienic procedures with no foreseeable sequelae, came initially from the Somali women themselves. This might seem surprising, especially in light of the fact that many immigrants appear quite naïve about the Western opposition to "female circumcision," even expressing disappointment that Medicaid will not cover the procedure.⁸² However, the women's request can be attributed to the use of the "minimal" procedure as a strategy in the anti-circumcision movement in Somalia itself, and to the varying levels of sophistication and support for some form of FGA among Somalis living in the United States.⁸³

The hospital was intrigued by a possible compromise that offered a way out of a terrible dilemma; refusing to do the procedure simply condemned the girls to an uncontrolled, unsupervised, life-threatening array of possibilities in their homeland. According to the compromise, girls old enough to provide consent⁸⁴ would undergo a tiny nick on the prepuce which would be performed with appropriate analgesia and under sterile conditions.⁸⁵ The operation would be less extensive than the commonly practiced male circumcision, and more analogous to ear-piercing. The community-bonding, cultural aspects of the practice would be preserved, as the girls' mothers would be able to

⁸⁰ See Lisa M. Hamm, *Immigrants Bring the Practice of Female Circumcision to the U.S.*, ASSOCIATED PRESS, Nov. 18, 1996.

⁸¹ See Brune, *supra* note 76 (stating reasons why Somali parents want their daughters to undergo the procedure); see also Coleman, *supra* note 77, at 741-42.

⁸² See Celia W. Dugger, *Tug of Taboos: African Genital Rite vs. U.S. Law*, N.Y. TIMES, Dec. 28, 1996, at 1, 9 (discussing the legal problems of practicing female genital mutilation in the United States).

⁸³ See Coleman, *supra* note 77, at 739 & n.78 (citing L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 284 (1997)).

⁸⁴ I share with the reader a grave doubt about the validity of this consent, given everything that has been said about the pervasiveness of this custom and the dreadful life prospects imagined for girls who do not have some form of the procedure done. In my view, the "consent" requirement was just window dressing.

⁸⁵ See Brune, *supra* note 76 (describing an alternative procedure which would save girls from other drastic forms of circumcision and be performed under sterile conditions).

invite the community to the hospital, organize appropriate rituals, throw a party to honor the girls, and so on.⁸⁶

The hospital formed a committee to discuss the idea, which met over a lengthy period of time. While they were deliberating, they held three public meetings with Somali mothers, involving about 13 women each time. The women were committed enough to the compromise that they waited for the hospital to make a decision, not turning to other avenues of genital alteration until the hospital backed out.⁸⁷ One activist within the Somali Seattle community said that about 40 women came forward to express their interest in having the modified procedure for their daughters.⁸⁸

Not surprisingly, once reporters got hold of the story the response was dramatic. Despite reiterations by the hospital that it was not contemplating "circumcision," but merely a tiny bloodletting substantially less severe than routine newborn male circumcision, many reporters continued to misstate the facts or to write headlines which contradicted facts in the body of the articles.⁸⁹ There was a great deal of public outcry. Activists against female genital mutilation, both Westerners and African women now living in the West, expressed intense disapproval. Even among those who appeared to understand the medically minimalist nature of the procedure being contemplated, there was condemnation based on the belief that any compromise would validate the misogynist, patriarchal culture that gives rise to the custom, or would give immigrants the idea that this was an acceptable practice. "How dare it even cross their mind," said Meserak Ramsey, an Ethiopian immigrant whose San Jose-based group, Forward USA, seeks to eliminate the ritual completely. "What the Somalis, what the immigrants like me need is an education, not sensitivity to culture."⁹⁰ Opponents did not have good answers to the problem Harborview faced, that is, the near certainty that these girls would face a far worse fate elsewhere.

⁸⁶ Telephone conversation with Leslie R. Miller, Assistant Professor of Obstetrics/Gynecology, Harborview Medical Center, Seattle, WA.

⁸⁷ *Id.*

⁸⁸ See Tina Kelley, *Token 'Circumcision' Is Too Painful*, BALTIMORE SUN, Jan. 6, 1997, at 2A.

⁸⁹ See Coleman, *supra* note 77, at 748 & n.137.

⁹⁰ Brune, *supra* note 76.

In addition to the onslaught in the press, individual members of Harborview received hate-mail and death threats. Finally, the Center put out a press release saying that its "role in considering the need for a culturally sensitive, safe alternative to the practices of female circumcision or female genital mutilation has now been concluded."⁹¹ Physicians at the Center are convinced that many of the girls whose mothers had asked for the minimalist procedure were instead subjected to some form of ritual practice either in Africa or by one of three California "midwives" imported by the community.⁹² As Doriane Lambelet Coleman notes,

"In their Pyrrhic victory . . . Harborview's opponents probably denied some Somali girls in Seattle the possibility of living a life free of the physical and emotional devastation caused by the traditional circumcision practiced in their community; in the name of ideological purity, they probably sacrificed some of the very girls they claim are the beneficiaries of their efforts."⁹³

In light of the news releases quoted above, Coleman's "probably" should be changed to "certainly." One Somali activist expressed concern that Somalis preparing to leave Africa for America will hear of Harborview's decision and take it as a catalyst to have their daughters cut in Somalia before emigrating.⁹⁴

For the purposes of this article, what is most interesting about this story are the legal ramifications of Harborview's proposed experiment. At the time of the public brouhaha, the federal law authored by Congresswoman Schroeder had been passed but had not yet taken effect. Schroeder herself wrote to Harborview, saying that she believed the proposal would violate the new law.⁹⁵ "The clear intent of the legislation," she wrote,

⁹¹ Coleman, *supra* note 77, at 748 (quoting Celia W. Dugger, *Clash of Cultures, Customs: Rite of Female Genital Cutting Collides With U.S. Views, New Law*, CHARLOTTE OBSERVER, Dec. 26, 1996, at 2A).

⁹² *See id.* at 749.

⁹³ *Id.* at 737-38.

⁹⁴ *See* Kelley, *supra* note 88.

⁹⁵ *See* Dugger, *supra* note 82. It remains somewhat unclear whether Schroeder had all the facts when she made that pronouncement. It is also unclear whether the compromise, had it been implemented, would have run afoul of state laws against child abuse. *See also* Coleman, *supra* note 77, at 750.

“was to criminalize *any medically unnecessary procedure* involving female genitalia.”⁹⁶ Certainly, under some forms of state criminal statutes, such as North Dakota’s, any practice, no matter how minimal, would constitute a felony under the “surgically alters” wording of the law.

Dr. Leslie Miller of Harborview responded to the final decision by saying: “We will cut the whole foreskin off a penis, but we won’t even consider a cut, a sunna, cutting the prepuce, a little bloodletting (on a girl). . . .”⁹⁷

As we shall see below, newborn male circumcision faces no such legal constraints. The Seattle experience makes clear that, at least in the eyes of the Federal law’s primary author, even a tiny cut with proper medical precautions done on a minor female’s genitalia is illegal. Male circumcision, however, which is a more substantial procedure than the one contemplated in Seattle, is legal even when done by traditional, nonmedical practitioners in the home. As Coleman comments, the comparison between male circumcision and female genital mutilation, while “usually disingenuous,” in this case was “ultimately legitimate.”⁹⁸ Thus, the difference in legal constraints needs to be justified, or else it raises questions of religious discrimination and equal protection.

III. MALE GENITAL ALTERATION

A. Medical and Statistical Facts

In this article, I shall confine myself to looking at the vast majority of male surgical alterations: routine newborn circumcisions. In routine circumcision, whether or not it is done as part of a religious ritual, the practitioner completely removes the foreskin, exposing the tip of the penis.⁹⁹ “Circumcision is the amputation of the prepuce from the rest of the penis, resulting in permanent alteration of the anatomy, histology and function of the penis.”¹⁰⁰ When done as a medical procedure, it is usually accomplished in the first few days of life, if the infant is “stable

⁹⁶ Coleman, *supra* note 77, at 752 (citation omitted).

⁹⁷ Ostrom, *supra* note 79.

⁹⁸ Coleman, *supra* note 77, at 736.

⁹⁹ See American Academy of Pediatrics, *Circumcision: Information for Parents* (visited Feb. 16, 2001) <<http://www.aap.org/family/circ.htm>>.

¹⁰⁰ R.S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 *BJU INT’L* 63, 63 (Supp. I 1999).

and healthy.”¹⁰¹ As part of the traditional Jewish *berit milah* it is always done on the eighth day of life, unless there are medical indications to the contrary.¹⁰²

Frequency of male genital alteration (MGA) in the United States is surprisingly difficult to ascertain. Hospital discharge records provide only partial information, as they do not include ritual circumcision or circumcisions performed in doctors' offices after mother and baby have left the hospital (as hospital stays become shorter, this latter practice presumably is more common).¹⁰³ This leads to the counter-intuitive result that significantly fewer infants are altered in New York City than virtually anywhere else in the country.¹⁰⁴

Another way to get at this data is to interview adult men about their circumcised state. It turns out, surprisingly, that about one third of men do not know whether or not they have been circumcised.¹⁰⁵ However, given these difficulties, it is generally agreed that the circumcision rate among American males is somewhere between 70 and 80 percent. This is in contrast to other Western countries, which have much lower rates. In Canada, the rate had been comparable to the U.S., but fell to less than 20 percent in the 1990s, following a re-evaluation of the efficacy of circumcision by the Canadian medical community. Canada's story is repeated in Australia and Great Britain, which have comparably low rates today.¹⁰⁶ In some Western countries, such as Finland, the practice is virtually nonexistent.¹⁰⁷ “The United States stands alone as the only country in

¹⁰¹ See generally *id.* at 64-65.

¹⁰² See generally Claire Irene L'Archevesque & Helene Goldstein-Lohman, *Ritual Circumcision: Educating Parents*, 22 PEDIATRIC NURSING 228 (1996) (describing exceptions to Jewish circumcision rituals based on infant's medical condition).

¹⁰³ See AAP, *Circumcision Policy Statement*, *supra* note 1, at 686 (discussing Georgia study which demonstrated that medical records underestimate true incidence of circumcision).

¹⁰⁴ See *id.*

¹⁰⁵ See Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 JAMA 1052, 1056 (1997) (examining the health and sexual outcomes of circumcision).

¹⁰⁶ See Stephen Cornell, *Controversies in Circumcision: Examining a Cultural Norm*, ADVANCE FOR NURSE PRACTITIONERS, Oct. 1997, at 49, 49 (examining the history of circumcision and arguments for and against the practice).

¹⁰⁷ See GOLLAHER, *supra* note 7, at 144.

which the overwhelming majority of newborn males are circumcised, purportedly for health reasons.”¹⁰⁸

Within the U.S., MGA rates vary sharply with the socio-economic status of the parents; the single most critical variable is the mother’s level of education. In one study, 62 percent of respondents whose mothers did not finish high school had been circumcised, compared to 84 to 87 percent of those whose mothers had graduated from high school.¹⁰⁹ Rates also vary widely with geography, approaching 95 percent in some areas of the Midwest, but falling to the 50 percent mark on the West Coast.¹¹⁰ Although Jews are, not surprisingly, more likely than other groups to have high rates of male circumcision, the rates are so high overall in the U.S. that religion does not play an important statistical role.

The United States stands apart from the rest of the Western world for its high rates of neonatal circumcision. . . . With respect to prevalence, we demonstrated that circumcision rates are greatest among whites and better-educated respondents and that Americans of various religions do not display significantly different rates. The latter fact illustrates the unique cultural status maintained by circumcision in the United States. While circumcision has been employed as a religious marker in other Western societies, it has clearly lost such an association in America.¹¹¹

The March 1999 statement of the Task Force on Circumcision of the AAP adopted “an evidence-based approach” to the question of newborn MGA, and found that, while scientific evidence shows “potential medical benefits” of the procedure, “these data are not sufficient to recommend routine neonatal circumcision.”¹¹² Acknowledging that many parents make the decision about circumcision for reasons apart from the medical evidence, the Task Force said:

¹⁰⁸ Edward Wallerstein, *Circumcision: The Uniquely American Medical Enigma*, 12 UROLOGIC CLINICS N. AM. 123, 124 (1985) (examining the continuing practice of routine neonatal nonreligious circumcision).

¹⁰⁹ See Laumann et al., *supra* note 105, at 1054.

¹¹⁰ See Cornell, *supra* note 106, at 50 (noting that one possible reason for the lower rates on the West Coast could be the large Asian and Hispanic populations).

¹¹¹ Laumann et al., *supra* note 105, at 1055-56.

¹¹² AAP, *Circumcision Policy Statement*, *supra* note 1, at 691.

In the pluralistic society of the United States in which parents are afforded wide authority for determining what constitutes appropriate child-rearing and child welfare, it is legitimate for the parents to take into account cultural, religious, and ethnic traditions, in addition to medical factors, when making this choice.¹¹³

In 1992, in a hospital in New Mexico, a group of nurses who had been struggling with this issue since 1986 declared themselves "conscientious objectors to circumcision" and sent a formal letter to the administration of the hospital in which they worked, declaring their refusal to assist in the procedure. The group included 24 maternal-child nurses (nearly fifty percent of the staff). Their resistance eventually produced a Memo of Understanding for Circumcision Procedure, to recognize the conscientious objector rights of nurses employed by the hospital.¹¹⁴

In the rest of the Western world, medical support for routine newborn male circumcision is rapidly eroding. In Australia, the Australian College of Paediatrics' Position Statement on Routine Circumcision of Normal Male Infants and Boys opposes the practice, but acknowledges that some parents will opt for circumcision for "social, religious and family factors," in which case it is the duty of the physician to recommend that this be performed "at an age and under circumstances which reduce hazards to a minimum."¹¹⁵ Australia's national health plan no longer covers the operation, and some Australian physicians refuse to operate even when parents are willing to pay for it privately.¹¹⁶ The British Medical Association stated in 1996 that "[i]t is rarely necessary to circumcise an infant for medical reasons" and "[t]he BMA opposes unnecessarily invasive procedures."¹¹⁷ Nonetheless, the BMA does not support an outright prohibition against newborn circumcision, saying that

¹¹³ *Id.* (citing A.R. Fleischman et al., *Caring for Gravely Ill Children*, 94 PEDIATRICS 433 (1994)).

¹¹⁴ See Betty Katz Sperlich et al., *R.N. Conscientious Objectors to Infant Circumcision: A Model for Nurse Empowerment*, REVOLUTION—J. NURSE EMPOWERMENT, Spring 1996, at 87-88 (revealing that the nurse's memo subsequently received national media attention).

¹¹⁵ *Circumcision Deterred*, AUSTRALIAN MED. J., Jan. 1997, at 5 (discussing the Australian Medical Association's stance on the circumcision of male infants).

¹¹⁶ See Cornell, *supra* note 106, at 49.

¹¹⁷ British Med. Ass'n, *Circumcision of Male Infants: Guidance for Doctors* (visited Feb. 20, 2001) <http://www.cirp.org/library/statements/bma/>.

“[d]octors must be allowed to make clinical [judgments] in individual cases.”¹¹⁸ On the subject of ritual circumcision performed by physicians, the group says:

The BMA does not have a policy on the ethics of male circumcision for religious or cultural purposes but issues this guidance in response to doctors for all relevant factors to be taken into account. The practice of circumcision has previously been considered to be morally neutral, that is, no harm was caused to the child and therefore with appropriate consent from both parents or a person lawfully exercising parental responsibility, it could be carried out. The neutrality of the procedure, however is now being increasingly challenged although it is argued that it is in the best interest of the child to be circumcised, to be accepted into a religion or community. Arguably the procedure can confer social benefits in some such circumstances.¹¹⁹

In 1996, the Canadian Paediatric Society issued a statement from its Fetus and Newborn Committee, recommending that “circumcision of newborns should not be routinely performed,” an iteration of a position it took in 1982.¹²⁰ In 1995, at the annual meeting of the Registered Nurses’ Association of British Columbia, delegates passed a resolution condemning routine circumcision.¹²¹

These policy statements by the relevant medical communities have clearly had an effect. Rates of newborn male circumcision in those countries, which in the 1970s were similar to those in the U.S., have fallen to below twenty percent.¹²²

As the medical rationale for male circumcision is eroded, one sees increasing resistance to performing the procedure even when parents request it. An article in the *Canadian Medical Journal Association* noted that:

The performance of unnecessary surgery on minors who have no say in the matter does not sit well with many

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Fetus & Newborn Comm., Canadian Paediatric Soc’y, *Neonatal Circumcision Revisited*, 154 CAN. MED. ASS’N J. 769, 777 (1996).

¹²¹ See Sperlich et al., *supra* note 114, at 87.

¹²² See Cornell, *supra* note 106, at 49.

people who consider circumcision a denial of basic human rights—specifically an infant’s right to the respect and autonomy fundamental to Canadian law.... Removal of a normally functioning healthy body part without medical indication has also been viewed as a violation of the Hippocratic oath, falling under the United Nations’ definition of genital mutilation.... In BC [British Columbia], the Infants Act stipulates that a child should be accorded the same protection under law as adults: if an adult male cannot be forced to undergo circumcision in adulthood, it follows that he shouldn’t be forced to have it in infancy simply because he is too small to resist.¹²³

B. Medical Arguments For and Against Newborn MGA

1. Arguments in Favor of Newborn MGA

In the United States, arguments about the medical basis for routine MGA have waxed and waned. In the 1970’s, the AAP officially said there was “no medical indication” for the procedure, in 1989 it talked of “potential medical benefits;” the recent report speaks of some benefits, but none sufficient to support the routine use of the procedure.¹²⁴ To some extent, this indecision is a result of different data, and to some extent it is likely the result of a tension between “evidence-based medicine” and the strongly held intuitions, based on perceived experience, of pediatricians powerful enough to influence policy. David L. Gollaher provides a summation of sorts when he says:

A few clinical researchers have tried to draw together the different strands of investigation and to estimate an overall effect. One group built a model incorporating most published evidence of risks associated with being circumcised or uncircumcised. Using quality-adjusted years of survival as their measure, based on a life expectancy of 85 years, they figured that the average man circumcised at birth could expect to live 84.999 years, whereas his uncircumcised counterpart would live 84.71

¹²³ Eleanor LeBourdais, *Circumcision No Longer a “Routine” Surgical Procedure*, 152 CANADIAN MED. ASS’N. J. 1873, 1874 (1995).

¹²⁴ See Deborah Stead, *Circumcision’s Pain and Benefits Re-Examined*, N.Y. TIMES, Mar. 2, 1999, at F6.

years. A subsequent study that included more recent findings about UTI [urinary tract infections] determined that, all things considered, being uncircumcised would shorten an average man's life by a total of fourteen hours. Statistically, the known pros and cons of circumcision cancel each other out.¹²⁵

One argument in favor of routine newborn MGA is that it protects against urinary tract infections. A review of the many studies on this subject shows that, despite a number of problems in summarizing and comparing the studies, there does seem to be a protective effect. In children younger than one year of age, the increased risk of a urinary tract infection among uncircumcised males may be as much as 4- to 10-fold. However, the disease is usually mild, and even at a 10-fold increase, the real numbers of children experiencing problems would be one in one hundred.¹²⁶ The Canadian Paediatric Society concluded that "the incidence of complications of circumcision, according to some reports, approaches or exceeds the incidence of UTI [urinary tract infection] among uncircumcised male infants."¹²⁷ Wallerstein, a critic of routine circumcision, points out that, "the penis is the only organ subjected to routine prophylactic surgery."¹²⁸ Dean Edell, a Jewish physician and father of five sons, commented on the Phil Donohue television show that "[a] certain small percentage of men with foreskins will get disease of the foreskin, but you can't just remove everybody's. You can't pull everybody's teeth to avoid cavities, remove breast tissue from little girls so they won't get breast cancer."¹²⁹

Another common argument is that genitally altered males are at lower risk of penile cancer. The risk is low in any case: the annual age-adjusted incidence in the U.S. is about 1 per 100,000. The rate of penile cancer in countries where very few men are circumcised is lower (compared to the U.S.) in Denmark, but higher in Brazil and India.¹³⁰ Circumcision is extremely rare in Finland, where penile cancer rates are "extraor-

¹²⁵ GOLLAHER, *supra* note 7, at 157-58.

¹²⁶ See AAP, *Circumcision Policy Statement*, *supra* note 1, at 690.

¹²⁷ Fetus & Newborn Comm., Canadian Paediatric Soc'y, *supra* note 120, at

¹²⁸ Wallerstein, *supra* note 108, at 130.

¹²⁹ GOLLAHER, *supra* note 7, at 169-70 (citation omitted).

¹³⁰ See AAP, *Circumcision Policy Statement*, *supra* note 1, at 690.

dinarily low.”¹³¹ It is thus difficult to ascertain whether the relevant variable is the circumcision, or some other factor relating, perhaps, to developed versus developing countries. The American Cancer Society, in 1996, stated that routine circumcision should not be promoted as a means of preventing penile cancer.¹³²

One confusing issue involves proper care and hygiene of the intact penis. Proponents of circumcision are likely to argue that it is difficult and painful to fully retract the foreskin early in life, in order to clean it properly.¹³³ However, physicians who have studied the issue now believe that the normal foreskin does not retract fully in early childhood, sometimes up until adolescence, and that there is no need to force it; “gentle washing” while bathing is enough.¹³⁴

Circumcision has long been a factor in the epidemiology of sexually transmitted diseases. A 1999 analysis reported that the relative risk of heterosexual HIV infection (the primary transmission vector in Asia and Africa) is two to eight times higher for uncircumcised males.¹³⁵ One could argue that it is silly to use surgery for a public health risk that also be controlled by using condoms. However, in places where men have not been persuaded to the routine use of condoms, there may be good arguments for circumcision. More work needs to be done before the effects of circumcision can be detached from the effects of the culture and lifestyle of groups of people who circumcise. David L. Gollaher says:

Circumcision is not random. It remains an expression of powerful cultural and religious ideas. Knowing this, we are apt to wonder whether the circumcised practice dif-

¹³¹ Cornell, *supra* note 106, at 52.

¹³² See GOLLAHER, *supra* note 7, at 145 (stating American Cancer Society’s official position).

¹³³ See Cornell, *supra* note 106, at 50.

¹³⁴ See American Academy of Pediatrics, *supra* note 99 (addressing frequently asked questions surrounding the benefits and risks of circumcision for infant boys).

¹³⁵ See Edward C. Green, *The Circumcision and AIDS Debate*, ANTHROPOLOGY NEWS, Jan. 2000, at 22 (discussing debate surrounding the research done by anthropologists Daniel Halperin and Robert Bailey and their suggestion that male circumcision in African countries could save millions of men from HIV).

ferent hygiene, engage in different sexual behaviors, or even eat different foods than the uncircumcised.¹³⁶

With respect to other sexually transmitted diseases, the Canadian Paediatric Society reports a mixed bag of results¹³⁷ with no clear answer. The same report said that no causal relationship had been established between a man's circumcised state and the likelihood that his female sexual partner(s) will develop cervical cancer.¹³⁸

2. Arguments Against Routine Newborn MGA

The simplest and most forceful argument against MGA is that, absent some compelling reason, one ought to leave the natural body intact. Thus, the goals of Nurses for the Rights of the Child, formed in 1995, include: "To act as human-rights advocates for babies and children by informing and educating the public that the forced amputation of a healthy part of the genitals of an unconsenting infant or child—whether in the name of medicine, religion, or social custom—is a human-rights violation."¹³⁹ Or to quote a memorable line from web-columnist Bruce LaBruce, "Why throw away a beautifully crafted, luxuriously textured protective carrying case designed specifically for one of your most precious mementos?"¹⁴⁰

"The simple argument against routine neonatal circumcision is that the procedure is unnecessary surgery with little benefit, performed on a patient incapable of giving consent."¹⁴¹ If circumcision is best described as elective cosmetic surgery, then it should not be performed on persons without their consent. In this case, consent by parents for surgery on minors is not ethically sufficient, because there is no therapeutic benefit to be gained. This argument is reminiscent of arguments against genital alteration on female children.

¹³⁶ GOLLAHER, *supra* note 7, at 151.

¹³⁷ *See Fetus & Newborn Comm., Canadian Paediatric Soc'y, supra* note 120, at 772-73 (reviewing scientific literature on correlation between STDs and circumcision).

¹³⁸ *See id.* at 773-74.

¹³⁹ Sperlich et al., *supra* note 114, at 88.

¹⁴⁰ Bruce LaBruce, *The Uncut Truth* (visited Feb. 22, 2001) <http://www.eye.net/eye/issue/issue_01.22.98/plus/feelings.html> (expressing author's personal view of male circumcision).

¹⁴¹ Cornell, *supra* note 106, at 52.

A third argument, which necessarily relates to the first two, is that no surgery, however minor, is completely without risk. Risks that might be reasonable when balanced against the benefits expected from therapeutic surgeries are not acceptable when the surgery is cosmetic in nature (especially when the subject is not a consenting adult). The AAP Task Force on Circumcision reports that the "true incidence of complications after newborn circumcision is unknown," but cites two large studies as suggesting that most complications are quite minor and that the frequency is between 0.2% and 0.6% of all newborn procedures.¹⁴² In September 1999, the Food and Drug Administration warned doctors to watch out for worn-out or misassembled surgical clamps, which had caused 105 reported cases of injuries over a three year period (among an estimated 1.2 million circumcisions performed each year). Injuries ranged from bleeding to urethral damage, and included four cases in which the tip of the penis was amputated.¹⁴³ On the other hand, if a person has not been circumcised as an infant and problems develop which require the operation later in life, the risks are higher.¹⁴⁴

Because most traditional *mohels* are not medical doctors, there are no reliable reporting mechanisms for documenting adverse outcomes from circumcisions performed in the home; therefore, "the incidence of complications after berit mila is difficult to determine."¹⁴⁵ There is a common belief, both within and without the Jewish community, that *mohels* are better at circumcision because that is their only job and they do more of them. Henry C. Romberg, a physician and a traditional *mohel*, asserts that "the traditional mohel performs a circumcision far more skillfully, far less traumatically, far more safely, and certainly far more aesthetically (though this last quality is in the eye of the beholder) than the average medical house officer who is assigned to circumcise newborn babies."¹⁴⁶

¹⁴² AAP, *Circumcision Policy Statement*, *supra* note 1, at 688 (citations omitted).

¹⁴³ See *F.D.A. Warns of Injuries By Circumcision Clamps*, N.Y. TIMES, Sept. 5, 1999.

¹⁴⁴ See AAP, *Circumcision Policy Statement*, *supra* note 1, at 688.

¹⁴⁵ Jacob C. Langer, *Berit Mila: Jewish Ritual Circumcision in an Historical and Cultural Context* (unpublished paper) (on file with author).

¹⁴⁶ HENRY C. ROMBERG, *BRIS MILAH: A BOOK ABOUT THE JEWISH RITUAL OF CIRCUMCISION* 27 (1982). Probably because of this belief, British royalty at least since the time of Queen Victoria, have been circumcised by *mohels*. Prince Charles was circumcised by a *mohel* who was also a physician. Charles and Diana, however,

Another argument against circumcision is that psychological damage is done by subjecting a newborn to a painful and violent procedure. As early as 1976, Dr. Benjamin Spock said that:

I am in favor of leaving the penis alone. Pediatric opinion is swinging away from routine circumcision as unnecessary and at least mildly dangerous. I also believe that there is a potential danger of emotional harm resulting from the operation.¹⁴⁷

Or as another author put it, in more forceful language:

Leave it to humans to invent a method for making an infant male's first experience of genital sensation a traumatic, castrating one. Let's piss off men early on and make sex and violence interchangeable in their minds, shall we?¹⁴⁸

Just as Western commentators assume that, *of course*, girls subjected to FGA must be emotionally damaged by the process, there is also a tendency to assume that, *of course*, MGA is benign or trivial, and men who complain of it as adults are slightly weird, or whiners. In neither case is there empirical evidence for the percentage of adults who claim to have been damaged as children. In both cases, the acceptance of the procedure by the wider culture makes it difficult for people to speak up about their own experience. People who argue against male alteration collect accounts of men who, looking back, feel damaged by the operation. Ronald Goldman claims that "[t]hose who have feelings about their circumcision are generally afraid to express them because they are afraid that their feelings may be dismissed or ridiculed."¹⁴⁹ Of the many comments Goldman has collected, I will quote just one:

chose not to have the new generation of royalty circumcised. See Joel Roth, *The Meaning for Today*, MOMENT, Feb. 1992, at 41, 44.

¹⁴⁷ Miriam Pollack, *Circumcision: A Jewish Feminist Perspective*, in JEWISH WOMEN SPEAK OUT: EXPANDING THE BOUNDARIES OF PSYCHOLOGY 171, 177-78 (Kayla Weiner & Arinna Moon eds., 1995) (arguing against the tradition of circumcising male infants).

¹⁴⁸ LaBruce, *supra* note 140 (arguing against circumcision due to psychological damage).

¹⁴⁹ GOLDMAN, *supra* note 2, at 43 (discussing factors that reduce the likelihood that circumcised men will express dissatisfaction with their circumcision).

The shock and surprise of my life came when I was in junior high school, and I was in the showers after gym....I wondered what was wrong with those penises that looked different than mine....I soon realized I had part of me removed. I felt incomplete and very frustrated when I realized that I could never be like I was when I was born—intact. That frustration is with me to this day. Throughout life I have regretted my circumcision. Daily I wish I were whole.¹⁵⁰

The most difficult argument to judge, perhaps, is the role of the foreskin in sexual pleasure, and the extent to which circumcision heightens or lowers sensation for men and their partners. Circumcised men who militate against the procedure commonly claim that their sexual pleasure has been lessened (both as individuals and as part of a couple). One man who was circumcised as an adult and was thus able to compare, said, "It was like night and day. I lost most sensation. I would give anything to get the feeling back. I would give my house."¹⁵¹ Another said:

The sexual differences [sic] between a circumcised and uncircumcised penis is . . . like wearing a condom or wearing a glove. . . . Sight without color would be a good analogy. . . . Only being able to see in black-and-white, for example, rather than seeing in full color would be like experiencing an orgasm with a foreskin and without. There are feelings you'll just never have without a foreskin.¹⁵²

Proponents of MGA usually describe the foreskin as merely a flap of useless, extra skin.¹⁵³ Some researchers disagree. Three Canadian scientists, for example, point out that, based on autopsies they performed on 22 adult foreskins, the outer foreskin's concentration of nerves is "impressive," and the sensitivity to stimuli is similar to that of the rest of the penis. The foreskin, they concluded, has many different kinds of nerves, and "should

¹⁵⁰ *Id.* at 46 (quoting a circumcised man who is dissatisfied later in life because he had the procedure performed on him).

¹⁵¹ *Id.* at 40.

¹⁵² *Id.* at 41 (citation omitted).

¹⁵³ See GOLLAHER, *supra* note 7, at 109 (noting that medical support for routine circumcision is based on the presumption that the foreskin is a trivial few millimeters of skin); see also Pollock, *supra* note 147, at 175 (discussing the purpose of the foreskin).

be considered a structural and functional unit made up of more [or] less specialized parts...the glans and penile shaft gain excellent if surrogate sensitivity from the prepuce [foreskin]."¹⁵⁴ Male circumcision "removes between a [third and a half] of the penile skin, as well as nearly all of the penile fine-touch neuro-receptors."¹⁵⁵ "After circumcision, the surface of the glans thickens like a callus ... [with] nerve endings that can only sense deep pressure and pain."¹⁵⁶

Critics of MGA claim that the woman's pleasure suffers as well,¹⁵⁷ as she misses out on the "sliding" function of the foreskin and loses the lubricating properties of "the natural penis."¹⁵⁸ For obvious reasons, evidence for this claim is hard to come by.¹⁵⁹ A study done in Iowa in the late 1980s reported that women had aesthetic preferences for circumcised penises. However, as only 16.5% of the 145 women surveyed had had sexual experiences with both altered and unaltered men, it appears that the women were more likely reporting a preference for what was familiar. (Strikingly, over half the women in that study said that they preferred circumcised penises because they looked "more natural.")¹⁶⁰

¹⁵⁴ J.R. Taylor et al., *The Prepuce: Specialized Mucosa of the Penis and Its Loss to Circumcision*, 77 BRIT. J. UROLOGY 291, 295 (1996).

¹⁵⁵ K. O'Hara & J. O'Hara, *The Effect of Male Circumcision on the Sexual Enjoyment of the Female Partner*, 83 BJU INT'L 79, 79 (Supp. I 1999).

¹⁵⁶ *Id.*

¹⁵⁷ To my knowledge, all investigation into this topic has focused on heterosexual activities.

¹⁵⁸ See GOLLAHER, *supra* note 7, at 120 (describing the negative consequences of circumcision to sexual activity).

¹⁵⁹ Followers of Maimonides, the revered medieval Jewish physician-philosopher and author of *Guide for the Perplexed*, seemed to accept that circumcision made intercourse less pleasurable for both parties, and was thus a corrective to unbridled sexual passion. A thirteenth-century French Maimonides disciple, Isaac ben Yediah, was quite explicit in his description. When a woman has sex with an uncircumcised man:

[S]he feels pleasure and reaches an orgasm first. When an uncircumcised man sleeps with her and then resolves to return to his home, she brazenly grasps him, holding onto his genitals and says to him, "come back, make love to me." This is because of the pleasure that she finds in intercourse with him, from the sinews of his testicles—sinew of iron—and from his ejaculation—that of a horse—which he shoots like an arrow into her womb.

GOLLAHER, *supra* note 7, at 21-22.

¹⁶⁰ See Marvel L. Williamson & Paul S. Williamson, *Women's Preferences for Penile Circumcision in Sexual Partners*, 14 J. SEX EDUC. & THERAPY, Fall-Winter 1988, at 8, 10-11.

A 1999 study that surveyed 139 women who had had sexual experiences with both circumcised and “anatomically complete” partners reported a strong preference for unaltered men.¹⁶¹ They stated that they were far more likely to experience vaginal orgasm with an unaltered partner, and much less likely to experience discomfort or to need artificial lubricants. Interestingly, they also reported more instances of premature ejaculation among altered partners (contrary to the common myth that decreased sensitivity in the glans enables circumcised men to “last longer”). “During prolonged intercourse with their circumcised partners, women were less likely to ‘really get into it’ and more likely to ‘want to get it over with. ... On the other hand, with their unaltered partners, the reverse was true; they were less likely to ‘want to get it over with’ and considerably more likely to ‘really get into it.’”¹⁶²

The authors had a number of hypotheses for this result. “When the anatomically complete penis thrusts in the vagina, it does not slide, but rather glides on its own ‘bedding’ of movable skin, in much the same way that a turtle’s neck glides in and out of the folder layers of skin surrounding it.” This gliding motion allows stimulation with “minimal friction or loss of secretions.” Further, they posit that because of the fine-touch receptors in the glans of uncircumcised men and the way in which the foreskin bunches up behind the corona, unaltered men are more likely to adopt a style of sexual intercourse (“short, gentle thrusts” and more contact with the clitoris and mons pubis) that women in the study found more satisfying.¹⁶³ The authors also speculate that the well-known statistic that unaltered men are less likely to engage in a wide variety of sexual activities (e.g., fellatio, anal sex) may be attributed to their greater satisfaction in vaginal intercourse.¹⁶⁴ However, as we know that there are correlations between male circumcision, culture, and socioeconomic status, this is a hard claim to pin down.

¹⁶¹ Although this study seems much more defensible, it has its own methodological difficulties; for example, some of the women were recruited into the study through anti-circumcision websites.

¹⁶² O’Hara & O’Hara, *supra* note 155, at 80.

¹⁶³ *See id.* at 82.

¹⁶⁴ *See id.* at 83.

3. The Problem of Pain

Until recently, there was considerable disagreement over whether newborns felt pain at all, and specifically if they felt the pain of genital alteration. Medically and scientifically, it is now generally recognized that newborns do feel pain.¹⁶⁵ The related belief that newborns, even if they did experience pain, have no memory of it and therefore no lasting effect, has also been repudiated.¹⁶⁶ Despite the scientific consensus on these points, some defenders of circumcision disagree. In a 1996 letter to the editor of the *New York Times*, Rabbi Eugene Cohen, president of the Brit Milah [ritual circumcision] Board of New York, stated “newborns ‘cannot feel pain.’”¹⁶⁷ Mohel (ritual circumciser) Romi Cohn, who has performed thousands of operations, called the procedure “absolutely painless.”¹⁶⁸ An article in the *Brit Milah Newsletter* calls the pain “mild,” and recommends that the traditional cloth dipped in wine and placed in the infant’s mouth, is sufficient pain control.¹⁶⁹ Romberg, a physician and mohel, wrote in 1982 that “[i]t has been my experience that the procedure is generally painless up to at least four or five months of age.”¹⁷⁰ Romberg concedes that babies are often “cranky” the first night after circumcision, but attributes this to the irritation of the bandage rather than to pain.¹⁷¹

Just as the debate over FGA is made lurid by firsthand descriptions of young girls being tortured and mutilated, so the debate over MGA has its own horror stories. Marilyn Milos, who first witnessed a male circumcision when a nursing student, provides one example:

We students filed into the newborn nursery to find a baby strapped spread-eagle to a plastic board on a counter top across the room. He was struggling against

¹⁶⁵ See Thomas E. Wiswell, *Circumcision Circumspection*, 336 *NEW ENG. J. MED.* 1244 (1997) (revealing empirical evidence that newborns undergo some pain during circumcision).

¹⁶⁶ See Gary A. Walco et al., *Pain, Hurt, and Harm: The Ethics of Pain Control in Infants and Children*, 331 *NEW ENG. J. MED.* 541, 542 (1994) (repudiating the old belief that infants forget pain).

¹⁶⁷ GOLDMAN, *supra* note 2, at 23 (citation omitted).

¹⁶⁸ *Id.* at 22 (citation omitted) (explaining that Jewish law emphasizes not traumatizing the infant).

¹⁶⁹ See *id.* at 22.

¹⁷⁰ ROMBERG, *supra* note 146, at 67.

¹⁷¹ See *id.*

his restraints—tugging, whimpering, and then crying helplessly.... I stroked his little head and spoke softly to him. He began to relax and was momentarily quiet. The silence was soon broken by a piercing scream—the baby’s reaction to having his foreskin pinched and crushed as the doctor attached the clamp to his penis. The shriek intensified when the doctor inserted an instrument between the foreskin and the glans (head of the penis), tearing the two structures apart. The baby started shaking his head back and forth—the only part of his body free to move—as the doctor used another clamp to crush the foreskin lengthwise, which he then cut. This made the opening of the foreskin large enough to insert a circumcision instrument, the device used to protect the glans from being severed during the surgery. The baby began to gasp and choke, breathless from his shrill continuous screams... During the next stage of the surgery, the doctor crushed the foreskin against the circumcision instrument and then, finally, amputated it. The baby was limp, exhausted, spent.¹⁷²

Scientifically, there is ample evidence that newborns do experience circumcision as painful, and that the impact of that pain lingers even after the procedure is completed.¹⁷³ “During circumcision boys are agitated, cry intensely, and have changes in facial expression. Their heart rates and blood pressure increase, and their oxygenation decreases. Their serum cortisol, β -endorphin, and catecholamine concentrations rise. Clearly, circumcision is painful.”¹⁷⁴ Studies have shown that infants who experience the pain of circumcision exhibit disturbances in feeding and sleeping.¹⁷⁵

In 1997, Taddio, Katz, Ilersich, and Koren noted that analgesia is still “rarely” given for routine circumcisions, because of “a common belief that the effects of circumcision pain are short-lived and clinically insignificant”¹⁷⁶ To test that belief, the researchers compared three sets of infants with respect to

¹⁷² GOLDMAN, *supra* note 2, at 28 (citation omitted).

¹⁷³ See AAP, *Circumcision Policy Statement*, *supra* note 1, at 688.

¹⁷⁴ Wiswell, *supra* note 165, at 1244.

¹⁷⁵ See Walco et al., *supra* note 166, at 542.

¹⁷⁶ Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599, 599 (1997) (citations omitted) (examining study of pain caused by circumcisions).

their pain response to routine vaccinations at four and six months. Infants who had been altered as newborns showed a stronger pain response four or six months later than did infants who had not been circumcised. Further, within the altered group, infants who had had the benefit of a topical analgesic cream during their circumcision, reacted less strongly to the vaccination than did infants who had been circumcised without analgesia.¹⁷⁷ Scientists are investigating the possibility that early experience with pain may actually change the way in which neural pathways for pain develop.¹⁷⁸

In response to the growing acknowledgement that infant pain is real, it is increasingly recommended that babies who undergo MGA be given the benefit of some form of analgesia. "The ethical responsibility of clinicians is to provide full treatment of pain in children unless otherwise justified by defined therapeutic benefits."¹⁷⁹ The AAP statement strongly counsels the use of analgesia. But what kind of analgesia is safe and effective? According to the AAP, neither sucrose on a pacifier nor acetaminophen is adequate for the operative pain and "cannot be recommended as the sole method of analgesia."¹⁸⁰ Presumably, this would apply also to the few drops of wine on a cloth that is the mainstay of the traditional mohel.

The AAP report distinguishes three types of analgesia. The first is EMLA cream (eutectic [easily melted] mixture of local anesthetics), applied to the penis 60 to 90 minutes before the procedure. The second is dorsal penile nerve block, administered by needle at two spots at the base of the penis. The third is subcutaneous ring block, also by injection. This latter was found to be the most efficacious in preventing pain. The AAP group called this a "simple and highly effective technique."¹⁸¹ The EMLA cream, while the easiest to administer, is unfortunately the least effective.¹⁸²

¹⁷⁷ See *id.* at 602 (citing findings of one study concerning pain and male circumcision).

¹⁷⁸ See Denise Grady, *Babies' Pain Has Long Effect, Study Hints*, N.Y. TIMES, July 28, 2000, at A17 (discussing research studies observing pain responses in adult rats that were subjected to pain as infants and noting how the results might be applicable to human pain response models).

¹⁷⁹ Walco et al., *supra* note 166, at 543.

¹⁸⁰ AAP, *Circumcision Policy Statement*, *supra* note 1, at 689.

¹⁸¹ *Id.*

¹⁸² See GOLLAHER, *supra* note 7, at 138.

Even among *mohels* who are also physicians and who are interested in working toward amelioration of the baby's pain, there is only partial acceptance of these analgesic methods. In the 1990 book *Berit Mila in the Reform Context*, which "will undoubtedly become the classic text for [the Reform] movement regarding matters of circumcision," Dr. Thomas Goldenburg, in his chapter on medical issues, wrote that a local anesthetic is "unnecessary."¹⁸³ Dr. Dorothy Greenbaum wrote in 1995 that she used a mixture of swaddling and a sucrose soaked pacifier for pain relief, but was beginning a project to experiment with EMLA.¹⁸⁴ A model brochure for parents written by Rick Streiffer, a Reform¹⁸⁵ *mohel* and physician, published in the same issue of the *Berit Mila Newsletter* as Greenbaum's article, explains to parents that "[n]ewborn circumcision is usually done without anesthesia." Streiffer believes that the pain of circumcision lasts only a couple of minutes, and that injecting local anesthesia actually increases overall stress.¹⁸⁶ Another physician/*mohel*, Stuart M. Berlin, wrote in 1989 that the pain of circumcision is "tolerable." His remarks, contained in an article written in response to a Jewish woman expressing great concern about the pain of circumcision, are worth quoting at length:

Yes there is pain associated with being circumcised. Now, what does that mean?

There is a misconception that pain is a bad thing to be avoided at all cost. Pain is part of life as a human being. We could not survive without pain ... We could not grow and learn as individuals without pain. You cannot give your child a life without pain. The consequence of doing that would be disastrous.

¹⁸³ Michael B. Herzbrun, *Circumcision: The Pain of the Fathers*, CENT. CONF. AM. RABBIS J.: REFORM JEWISH Q., Fall 1991, at 6.

¹⁸⁴ See Dorothy Greenbaum, *In Pursuit of the Painless Bris*, BERIT MILA NEWSL. (National Org. of Am. Mohalim/ot), June 20, 1995 (visited Feb. 27, 2001) <<http://www.rj.org/beritmila/bmnews7.html>> (discussing various ways to make a circumcision less painful for the infant).

¹⁸⁵ The four main branches of Judaism are Reform, Conservative, Orthodox, and Reconstructionist, with Reform being the most liberal in terms of halakhic observance.

¹⁸⁶ Rick Streiffer, *Model Brochure to Give to Parents*, BERIT MILA NEWSL. (National Org. of Am. Mohalim/ot), June 20, 1995 (visited Feb. 27, 2001) <<http://www.rj.org/beritmila/bmnews7.html>> (claiming that anesthesia can actually increase overall stress of the infant).

The question to be asked is not is there any pain, but is the pain tolerable? Regarding infant circumcision without anesthesia the answer is certainly yes. Pain must be placed with [sic] a context. All babies undergoing circumcision have undergone a much more prolonged and painful experience than circumcision. That experience is not elective, we don't choose to be born, but we are. . . .

Compared to being born, a circumcision is a brief procedure, less than two minutes by the Mogen technique, with mild pain, easily tolerated, and quickly subsides. . . .

I have been very impressed with the use of wine as an anesthetic at a bris. For wine to be effective, enough must be given and it must be given enough time to work. When I perform a bris, I explain the history, meaning and significance of the ceremony for about 15 minutes. All during this time the baby is taking the wine by sucking on a washcloth dipped in wine. The babies still cries [sic] when they are restrained on the circumcision board, and the circumcision itself is less traumatic than being restrained.¹⁸⁷

Some writers have suggested that the parents of circumcised infants either deny the pain or are in "collusion."¹⁸⁸ Ronald Goldman, a critic of circumcision, reports on attending a Jewish ritual circumcision where the baby cried very hard for a long time, but a guest at the ceremony later recalled that the baby had not cried at all.¹⁸⁹ Michael Herzbrun reports asking fathers whether or not they would choose a procedure for their newborn sons that included some kind of anesthetic. He says that a number of fathers found the suggestion "fatuous," and responded that "[y]ou're making too much about this, rabbi;

¹⁸⁷ Stuart M. Berlin, *From the Jewish Journal: Don't Fear "Brit Milah,"* BERIT MILAH NEWSL. (National Org. of Am. Mohalim/ot), Oct. 6, 1989 <<http://uahc.org/congs/ot/ot005/bmnews2.html1#FEAR>>.

¹⁸⁸ See Herzbrun, *supra* note 183, at 6.

¹⁸⁹ See GOLDMAN, *supra* note 2, at 28.

that's the way it's always been done; no one I know remembers the pain, isn't that right?!"¹⁹⁰

In sum, we know that newborns feel pain, that an initial painful experience may make them more sensitive to pain months or perhaps even years later in life, and that analgesics of various levels of efficacy exist. However, it appears that, despite articles in the medical literature exploding the myth that newborns do not feel pain or that genital alteration is not painful enough to warrant analgesics, the majority of male newborn alterations are done without effective pain control measures.¹⁹¹ This lack of pain control does not seem to be associated primarily with ritual practitioners nor with physicians, but occurs across the board. In 1999, Carole Lannon, the pediatrician who headed the AAP Task Force on Circumcision, said that fewer than half the children operated on in the hospital setting had received anesthesia; she and David Gollaher agreed that there is no anesthesia in the "typical" traditional *berit milah*.¹⁹²

4. Oversight

As with virtually all medical operations, there is no legal oversight of MGA performed by licensed physicians, either in the hospital, the outpatient clinic, or in the home as part of a religious ritual. There is also no legal oversight, nor even reporting, of traditional practitioners who do not have medical training. Apparently, MGA is considered so minor, or such a familiar part of the American landscape, that *mohels* are not considered to be practicing medicine without a license. In the late 19th century, bills in states such as Ohio and New York would have banned ritual circumcision altogether, or required the presence of a licensed physician; these bills were probably motivated as much by anti-Semitism and desire to protect physicians' income as they were by concern for the baby boys; in any case, they failed to garner sufficient support.¹⁹³ Today, ac-

¹⁹⁰ Herzbrun, *supra* note 183, at 6.

¹⁹¹ See Anna Taddio et al., *Efficacy and Safety of Lidocaine-Prilocaine Cream for Pain During Circumcision*, 336 NEW ENG. J. MED. 1197, 1197 (1997); see also Wiswell, *supra* note 165, at 1245 (declaring that analgesics should be used in circumcision).

¹⁹² See *Talk of the Nation: Pros and Cons of Circumcision* (National Public Radio broadcast, Mar. 3, 1999) (Real-Audio archive at <http://search.npr.org>).

¹⁹³ See GOLLAHER, *supra* note 7, at 95 (describing criticism of Jewish circumcision by Gentile physicians and addressing lack of support for regulations). In Swe-

ording to one *mohel*: “The last thing which the observant Jewish community desires is governmental licensing since this often degenerates into a not so subtle ruse through which to eliminate traditional norms of *bris milah* and convert it into an aseptic, cosmetic, standardized surgical procedure totally devoid of religious meaning and value.”¹⁹⁴

There is also no requirement that *mohels* be certified even within their own religious communities.¹⁹⁵ Some certification programs do exist but in many cases *mohels* are still trained in apprenticeship to other *mohels*, and parents are urged to seek out the most skilled ones by consulting other parents.¹⁹⁶ The Berit Mila Board of Reform Judaism creates courses to teach physicians how to become *mohels*, in essence adding the religious piece onto existing medical expertise, but also training them in the technical specifics of newborn MGA.¹⁹⁷

IV. THE MEANING OF GENITAL ALTERATION

The religious/cultural/societal meanings of male and female genital alteration are often brought into arguments over the legality and propriety of criminalizing these practices. It is common to hear opponents of FGA claim that it is not religious in any “correct” understanding of Islam, or that its only cultural function is to degrade women and eradicate their sexuality. Conversely, MGA, when not being defended as good medical practice, is also often afforded great respect as a ritual required by the Jewish religion and one with no negative societal or misogynistic elements. A moment’s thought would make it obvious to any student of culture that such simplistic claims cannot

den, legislation proposed in June 2000 would effectively ban circumcision as a Jewish ritual, not only by requiring the use of anesthetics and insisting that all circumcisers be qualified physicians, but by insisting that the child’s consent be obtained, which obviously excludes eight-day-old babies. The law was motivated by medical reports about botched circumcisions of some teenage and adult Muslims in Sweden. See Douglas Davis, *Protest Over Swedish Bill to Outlaw Circumcision*, JERUSALEM POST, June 19, 2000, at 6.

¹⁹⁴ ROMBERG, *supra* note 146, at 38.

¹⁹⁵ See Jacob C. Langer, *Berit Mila: Jewish Ritual Circumcision in an Historical and Cultural Context*, at 6 (unpublished paper) (on file with the author).

¹⁹⁶ See ROMBERG, *supra* note 146, at 34.

¹⁹⁷ See *Berit Mila Board of Reform Judaism* (visited Feb. 25, 2001) <<http://www.rj.org/beritmila/settupbe.html>> (outlining the joint educational project of the Central Conference of American Rabbis, Hebrew Union College—Jewish Institute of Religion, and Union of American Hebrew Congregations).

be correct. Practices that, for both girls and boys, predate recorded history¹⁹⁸ and span many cultures and religions, cannot plausibly present such a simple story.

A. The Meanings of FGA

Female genital mutilation is a human rights tragedy that represents an extreme example of how societies around the world attempt to suppress women's sexuality, maintain their subjugation, and control their reproductive function. In addition to being illegal, the procedure involves child abuse, torture, and violence against women.¹⁹⁹

Circumcision in both males and females in Africa is a mark of cultural identity; it designates one's membership in one's tribe and participation in its life and assumptions.²⁰⁰

1. Religion or Culture?

It would be a mistake to assume an identity between Islam and FGA. Saudi Arabia and Iran, two of the most traditional Islamic nations, have no incidence of the practice,²⁰¹ while non-Islamic minorities living in predominantly Muslim cultures sometimes embrace it.²⁰² Nonetheless, the majority of people who practice some form of this custom identify with Islam, either as a religion or a culture, and a great deal of ink has been

¹⁹⁸ Female genital alteration originated in Egypt in the fourteenth century B.C.E. See Douglas, *supra* note 37, at 477. Male genital alteration is significantly older; a 2400 B.C.E. stele at the Egyptian site of Saqqara depicts the circumcision of two young noblemen. See GOLLAHER, *supra* note 7, at 1.

¹⁹⁹ Kowser H. Omer-Hashi, *Commentary: Female Genital Mutilation: Perspectives from a Somalian Midwife*, 21 BIRTH 224, 225 (1994).

²⁰⁰ Shullenberger, *supra* note 39.

²⁰¹ See Douglas, *supra* note 37, at 478 (demonstrating that Islam neither requires nor condones female circumcision).

²⁰² Lane and Rubinstein report that, when Roman Catholic missionaries settled in Egypt in the 17th century, they forbade female genital alteration among their flock, under the misapprehension that it was a Jewish custom. However, the unaltered girls of these Catholic converts were unable to find husbands when they grew up; their male coreligionists refused to marry them, choosing instead (genitally altered) girls from the surrounding culture. The College of Cardinals in Rome was forced to rescind its decision. Lane & Rubinstein, *supra* note 4, at 34.

spilled on the question of whether the Koran and other authoritative Islamic texts require, encourage, or condemn the practice.

No mention of FGA is found in the Koran, the sacred Muslim text.²⁰³ However, the inquiry cannot end with the Koran. Just as, in Judaism and Christianity, binding religious obligations can arise from oral teachings and extrabiblical sources (e.g., rabbinic teachings, papal encyclicals), Islam looks to other sources to interpret and supplement Koranic teachings. Therefore, to say, "[I]t's not in the Koran, therefore it's not part of the religion," as some Western opponents of FGA have written,²⁰⁴ is as nonsensical as telling a Roman Catholic that because there is no prohibition against abortion in the Bible she cannot claim to be opposed to abortion on religious grounds.²⁰⁵

²⁰³ See Eric Winkel, *A Muslim Perspective on Female Circumcision*, 23 *WOMEN & HEALTH* 1, 2 (1995).

²⁰⁴ An article in *Liberty*, a Seventh Day Adventist publication subtitled "A Magazine of Religious Freedom," says, "Populations practicing female genital mutilation quickly cite religion as justification. But the truth seems to be rooted more in culture, tradition, and sexual control of women." Bailey, *supra* note 20, at 11. The article continues: "Among Muslim populations religious scholars concede that the Koran makes no mention of FGM, and no established religion in the world requires, or even suggests, that this procedure has a true religious significance." *Id.* (citation omitted). Doriane Lambelet Coleman cites a number of authors who "reject or marginalize" the religious importance of FGA to its followers, including Senator Carol Moseley-Braun, in her statement for the Congressional Record in favor of the Schroeder bill outlawing the practice. Coleman, *supra* note 77, at 729 & n.28 (noting that opponents of female genital alteration reject the view that such a practice is dictated by religion).

A related issue has to do with the origins of female genital alteration. It is common for writers to imply that, because the practice predates Islam (or any of today's religions) it cannot be an Islamic religious obligation. Karen Hughes writes that "many FGM proponents adhere to the mistaken belief that FGM originated as a requirement of Islam." Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 4 *J.L. & POL'Y* 321, 331 (1995). Jane Wright writes that "[r]eligion is often stated as a reason for FGM. However, the practice predates all the major religions which practise the operation," Jane Wright, *Female Genital Mutilation: An Overview*, 24 *J. ADVANCED NURSING* 251, 253 (1996). The problem with this argument is that most of today's religious practices can be traced to earlier customs of the cultures that surrounded and/or preceded them. No one argues that male genital alteration is not an authentically Jewish religious practice, simply because the practice predates Judaism by thousands of years and was certainly adopted by the ancient Israelites from the surrounding Egyptian culture. See GOLLAHER, *supra* note 7, at 1-6 (examining ancient Egyptian circumcision practices).

²⁰⁵ The parenthetical statement, "(FGM is not required by any religion)," without further discussion, is an example of the sort of unthinking arrogance with which Westerners often approach this issue. Anne J. Davis, *Female Genital Mutilation: Some Ethical Questions*, 17 *MED. & L.* 143, 144 (1998). It is instructive to compare this attitude with a parallel instance regarding the Jewish *bris*, or ritual male

The Arabic term for Islamic law, *sharia*, literally means path or way to a water hole in the desert. For the desert dwellers living in the time of the Prophet Muhammad "water and direction were essential to life."²⁰⁶ In addition to the Koran, there are three supplemental sources of Islamic law. The most important is *hadith* ("narration") which are accounts of the sayings and doings of the Prophet which embody normative prescriptions, or *sunnah*. Not all *hadith* are considered canonic by all Islamic denominations and legal schools; furthermore, some *hadith* are considered more "strong" than others. The degree to which a particular *hadith* is accepted can depend on its coherence with the teachings of the Koran and also with the degree of reliability of its sources and "chain of transmission."²⁰⁷ The next source of law, *itihad*, is analogical reasoning—familiar to law students and Jewish scholars alike—in which the jurist faced with a novel issue attempts to categorize it with respect to existing case law and texts.

Finally, there is *ijma*, or consensus. Consensus as the concept of the "informal agreement of the community" has an "overriding authority," and yet "there is no consensus on the definition of consensus."²⁰⁸ Consensus could include literally the whole community, or could apply only to the community of *ulama* (interpreters), or only *ulama* of a certain age.²⁰⁹ Reform-

circumcision. A 1951 article in the *Archives of Pediatrics* suggested that, instead of the *mohel* who traditionally performs both the surgical and ritual aspects of the ceremony, Jewish families engage a physician to do the first, while a rabbi of their choice "officiates." The author defends this departure from tradition by equating it with other examples of flexibility in Judaism. "Mosaic Dietary Law is another very important law to be observed in Judaism, and as everyone knows, many of our best Jewish families enjoy pork chops and Virginia ham in their menus. Our religious leaders apparently do not disapprove of the infractions of the above laws." ROMBERG, *supra* note 146, at 31 (citation omitted). To which Henry C. Romberg, a fierce traditionalist, replies, "So much for his understanding of pork chop Judaism." *Id.*

²⁰⁶ Khalid Masud, *Islamic Law*, in *THE MUSLIM ALMANAC: A REFERENCE WORK ON THE HISTORY, FAITH, CULTURE, AND PEOPLES OF ISLAM* 269, 269 (Azim A. Najji ed., 1996).

²⁰⁷ See Fazlur Rahman, *Islam: An Overview*, in *7 THE ENCYCLOPEDIA OF RELIGION* 309 (Mircea Eliade ed., 1987).

²⁰⁸ *Id.* at 310.

²⁰⁹ As stated by Eric Winkel:

The legal discourse of Islam may be conceived of as a more or less flexible superstructure erected over the shari'ah, which in turn may be defined as the set of injunctions emanating from the Qur'an and Sunnah (exemplary prophetic practice). Those who deal with this superstructure, and help it flex and bend to meet new circumstances, may be loosely defined as the

ers and traditionalists also disagree on whether an earlier consensus can be repealed by a later one.²¹⁰ Feminists might well ask how well women's perspectives and voices are reflected in this process (although there are female *ulama*).

Because FGA is not mentioned in the Koran, claims to its religious authenticity rest on *hadith*. This article cannot cover the wide and complex range of discussion among Muslim scholars on this issue, but will seek to sketch out a centrist, relatively uncontroversial view. According to many Muslim scholars, while male "circumcision" is religiously obligatory, female "circumcision" is classified as "sunnah," meaning that it is optional and virtuous.²¹¹ Ibn Qudamah, a medieval commentator on the work of Ahmad ibn Hanbal (founder of the strictest school of Islamic jurisprudence) writes: "As for circumcision, it is obligatory on men and admirable [*makrumah*] for women, but it is not obligatory for them. This is the position of the majority of people of knowledge."²¹²

There is also grounding for the position that the procedure should be relatively minimal. One *hadith* (but one considered "weak" in its chain of transmission and authenticity) has the Prophet talking with a ritual circumciser and telling her "[d]o not overdo it, because that [clitoris] is lucky for the woman and dear to the husband."²¹³ Making use of the analogic route to legal knowledge, Muslim scholar Eric Winkel argues that removal of the clitoris and/or infibulation (as opposed to some lesser form of clitoral circumcision) is in the same category as castration of the penis, or amputation of any part, which is explicitly forbidden by Islam. The Koranic phrase: "Let there be no alteration in Allah's creation," has traditionally been applied to outlaw tattoos and other forms of disfiguration.²¹⁴ Winkel also

'ulama', those who have knowledge. This amorphous group of people, women and men, are recognized in their communities by their knowledge. Winkel, *supra* note 203, at 3.

²¹⁰ See Rahman, *supra* note 207.

²¹¹ See Winkel, *supra* note 203, at 4; see also Sami A. Aldeeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 *MED. & L.* 575 (1994) (discussing Arab and Muslim based distinctions between male and female circumcision). Abu-Sahlieh opposes both male and female genital alteration. See *id.* at 611-12.

²¹² Winkel, *supra* note 203, at 4 (quoting Ibn Qudamah, *al-Mughni Sunan al-Fitrah*).

²¹³ *Id.* at 5 (quoting Abu Dawud, *Sunan Abu Dawud Kitab al-Adab*, hadith 5271).

²¹⁴ *Id.* at 4 (quoting the Qur-an 30:30).

argues that a critical reading of the texts makes it clear that sexual enjoyment within marriage is to be encouraged and therefore that female genital alterations which have as their goal the eradication of female pleasure are "illegitimate."²¹⁵

Anthropologists Lane and Rubinstein show how religious ideas permeate everyday thinking about the practice of genital alteration:

In Islam as practiced in everyday life, the association of religious ideas with female circumcision is evident in the colloquial terms used to describe the custom. The use of the term *sunna* (meaning to follow the tradition of the Prophet), implies that the custom is religiously ordained. Similarly, although the classical Arabic term for female circumcision is *khifad* (literally "reduction"), in colloquial Arabic it is popularly called *tahara*, referring to a ritual state of purity that is required for Islamic prayer. In the bipolar opposition implied by the term *tahara*, genitals in their natural state...are ritually impure. In fact, in Egypt to ask if a woman is circumcised one asks "*Intii mutahara?*" "Are you purified?"²¹⁶

The tortured history of the recent conflict over FGA in Egypt is a good case study of the mix of religious, cultural, political, and economic agendas that attend this issue. In Egypt, where the proportion of genitally altered women is among the highest in the world,²¹⁷ there was a growing sentiment against the practice beginning in the 1930s and peaking in the late 1950s with a 1959 decree by the Ministry of Health prohibiting female alteration in public hospitals.²¹⁸ (From the fact that

²¹⁵ See Winkel, *supra* note 203, at 5.

²¹⁶ Lane & Rubinstein, *supra* note 4, at 34 (citation omitted).

²¹⁷ The World Health Organization reports a 1995 study done in Egypt, which found a "surprisingly high" rate of 97%. This figure is being validated by a study on a subsample; these results are not yet available. WORLD HEALTH ORG., *supra* note 48, at 13. The high number is "discounted" because women in rural areas might claim to be altered to preserve their reputations, even if they are not. See Neil MacFarquhar, *Mutilation of Egyptian Girls: Despite Ban, It Goes On*, N.Y. TIMES, Aug. 8, 1996, at A3 (discussing ban of female genital mutilation by the Egyptian Health Minister and rural opposition to the governmental ban).

²¹⁸ See Kirsten Moore et al., *The Synergistic Relationship Between Health and Human Rights: A Case Study Using Female Genital Mutilation*, 2 HEALTH & HUM. RTS. 137, 139-42 (1996) (discussing the legal and political history of female genital alteration in Egypt).

Egypt has a prevalence rate of around 97%, one can infer that this prohibition merely insured that girls were subjected to this practice outside public hospitals.) During that period, FGA rose and fell on the agendas of various health and women's organizations, and was "initially of little importance to the Islamist movement."²¹⁹

This decree remained in place until 1994. That was the year when, at the International Conference on Population and Development in Cairo, women from all over the world took activist positions on the connections between women's health, family planning, and human rights. During the Conference, a CNN film was shown that depicted the circumcision of a little girl, in its most horrific form. The film galvanized international opposition to the practice, often in terms that even Muslim opponents of FGA found insulting and racist. "In the few-minutes-long segment a small part of Egyptian culture was displayed that seriously angered and 'shamed' Egypt before the international community."²²⁰

Immediately after the film was aired, Egypt's Population Minister and members of parliament spoke publicly about the need to pass legislation criminalizing FGA. However, this was met with swift opposition from the Grand Shaikh of Al Azhar, one of the country's prominent Islamic leaders, who issued a *fatwa* (religious opinion) that "female circumcision is 'an Islamic duty to which all Muslim women should adhere.'"²²¹ "[C]ivic, religious, and state entities and groups began to use the issue as a way to define their position on the Egyptian political and ideological map."²²² The Minister of Health and the Minister of Population each made a promise to the international community to strengthen the 1959 decree and to work harder to eradicate the practice. On its side, Al Azhar and traditionalist organizations launched a public campaign claiming that circumcision kept women free and independent and promoted female equality by preserving their virtue. Further, the campaign depicted female circumcision as an integral component of Egyptian national identity.²²³

²¹⁹ *Id.* at 140.

²²⁰ Lane & Rubinstein, *supra* note 4, at 36 (citation omitted).

²²¹ *Id.* at 37 (citation omitted).

²²² Moore et al., *supra* note 218, at 140.

²²³ *See id.* (discussing the arguments supporting and opposing eradication of female genital mutilation).

Faced with growing political/religious furor, the Health Minister announced that he would defer any action until after the upcoming parliamentary elections. He then formed an advisory committee, whose advice he proceeded to reject. The committee had advised against legalizing FGA, and the Grand Mufti (the official government interpreter of Islamic law) had declared that the practice is not strongly endorsed by Islam and that its legality should be decided by physicians; nonetheless the Minister issued a directive making FGA "a legitimate medical treatment."²²⁴

In 1996, a new Health Minister again banned the practice, this time both in and out of hospitals. He was supported by a new head of Al Azhar, Sheik Mohammed Tantawi, who found the *hadith* concerning FGA "too vague to constitute a ruling."²²⁵ The efficacy of the ban remains to be seen. In rural areas, where the prevalence of FGA is virtually total, it is unthinkable to most villagers that the practice not continue. Doctors themselves, typically extremely conservative, inattentive to women's concerns, and with economic incentives to continue the practice, have challenged the ban, citing reasons of religion, health, and law.²²⁶ "Dr. Gamal Gaith, who works at the Minya el Qamh Public Hospital, said the decree finally prompted him to turn families away. 'I used to do it,' he said, 'even though I knew it was harmful for the women, because of the money.'²²⁷

Thus, we see how difficult it is to separate religious concerns from those which are primarily nationalist, cultural, economic, or medical. Nevertheless, across nations and cultures that practice some form of female genital cutting, the perception that it is a religious obligation, or at the very least a religious virtue, is ubiquitous. Lane and Rubinstein state that the belief that female circumcision is required by religion is "common." "Although it is not a practice of the majority of Muslims in the world, among those who do practice it female circumcision is nonetheless often considered to be legitimated by religion."²²⁸ The *fatwas* issued on the subject in Egypt are also evidence of the religious element in the persistence of FGA. Even writers

²²⁴ *Id.* at 141.

²²⁵ See MacFarquhar, *supra* note 217.

²²⁶ See Moore et al., *supra* note 218, at 141 (explaining why the Egyptian Medical Syndicate supports female genital mutilation).

²²⁷ MacFarquhar, *supra* note 217.

²²⁸ Lane & Rubinstein, *supra* note 4, at 34.

who facetiously dismiss the religious factor as “error,” nonetheless acknowledge the widespread belief that FGA is required or expected of Muslims.²²⁹ Coleman, citing an interview conducted with one of the Harborview physicians, explained:

[O]ne Somali woman who is a Sunni Muslim “insist[ed] that each of her three young daughters must be cut.” She claimed that “It’s important for [their] health; it’s important for religion. We have to keep the religion.” Another woman noted that “[e]verything we do comes from religion—how we eat, how we dress, how we talk to people.” The hospital is reported to have been “convinced...that as strongly as a Jewish mother believes her son must be circumcised to be a member of the faith, so do some Somali Muslim refugees in Seattle believe that their daughters’ genitals must be cut to comply with their religion and demands of their culture.”²³⁰

A disingenuous refusal to see the connection between FGA and Islamic religion can serve the interests of Muslims who want to defend their religion and culture from Western criticism. Rana Kabbani, in a book intended to defend Islam’s image after attacks on it following the *fatwa* against writer Salman Rushdie, wrote, “I am always pained by Western misconceptions about the lives of Muslim women.... I was visited by a novelist who had come to talk to me about a Muslim character she wanted to put into her next book. ‘How can a feminist like you defend Islam,’ she inquired, ‘when it advocates female circumcision?’ As chance would have it, that same day I read a piece by the historian Marina Warner in which she described Islam as a religion that practices clitoridectomy. Could these two writers not have taken the trouble to discover that this was an African practice which had nothing whatsoever to do with Islam?” To which American journalist Geraldine Brooks responds, “Could...Kabbani not have taken the trouble to reflect that one in five Muslim girls lives in a community where some

²²⁹ See Anne M. Gibeau, *Female Genital Mutilation: When a Cultural Practice Generates Clinical and Ethical Dilemmas*, 27 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 85, 88 (1998) (discussing the ethical and legal considerations surrounding female genital mutilation in the U.S. and abroad).

²³⁰ Coleman, *supra* note 77, at 743 (citing Carol M. Ostrom, *Harborview Debates Issue of Circumcision of Muslim Girls*, SEATTLE TIMES, Sept. 13, 1996, at A1).

form of clitoridectomy is sanctioned and religiously justified by local Islamic leaders? Or to note the chapters on 'Women and Circumcision' appearing in many new editions of Islamic texts, especially in Egypt?"²³¹

The refusal of many writers and activists to accept the religious elements of FGA is motivated by a number of factors. Western society places a high premium on (at least lip-service to) respect for other religions. As we shall see in Part V, religiously motivated practices enjoy special protection under the free exercise clause of the First Amendment to the Constitution. Therefore, although it anticipates my Constitutional argument somewhat, it is appropriate to end this section with a reminder that a person's religious beliefs need not be "correct" nor universally held within her denomination, to enjoy constitutional protection. In *Thomas v. Review Board of Indiana*,²³² a man refused to work in a factory that produced gun turrets because it was against his religious beliefs. The state Review Board denied his unemployment compensation benefits, stating that he had quit "voluntarily" and refusing to take his religious beliefs into account. The Indiana Supreme Court, in upholding the denial of unemployment compensation, argued that Thomas's religious convictions with respect to weapons-related work were "unclear," in part because he agreed that he would work in a part of the factory that produced raw materials, even if they eventually became weapons. The Indiana court also relied on the fact that other workers in the same factory who shared Thomas's Jehovah's Witness convictions, nonetheless had no religiously based objection to manufacturing gun turrets; the court took that as further evidence that Thomas's views were not truly religious. The U.S. Supreme Court however, refused to allow Thomas's lack of clarity, nor the idiosyncratic nature of his beliefs, to count against him. Nor would it countenance the Court becoming a theological body with the power to decide which person's religious beliefs are "correct."

[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire

²³¹ BROOKS, *supra* note 55, at 54.

²³² 450 U.S. 707 (1981).

whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.²³³

Thus we see that, whether or not a particular person or culture is "correct" in believing that FGA is part of Islam, is not constitutionally relevant.

2. The "Purpose" of FGA

When I speak about this topic publicly, a common response is that the "purpose" of FGA is to subjugate females and to deny them their sexuality. This response can be used to contrast female with MGA, which is thought to have only benign cultural/religious meanings. It can also be used to argue that the subjugation of women is not a goal to which U.S. law should be respectful or sympathetic; therefore, banning all FGA, even the "nick" proposed by the Seattle physicians, is acceptable.

Constitutionally, of course, parents are given a great deal of leeway in how they bring up their children, including instances of gender discrimination and subjugation of girls. Parents can send only their boys to college, pull girls out of school at the minimum legal age, teach girls that their place is in the home, and acculturate boys to expect to be waited on hand and foot. Only if these patriarchal practices are *otherwise* harmful or illegal, can parents be legally forced to abjure them.

Nonetheless, it is useful to see how multi-layered the motives and meanings of FGA really are. Leaving aside the religious significance of FGA, we are left with three broad categorizations (which are not, of course, in the least mutually exclusive): control and subjugation of females; eradication of female sexual pleasure; communal identity and cohesiveness.

FGA is often justified as a way of keeping girls virginal and well-behaved, in societies which believe that women are "naturally" wild and wayward. It is probable that this belief is connected with the identification of the clitoris as a type of penis, so that a woman who possesses an unaltered clitoris will be as sexually aggressive as men are expected to be. (Among some peoples, it is believed that a clitoris that is not surgically altered will grow to be as large as a penis, or even down to the

²³³ *Id.* at 715-16.

woman's knees.²³⁴) As an Egyptian farmer told a *New York Times* reporter in 1996, after the Egyptian Health Minister banned the procedure, "Am I supposed to stand around while my daughter chases men? ... 'So what if some infidel doctor says it is unhealthy? Does that make it true? I would have circumcised my daughter even if they passed a death sentence against it.'"²³⁵

To people who hold these beliefs, the fact that Western nations do not practice FGA is actually an argument in its favor. "Banning it would make women wild like those in America."²³⁶ "American women jump from man to man because their sexual organs are driving them to have sex."²³⁷ A Somali woman in Seattle explained that genital alteration would protect her daughters from "the American disease: 'Girls 13, 14, 15 get pregnant, go wild, get welfare.'"²³⁸ In Egypt, among educated middle-class women who are seeking to have their girls genitally altered in hospital settings, the increased independence of women in modern society and their increasing exposure to sexual stimulation have become other reasons to have them circumcised.²³⁹ (Loretta Kopelman points out an important conflict here. Most proponents of FGA argue that women do not feel sexual pleasure in any case, and thus are not being deprived by the procedure.²⁴⁰)

FGA keeps women's sexuality in check in a number of ways. By removing large parts of her genitals, it arguably makes any sexual stimulation, from masturbation to intercourse, less enjoyable to her.²⁴¹ One Egyptian doctor said that, by re-

²³⁴ See Lane & Rubinstein, *supra* note 4, at 33; See also Coleman, *supra* note 77, at 728 n.27 (citing Jacquie Miller, *Canadian Aid Helps Stop Ritual Genital Mutilation of Girls in Rural Mali*, OTTAWA CITIZEN, Jan. 22, 1997, at A5).

²³⁵ MacFarquhar, *supra* note 217.

²³⁶ *Id.*

²³⁷ Coleman, *supra* note 77, at 742 (quoting Mimi Ramsey, President and Founder of Forward, an organization combating FGM domestically and internationally, in Donna Abu-Nasr, *Women's Efforts to Ban Genital Mutilation of Girls Pays Off Today*, SEATTLE TIMES, Mar. 29, 1997 at A3).

²³⁸ Coleman, *supra* note 77, at 742 (quoting Carol M. Ostrom, *Harborview Debates Issue of Circumcision of Muslim Girls*, SEATTLE TIMES, Sept. 13, 1996, at A1).

²³⁹ See Douglas, *supra* note 37, at 478.

²⁴⁰ Loretta M. Kopelman, *Female Circumcision/Genital Mutilation and Ethical Relativism*, SECOND OPINION, Oct. 1994, at 54, 63.

²⁴¹ It should be noted that it was not uncommon in the West for clitoridectomies to be performed on women and girls to "cure" masturbation and "nervousness,"

moving her "external parts," a girl will no longer be sexually stimulated by "tight nylon underclothes."²⁴² Infibulation makes intercourse extremely painful, and often impossible without preliminary cutting. It also makes it impossible for women who are supposed to be virgins to hide evidence of sexual intercourse.²⁴³

The dual result of lessening a woman's sexual pleasure while heightening that of her partner, makes it clear that women's health, needs and desires are not important. Anthropologist Ellen Gruenbaum, who studied FGA among the Sudanese, where the most severe form is common, comments:

Critics and practitioners alike think that pharaonic circumcision serves the interests of men. Although tight infibulation can obstruct first intercourse (and requires repeated efforts over time or even a small incision to widen the opening), the opening remains fairly tight and is retightened after each childbirth. Both men and women in my research communities told me that men derive far greater sexual pleasure from intercourse with a woman whose vaginal opening has been surgically narrowed in this way. This view is widely held as a reason for the continuation of the practice, even among middle-class urban women, including those who actively oppose the practice.²⁴⁴

A different take on preserving men's interests is the theory that, because men's virility lessens with age, if women's sexuality were not reduced by FGA older men would find themselves unable to satisfy their wives. This disparity would drive men to the use of drugs in order to enhance their sexual performance.²⁴⁵

during the 19th century and up through the 1940s. See Lane & Rubinstein, *supra* note 4, at 32.

²⁴² MacFarquahar, *supra* note 217.

²⁴³ See Wright, *supra* note 204, at 252.

²⁴⁴ Gruenbaum, *supra* note 29, at 461. A 1996 study which surveyed 300 Sudanese men who had had intercourse with both infibulated and noninfibulated wives, however, found that almost all of them said that they preferred sexual intercourse with the noninfibulated wife. See Wright, *supra* note 204, at 254.

²⁴⁵ See Abu-Sahlieh, *supra* note 211, at 593 (citations omitted) (describing how female circumcision keeps couples together and prevents drug abuse).

Men's interests are also served by protecting "family honor," and lessening the chance of "shotgun weddings" and illegitimate births. One way in which families are strengthened economically and socially is by judicious use of daughters to make strategic marriages and to produce large numbers of legitimate offspring.²⁴⁶ Girls whose virginity can be proven bring higher dowries. "Virginity is a money-making asset. That is why some nations are so keen on infibulation."²⁴⁷

In cultures which believe that genitally altered women are "certifiable" virgins, more satisfying sexual partners for their husbands, more beautiful according to the prevailing norms of their culture, and also more passive and obedient, it is not surprising to find that lack of alteration makes girls much less marriageable. Thus, even mothers who decry the practice say that they are ensuring their daughters' economic and social survival by making sure that they are desirable mates. President Kenyatta of Kenya, in his 1938 book, *Facing Mount Kenya*, insisted that no man of his tribe would consider marrying a uncircumcised woman.²⁴⁸ Making sure their daughters could find mates within their immigrant community was an important reason for the request of the Somali immigrant women who came to Harborview hospital.²⁴⁹ Dr. Mushira al-Shafie, Egypt's Deputy Health Minister, said that women feel that "their reputations are at stake and therefore [they] do not object to [FGA]."²⁵⁰

Having an unaltered wife can even be a political liability for an African politician. In Sierra Leone, FGA was a large though unspoken issue in the 1997 elections (the first the country has ever known). Many women expressed suspicion of one of the leading candidates because his wife, an American, was presumably uncut. When the winner chose an uncut woman as Minister of Gender and Children's Affairs, the choice was held up for months in Parliament because "she would not be familiar with our adored customs."²⁵¹ Parasathi Teare says:

²⁴⁶ See generally Gruenbaum, *supra* note 29, at 461 (listing control of women to preserve family honor as a male interest in infibulation).

²⁴⁷ Abu-Sahlieh, *supra* note 211, at 604.

²⁴⁸ See Wright, *supra* note 204, at 254.

²⁴⁹ See Coleman, *supra* note 77, at 741 (quoting Tom Brune, *Refugees' Beliefs Don't Travel Well; Compromise Plan on Circumcision of Girl Gets Little Support*, CHI. TRIB., Oct 28, 1996, § 1, at 1).

²⁵⁰ MacFarquahar, *supra* note 217.

²⁵¹ French, *supra* note 28, at A4 (demonstrating that a woman's uncut status can influence political attitudes).

The vast majority of circumcised women are poor rural dwellers. The harshness of the practice of female circumcision echoes the harshness of their existence. The day begins before dawn, food is prepared for the family and the remainder of the day is spent supplying basics for survival, gathering wood and water. Lives are dictated by things people have no control over, such as the weather, good or bad harvests, and disease.

A woman must fit into this society or die. If she is not circumcised, she will not marry. If she does not marry, she will not have children. Without children, she will have fewer hands to help out with the daily tasks or to look after her when she grows old. . . . We may not like it, but in these societies a good marriage is understood as the pinnacle of a woman's achievement. You could say that the children are circumcised because their parents love them and want them to be happy in their adult lives.²⁵²

Group identity and communal cohesiveness are other motivations for FGA. Gruenbaum shows how, among different ethnic groups in the Sudan, different types of female alteration serve as group demarcations (and also as ideological markers of superior morality and hygiene that support the dominance of some groups over others).²⁵³ As we saw in the recent history of the struggle over FGA in Egypt, the practice can easily become identified with nationalism, ethnic pride, and resistance to the dominance of Western (colonial) culture. As new national boundaries threaten to disrupt historical tribal dominance in particular geographic areas, a process accelerated by urbanization, FGA can be seen as an important custom that helps to maintain distinct village and tribal identities.

The *irua* ceremony in which FGA is performed among the Kikuyu, for example, fulfills a number of functions, including acceptance of adult obligations by the initiates, enforcing behavioral norms of the social group, and unification of the tribe

²⁵² Teare, *supra* note 32, at 34.

²⁵³ See Gruenbaum, *supra* note 29, at 461-62 (explaining that certain types of FGM serve as identity markers for certain groups).

and enhanced tribal identity.²⁵⁴ War and dislocation can stimulate people to protect and display their cultural identity by intensified practice of FGA. In 1997, women in displaced persons camps in Sierra Leone celebrated the end of war and their imminent return to their homes by holding a series of FGA rituals:

To celebrate this change of fortune, many felt, it was only proper that there should be a major ceremony marking what they hope will be a resumption of their normal lives. So, since Christmas, as many as 600 women from the camp have hiked off in groups of a dozen or more at a time to a clearing in the bush nearby.

There, the group members, ranging in age from 4-year-old girls to adult women, have stayed for a week or two at a time, dancing, feasting and sharing lessons about womanhood as part of an ancestral communal ritual known as Bondo, which culminates in having their external genitals cut off....

One champion of the practice estimates that in the space of less than a month 4,000 or more displaced women may have had their genitals cut by women known as Soweis, all in preparation for the return to their rural homes. Sierra Leoneans say such numbers would make the displaced women's festivities the largest event of its kind ever seen in the country....

"I decided to go to the bush and have this done now because I am a mature woman now," said Bateh Kindoh, a shy 16-year-old who sat with two other recent initiates to speak with a visitor. "We will go back to our villages soon, and I wanted to become part of the Bondo society first. This is a happy time for us."²⁵⁵

Anne Gibeau writes:

²⁵⁴ See Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2466-67 (1992) (describing the cultural importance of the *irua* ceremony to Kikuyu tribe).

²⁵⁵ French, *supra* note 28, at A4.

Although FGM is widely perceived to be a vehicle for the subjugation of women, the ceremony that accompanies the practice may serve as an important rite of passage for women, making it highly desirable to them. In the cultures in which FGM is performed, it may be a strictly ritualized, woman-centered experience that occurs at special times and places, such as around the time of harvest. The participants may be sequestered and given special foods and clothes. A communal meal for women might be served, during which an oral history of domestic life, the expected role of the adult woman, and information about women's secret societies are shared. These communal aspects of FGM ... and the ceremonies associated with it give women access to rituals and customs that they prize.²⁵⁶

B. The Meanings of MGA

1. Religious Aspects

In contrast to FGA, it is unnecessary to marshal proof that MGA, at least among Jews, is a religious practice. Therefore, I will begin this section with a description of the place of MGA within Judaism. After that, I will seek to problematize this depiction by showing how, for many Jews, the practice could better be described as cultural, especially if we applied to MGA the same standards currently applied to FGA.²⁵⁷

²⁵⁶ Gibeau, *supra* note 229, at 87 (citations omitted).

²⁵⁷ I focus on the Jewish practice of male genital alteration because it is the most familiar in the United States and it is associated with a larger population than American Muslims (although Muslims will probably outnumber Jews in America very shortly). If there was a movement to make MGA illegal in the U.S. on the same terms as FGA, it would doubtless be Jews who would be put forward as those whose religious rights could not possibly be so trampled upon. Although Jews have often felt marginal and oppressed in the U.S., they are certainly a much more integrated and accepted minority than Muslims, and one with much stronger representation in the legislatures and the courts (not to mention the medical and legal professions).

I regret that it is beyond the purview of this article to analyze this question from a different perspective—keeping the “Muslim” variable constant, and asking why no one questions the Muslim practice of male genital alteration. (This seems to be part of the confusion expressed by the Somali refugees in Seattle, who were told that the hospital would gladly circumcise their boys, but not their girls.) In some African cultures, boys are routinely circumcised at adolescence, without analgesics, and presumably with the same lack of sanitation and medical care as the girls. Nelson

As mentioned above, the origins of MGA predate any religion now in existence. It is certain that the ancient Egyptians practiced it, and the circumcision of two young nobles is depicted on a stele dating from 2400 B.C.E.²⁵⁸ There are many theories about how, when and why the practice made its way from Egyptian culture to the Israelites. One theory is that the Israelites learned it when they were slaves in Europe. In *Moses and Monotheism*, Sigmund Freud asserts that Moses introduced the custom of circumcision to the Jews. Norman Mirsky comments, "Why did he do this? Because the Egyptian males were circumcised and the Egyptians regarded *themselves* as a chosen people! Moses wanted the Jews to have the same self-esteem, to have the same sense of divine destiny as their former masters, to lose their slave mentality..."²⁵⁹ Whatever the reasons, the Israelites became the first people to genitally alter infants.²⁶⁰

According to the Hebrew Bible, Abraham was the first Israelite to be circumcised; he performed the operation on himself, in response to God's command, at age 99. He then circumcised his son Ishmael and all the males of his household. The Biblical injunction 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 shall be circumcised among you, every male throughout the generations." (Genesis 17:11-12)

Mandela has a powerful description of this event in his autobiography. See NELSON MANDELA, *LONG WALK TO FREEDOM* 30-34 (1994). Why is there no outcry over this? Is it because male genital alteration, at whatever age and in whatever culture, is too close to the prevailing American norms to be attacked, for fear of bringing our own practices under scrutiny?

Often, male or female circumcision is performed without anaesthesia in a barbaric manner, by persons without any medical training, such as barbers or midwives, using rudimentary instruments, causing complications which sometimes lead to death. We have many tragic testimonies on female circumcision but none on male circumcision as obviously nobody is interested in the latter topic. Still today, I can recall my youth and hear the screams coming from my young Muslim neighbours while they were being circumcised.

Abu-Sahlieh, *supra* note 211, at 578 (describing the practice of male and female circumcision worldwide).

²⁵⁸ See GOLLAHER, *supra* note 7, at 1.

²⁵⁹ Rabbi Norman Mirsky, *Freud, Circumcision and Berit Mila*, BERIT MILA NEWSL. (National Org. of Am. Mohalim/ot), Dec. 9, 1992 (visited Feb. 16, 2001) <www.rj.org/beritmila/bmnews5.html>

²⁶⁰ See Howard Eilberg-Schwartz, *Why Not the Earlobe?* MOMENT, Feb. 1992, at 32.

When Isaac, Abraham's second son, was born the following year, he was circumcised on the eighth day. Eilberg-Schwartz points out that the circumcision of Abraham and his descendants solved a double problem: that of creating and maintaining the genealogy of Abraham. As the progenitor of "a new lineage," Abraham had to be marked off in some special way, and he also had to be connected to all his descendants. Circumcision answered both needs.²⁶¹

Like all important religious rituals this one has many layers, even in its Biblical depictions. For Ishmael (Abraham's son by his servant Hagar) genital alteration has to do with fertility, but not with the covenant between God and his chosen people. When Isaac (Abraham's son by his wife Sarah) is circumcised, fertility becomes a means to fulfilling the covenant and God's promise to give Abraham an infinitude of descendants; the covenantal theme is dominant, as it is for Jews today.²⁶² Joel Roth explains:

Parents bringing their son into the covenant inevitably feel the weight of history on their shoulders. They know that circumcision has been the sign of the covenant—a mark of Jewish uniqueness—throughout our history. Tyrants from many times and places have attempted to stamp out Jewish observance of his ritual. The Talmud speaks of the suffering Jews endured to observe the *mitzvah* [obligation] of circumcision . . . the continued observance of . . . circumcision was one of the four things that guaranteed our redemption from slavery in Egypt.²⁶³

Jewish writers emphasize that the religious obligation is not fulfilled simply by performing the genital surgery.

²⁶¹ See *id.* at 35.

²⁶² See Roth, *supra* note 146, at 42.

²⁶³ *Id.* at 42-43. It is important to note that, while circumcision is the *sign* of belonging to the covenant, it does not confer Jewishness on a boy. Even males who are not circumcised are considered Jewish, if their mothers are Jewish (or if either parents is Jewish, in the Reform tradition). Circumcision, however, is the obligation of a Jewish father, and he is in derogation of his religious duties to God, the community, and to his son, if he fails to have it done. Failing that, other members of the community, or the young man himself when he is old enough, is obligated to arrange for the circumcision. See also *Circumcision*, *ENCYCLOPEDIA JUDAICA* 567-77 (1972) (discussing history and traditional background of circumcision).

If the event is merely an operation, the religious dimension of the ceremony is lost. The blessings, the correct procedure, the appropriate mindset and the legally mandated day of performance change a purely physical operation into a religious ceremony. The mere removal of the foreskin is not the link between the generations, but the ceremony of *berit milah* is.²⁶⁴

In fact, a Jewish male is not considered properly circumcised if the operation was originally performed in a secular manner; a ritual drawing of a drop of blood will have to be performed later for the circumcision to be considered covenantal.²⁶⁵

A ritual MGA, or *berit milah* (sometimes called a *bris*), has two components: the cutting and the naming of the baby. The cutting is performed by a *mohel*, who is not necessarily a rabbi and who may or may not be a physician.²⁶⁶ Even among traditional Jews, there are variations in how the ceremony is performed. What follows is a description of the core ritual, to which most Jews having a ritual circumcision would adhere.

The *berit milah* is a social occasion; friends and relatives of the family are invited and food is prepared. On the eighth day of the baby's life,²⁶⁷ the *mohel* comes to the home. The ceremony begins with the lighting of a candle by a friend or family member. One or two people (usually not the mother, who traditionally remains in another room) then bring the baby to the "throne of Elijah," a special chair set aside for the *sandek*, a male (often the baby's grandfather) who will hold the baby during the cutting. Elijah, the Angel of the Covenant, is thought to attend every *bris* to ensure the child's well-being and to serve as God's witness that the Jewish people are faithfully fulfilling this obligation.²⁶⁸ Another explanation is that, as Jews believe that the Messiah is not yet come, Elijah, whose job it is to announce the

²⁶⁴ Roth, *supra* note 146, at 43; see also ROMBERG, *supra* note 146, at 33 (describing the disassociation of circumcision from its religious origins).

²⁶⁵ See David A. Bolnick, *Parents' Guide to Bris Milah – Ceremony* (visited Feb. 20, 2001) http://www.brismilah.com/bris_3.htm.

²⁶⁶ See Fred Kogen, *The Berit Mila (Bris)* (visited Feb. 16, 2001) <www.briss.com/origins.html> (providing information on the ritual and non-ritual aspects of the Berit Mila).

²⁶⁷ If there is any reason why the baby cannot safely be cut on the eighth day, it is postponed until he is healthy and strong enough. Likewise, when there is suspicion that the baby may have a clotting disorder, circumcision is not done. See GOLLAHER, *supra* note 7, at 23 (referring to hemophilia).

²⁶⁸ See Bolnick, *supra* note 265.

Messiah's coming, attends every *bris* to make sure that he doesn't miss the event.²⁶⁹

The baby is restrained, and often given a cloth soaked in wine on which to suck.²⁷⁰ *Mohels* differ in their preferred technique, but a common way is to use a "mogen clamp," a sort of shield with a slit through which the foreskin is pulled. The shield protects the penis and scrotum while the foreskin is excised. The penis (which was bathed with an antiseptic solution before the procedure) is now bandaged; the baby is re-diapered and swaddled, and immediately allowed to nurse. Following the ritual cutting, the baby is given his Jewish name. Then the *mohel* or rabbi, if one is present, recites a blessing for the speedy recovery of the baby and the continuing recovery from childbirth of his mother. This is followed by a festive meal. Following the ceremony, the foreskin may be buried in the earth. In one custom, it is buried beneath a tree whose branches are later harvested to make the canopy for the child's wedding.²⁷¹ According to one *mohel*, the penis is "essentially healed" after a week.²⁷²

One rather controversial element of the traditional *bris* is the performance of *mezizah* ("suction") immediately after the cutting. Originally the *mohel* performed this orally, by sucking at the wound, alternately sucking out blood and turning to take mouthfuls of wine which he then spat on the wound. This was meant to be hygienic and antiseptic.²⁷³ A *mohel* who omitted this step was considered to be endangering the life of the child and was barred from practice.²⁷⁴ However, by the end of the 19th century the custom had died out in many communities, as it was feared that some babies had contracted disease from a *mohel* who had syphilis or tuberculosis.²⁷⁵ Some communities dispensed with *mezizah* altogether, while others mandated that it

²⁶⁹ See Kogen, *supra* note 266.

²⁷⁰ For a discussion of pain control during newborn male genital alteration, see *infra* pp. 506-11.

²⁷¹ See David Bolnick, *Parent's Guide to Bris Milah – Circumcision* (visited Feb. 20, 2001) <http://www.brismilah.com/bris_4.htm>.

²⁷² See *id.* (noting the swift recovery period).

²⁷³ See GOLLAHER, *supra* note 7, at 26, 29 (describing the process of *mezizah b'peh*).

²⁷⁴ See *Circumcision*, ENCYCLOPEDIA JUDAICA, *supra* note 263, at 572.

²⁷⁵ See GOLLAHER, *supra* note 7, at 29 (indicating that the practice gradually disappeared in urban areas and communities attuned to modern medicine).

be performed through a glass tube.²⁷⁶ In our current age of AIDS, with the risk of HIV transmission both to and from baby and *mohel*, *mezizah* has again been a subject for dispute. Orthodox Rabbi Moshe Tendler, a biologist and ethicist at New York's Yeshiva University, says that a *mohel* who practices (unmediated) *mezizah* now is "foolhardy." His colleague Rabbi David Bleich disagrees, saying the procedure is safe if the *mohel* first rinses his mouth with rum, wears gloves during the ritual cutting, and demands that mothers produce evidence of a negative HIV test before he agrees to perform the procedure.²⁷⁷

2. The Meanings of MGA

As we saw above, for most American parents the decision to alter their baby boys has nothing to do with religion. But even for American Jews the practice has many meanings, only some of them religious.

A common argument against FGA is that its purpose is to deprive women of their right to sexual enjoyment. It turns out that an anti-erotic agenda has also played a role in MGA. In the secular arena, genital alteration has often been recommended as a "cure" or preventive measure against masturbation. In 19th century America, the crusade against masturbation was very like our current "war against drugs."²⁷⁸ One stimulus was the discomfort that an increasingly puritan population felt at any evidence of young children's sexuality. For another, based on the observation that inmates of asylums tended to masturbate, physicians jumped to the conclusion that the practice caused lunacy (not to mention tuberculosis, epilepsy, and other diseases that had physicians stumped). A popular baby book of 1896 advised mothers to have their sons genitally altered to prevent "the vile habit" of masturbation. Interestingly, leading Jewish physicians, perhaps discerning an opportunity to present their distinct religious practice as being in the forefront of the fight for healthy American virtues, claimed that masturbation and bed-wetting were relatively rare among Jews, and attributed this

²⁷⁶ See *Circumcision*, ENCYCLOPEDIA JUDAICA, *supra* note 263, at 572.

²⁷⁷ See GOLLAHER, *supra* note 7, at 29-30 (presenting Bleich's position that the practice does not need to be reformed).

²⁷⁸ See, e.g., *id.* at 103 (describing propositions set by Athol Johnson and John Harvey Kellogg that circumcisions be performed without the administration of anesthesia in order to correlate the consequent pain of the procedure with an undesirable habit).

good fortune to the practice of circumcision. M.J. Moses, head of the New York State Medical Society and President of the Association of American Physicians, wrote:

I refer to masturbation as one of the effects of a long prepuce; not that this vice is entirely absent in those who have undergone circumcision, though I never saw an instance in a Jewish child of very tender years, except as the result of association with children whose covered glans have naturally impelled them to the habit.²⁷⁹

Some physicians advocated that genital alteration be deliberately accomplished in a painful manner. John Harvey Kellogg, the physician best known for "his obsession with dietary fiber and bowel disorders," advised performing circumcision on small boys without anesthetic, "as the pain attending the operation will have a salutary effect upon the mind, especially if connected with the idea of punishment."²⁸⁰

In Judaism as well, there has historically been an anti-erotic element in explanations for MGA. Judaism is usually thought of as an anti-ascetic religion that encourages robust enjoyment, within limits, of food, marital sex and other this-worldly pleasures. Like many stereotypes, this is largely correct but is also too simple. Eilberg-Schwartz writes that post-biblical rabbinic attitudes²⁸¹ toward sexuality are best described as "ambivalent," and "more radically negative than has generally been supposed." Even within marriage, sex is seen as a problem rather than an unalloyed good. Eilberg-Schwartz enlists the work of Steven Fraade to argue that there is a "persistent ascetic strain" in rabbinic Judaism, and that temporary sexual abstinence was "a significant element in the tradition."²⁸²

The first century Jewish philosopher Philo explained circumcision by claiming that it "represents the excision of the

²⁷⁹ *Id.* at 102 (citation omitted).

²⁸⁰ *Id.* at 103 (citation omitted).

²⁸¹ For a discussion of the meaning and history of rabbinic Judaism, see *Rabbinic Judaism* (2nd to 18th centuries) <<http://www.britannica.com>>.

²⁸² See Howard Eilberg-Schwartz, Response, *Damned If You Do and Damned If You Don't: Rabbinic Ambivalence Towards Sex and Body*, in FROM INTERCOURSE TO DISCOURSE: CONTROL OF SEXUALITY IN RABBINIC LITERATURE 38 (Center for Hermeneutical Studies, Protocol of the Sixty-Second Colloquy, Christopher Ocker, ed., 1990).

pleasure of sex, which bewitches the mind.”²⁸³ Moses Maimonides, the revered twelfth century physician, rabbi and scholar, wrote that the point of circumcision was “to weaken the organ of generation as far as possible, and thus cause man to be moderate Circumcision weakens the power of sexual excitement, and sometimes lessens the natural enjoyment.”²⁸⁴ As we saw above, women were often supposed to prefer uncircumcised men and to importune them for sex. In contrast, circumcised men and their partners were believed to enjoy sex less and spend less time engaged in it. This had the benefit of freeing the men’s minds and energies for the study of Torah. As Isaac ben Yediah, a French follower of Maimonides, explained, the husband “will not empty his brain because of his wife [and] his heart will be strong to seek out God.”²⁸⁵ Maimonides also emphasized that experiencing the pain of circumcision was important to put sex into its proper place, to diminish “the violent . . . lust that goes beyond what is needed.”²⁸⁶ The conservative Jewish magazine *Commentary*, in a 2000 article entitled “The New Enemies of Circumcision,” reflects some of this anti-erotic flavor when it comments

[Rabbinic] theology . . . in general sees human beings as born with a powerful appetite for evil, one that must be restrained, retrained, and redirected by a challenging and unending process of subordination to God’s covenantal will. It is therefore, by definition, diametrically opposed to the Romantic affirmation of natural man and his raw instincts, and to that liberal psychology in which personal choice is sacrosanct, “experience” is the goal, and the traditional virtues of sacrifice, disciplines, and obedience are slighted or rejected.²⁸⁷

Another factor in MGA, both in ancient times and today, is the promotion of group cohesion and Jewish survival. The same article in *Commentary* notes that even for the many Jews who

²⁸³ GOLDMAN, *supra* note 2, at 34 (citation omitted) (discussing the impact of circumcision on a man’s sexual activity).

²⁸⁴ *Id.* at 34-35 (citation omitted).

²⁸⁵ GOLLAHER, *supra* note 7, at 22 (citation omitted); *see also* Herzbrun, *supra* note 183, at 4.

²⁸⁶ Herzbrun, *supra* note 183, at 4 (quoting the RaMBaM).

²⁸⁷ Jon D. Levenson, *The New Enemies of Circumcision*, 109 COMMENTARY 29, 36 (2000).

no longer follow other religious practices, some form of ritual circumcision endures.²⁸⁸ (In fact, the *Commentary* author may be less than accurate here; what endures among many American Jews is simply the surgical operation, not the ceremonial *bris*.²⁸⁹) Goldman thinks that a high percentage of Jews genitally alter their sons not for religious reasons, but in response to societal, familial and community pressures.²⁹⁰ Although these may not be the most ideal reasons, they still bespeak the way in which the ritual remains an important element of the communal “glue” that holds Jewish culture together, especially in tolerant America, where assimilation is feared more than anti-Semitism. Pollack speaks of the way in which circumcision, originally an issue of tribal survival, became “laminated to our Jewish identities,” so that now, to argue against it is seen as anti-Semitic and an assault on Jewish identity. Pollack continues, “challenging circumcision can be an attack on Jewish identity only if Jewish women don’t count, for Jewish women have survived and kept their identities intact for millennia without any need of altering their bodies.”²⁹¹

Some Jewish leaders see the birth of a Jewish male as an opportunity to persuade the Jewish couple to intensify their ties to the Jewish community. At present, only one-third of American Jewish households are affiliated with a synagogue, a trend that is considered “alarming.” One Reform Jewish commentator begins with the statement that the decision to have a *berit milah* is “a decision with regard to Jewish identity,” and then lays out a number of strategies in which the ceremony can be the hook that brings the young couple into the community.²⁹²

For many unaffiliated or secular Jews, the decision to genitally alter their newborn sons (whether through *berit milah* or through the surgical operation alone) is done with so little

²⁸⁸ See *id.* at 32 (noting the ongoing value placed on male circumcision).

²⁸⁹ See LAWRENCE A. HOFFMAN, COVENANT OF BLOOD: CIRCUMCISION AND GENDER IN RABBINIC JUDAISM 211 (1996).

²⁹⁰ See Joel Silverman, *Circumcision: The Delicate Dilemma*, B’NAI B’RITH INT’L JEWISH MONTHLY, Nov. 1991, at 32 (discussing religious and non-religious reasons for Jewish parents’ decision to circumcise their sons).

²⁹¹ Pollock, *supra* note 147, at 181 (discussing the religious significance of Jewish circumcision).

²⁹² Leon Morris, *Bridging Identity and Community: Berit Mila and the Unaffiliated*, BERIT MILA NEWSL. (National Org. Am. Mohalim/ot), June 20, 1995, <<http://www.rj.org/beritmila/bmnews7.html>> (describing the holding of the Berit Mila ceremony in the synagogue).

thought about the religious aspects of the practice that it would seem rather a stretch to label their motivations as substantially religious. A common story is one told by this woman, who later converted to Judaism and became a *mohel*:

I have two daughters so I never had to confront the issue of Berit Mila. But I do recall asking my husband, Phil, when I was pregnant, if he would want the child to be circumcised if it were a boy. His reply was an emphatic "of course!" Had I had a boy, and he had requested a Berit Mila ceremony, I am sure I would have replied with an equally emphatic "of course!" If one of you had then asked me if we were going to raise the child as a Jew, I would not really have known how to answer. Phil and I both had a lot of disenchantment with organized religion, but I don't believe we ever really had a discussion about the religious upbringing of our children.²⁹³

A common reason given by Jews and non-Jews alike as to why they want their sons altered is so that they will look like their fathers.²⁹⁴ In fact, among all but the most traditional Jews, it is fair to say that their reasons for performing MGA are made up of religious elements, medical beliefs, familial and communal motivations, all mixed in with the prevailing acceptance of newborn MGA in the American culture. As long as the surrounding culture and the medical establishment accepted routine MGA without controversy, there was little reason for Jewish parents to question their decision to have their newborn sons altered. (At most, they might feel some conflict over using a physician in a secular operation, a traditional *mohel* in a traditional ceremony, or a physician-*mohel*.) Now, however, controversy within the Jewish community is on the rise.

An earlier debate about ritual circumcision occurred in 19th century Europe, among liberal Jews. In Frankfurt, in 1843, a society of Jewish laymen issued a manifesto that attacked the authority of the Talmud and a number of traditional practices, including *berit milah*. Although the rabbis angrily responded, some of them were actually less than enthusiastic about the

²⁹³ Marjorie Cramer, *Berit Mila and Boundry [sic] Issues*, BERIT MILA NEWSL. (National Org. of Am. Mohalim/ot), June 20, 1995, <<http://www.rj.org/beritmila/bmnews7.html>>.

²⁹⁴ See GOLDMAN, *supra* note 2, at 11.

practice themselves. The great Reform Jewish scholar Abraham Geiger said, “[i]t remains a barbarous bloody act . . . Its only supports are habit and fear.”²⁹⁵ Rabbi Samuel Holdheim called it “the expression of an outlived idea.”²⁹⁶ The topic was the subject of intense debate for some years, but eventually the rabbis reaffirmed the importance of the practice and the reformers gave up.²⁹⁷ A similar controversy arose in the United States in 1885, at a rabbinical conference to set forth principles of Reform Judaism, with a similar result.²⁹⁸

3. Current Controversies Over Ritual MGA

Controversy within the Jewish community today appears to fall into two categories: the perceived sexism of the practice and the pain and possible harm to the child. Secular, Reform, and Conservative Jews, who practice different levels of religious observance, may question why they adhere to this practice when they have dropped so many others.

a) Harm and Pain to the Child

Because most newborn genital alteration is done without adequate pain control, parents (many of whom have probably been guests at previous ritual circumcisions) react against the idea of voluntarily subjecting their child to a painful experience in his first days of life. One Jewish mother, married to a Jewish man, both members of a Conservative synagogue, explained why she declined to have her son circumcised: “My friends who are critical are the same ones who eat ham-and-cheese sandwiches. Our decision came out of Jewish ethics, out of the concern for someone’s well-being, namely our son.”²⁹⁹ Another mother writes:

Consider...what happens before a circumcision can even be performed: the infant penis is usually rubbed with an antiseptic. Trustingly his little body responds to

²⁹⁵ GOLLAHER, *supra* note 7, at 28.

²⁹⁶ GOLDMAN, *supra* note 2, at 13 (citation omitted) (discussing early opposition to Jewish circumcision).

²⁹⁷ See GOLLAHER, *supra* note 7, at 28 (stating the debate was considered too divisive and that the practice was integral to the Jewish culture).

²⁹⁸ See Levenson, *supra* note 287, at 32-33 (discussing an early attack on the Jewish practice of male circumcision).

²⁹⁹ Silverman, *supra* note 290, at 31.

his first overtly sexual experience. Next, the most sensitive part of his fully receptive body is cut, crushed and ripped or scraped away from the head of his penis.³⁰⁰

Lisa Braver Moss, who contends that an “honest reappraisal” of *berit milah* will help modern Judaism to “flourish,” writes about the lack of systematic data on death or complications from traditional MGAs performed by *mohels*, and argues that, even if death and complications are as rare as *mohels* contend, Jewish values require that even the most rare possibility be taken with tremendous seriousness. In Jewish law, the rule is that danger to life takes precedence over all other considerations and therefore that hazardous medical procedures are strictly forbidden.³⁰¹

Other writers are especially disturbed by the vulnerability of the newborn infant. Maimonides explained that one reason why ritual circumcision is performed on newborns is that parents have not yet fully bonded to them, and can therefore subject them to a procedure they would be unable to perpetrate on older children.³⁰² Herbert Goldstein comments that this goes against the important Jewish commandment to “love the stranger.” The reason for that precept is to guard against the common situation where a people who have been oppressed turn the tables on others once they have acquired the power to do so. Goldstein asks, “[i]f we might be unable to subject an older child to Brit Milah, is it Jewishly ethical to subject our infants to it?”³⁰³

b) Sexism

Miriam Pollack contends that “[c]ircumcision is at the heart of gender imbalance in Judaism.”³⁰⁴ There are a number of ways in which the traditional Jewish practice of MGA is seen as sexist. The most obvious argument is that *berit mila* is a “sign” of

³⁰⁰ Pollock, *supra* note 147, at 176 (explaining that circumcision is a traumatic betrayal).

³⁰¹ See Lisa Braver Moss, *Circumcision: A Jewish Inquiry*, MIDSTREAM: MONTHLY JEWISH REV., Jan. 1992, at 20, 20; see also Pollock, *supra* note 147, at 183 (explaining the Jewish principle of *pikuah nefesh*).

³⁰² See Moss, *supra* note 301, at 22.

³⁰³ HERBERT S. GOLDSTEIN, BETWEEN THE LINES OF THE BIBLE 265 (New York, Crown Publishers, Inc., 1959), quoted in Moss, *supra* note 301, at 22.

³⁰⁴ Pollack, *supra* note 147, at 171 (explaining the sometimes dichotomous reactions of Jewish mothers and Jewish fathers to circumcision).

the covenant with God, “a critical mark of identity,”³⁰⁵ a rite of passage, which is available only to boys. Among many Jews there is even the misconception that *berit mila* is the gateway through which Jews enter the covenant, so that somehow females are seen as “less Jewish” than males.³⁰⁶ The lack of similar ceremonies for girls or women “suggests that women only have access to the covenant through men; they are not covenantal Jews in their own right.”³⁰⁷ Eilberg-Schwartz notes that because only men can “commemorate the promise of God to Abraham,” circumcision “concretizes a latent association in the Hebrew language between masculinity and commemoration.” Eilberg-Schwartz pursues the connection between the symbolism of circumcision and the symbolism of blood. He sees circumcision as a post-partum ritual which highlights the separation of a male child from his mother. The mother’s blood—female and impure—is contrasted with the newborn’s male blood, “clean, unifying and symbolic of God’s covenant.” “Although circumcision is not a rite of passage into manhood, it is a rite that marks the passage from the impurity of being born of women to the purity of life in a community of men.”³⁰⁸

Traditional Jewish circumcision, as described above, is an important occasion which brings together the baby’s extended family and members of the community in a joyous celebration of a boy’s birth. Although there has been much activity lately in creating parallel ceremonies for the birth of a girl (*berit banot*), they are rarely given equal importance. Family who will travel long distances for a boy’s *berit mila* but are less likely to invest resources in a ceremony for a newborn girl.³⁰⁹ The inevitable

³⁰⁵ *Id.* (explaining the deep meaning of circumcision for Jewish males).

³⁰⁶ See Marjorie Cramer, *How Do We Deal With a Quintessentially Sexist Ritual?* BERIT MILA NEWSL. (National Org. Am. Mohalim/ot), Dec. 9, 1992 (available at <<http://www.rj.org/beritmila/bmnews7.html>>) (discussing that *berit banot* services for females should not be abandoned, but should be practiced “so that the baby girl can be placed in the context of Jewish women’s ritual”).

³⁰⁷ David Biale, *Rites and Wrongs*, 11 *TIKKUN* 72, 73 (1996) (reviewing LAWRENCE A. HOFFMAN, *COVENANT OF BLOOD: CIRCUMCISION AND GENDER IN RABBINIC JUDAISM* (1996)).

³⁰⁸ Eilberg-Schwartz, *supra* note 260, at 28, 31, 32.

³⁰⁹ See Cramer, *supra* note 306. I know one American couple with in-laws in Israel, who contemplated using amniocentesis to discover the sex of their fetus, so that the in-laws could make travel plans in advance.

result is that the birth of a boy is “a much bigger deal,” and girls may seem less valuable, their births more mundane.³¹⁰

Pollack offers a fascinating discussion about the sexism inherent in *berit mila*, focusing on the way in which the new mother is toppled from her rightful role as protector and nurturer of the baby, and her biological instincts and “mother-wisdom” ignored.³¹¹ Pollack’s most powerful passages concern the role of the *akedah*, the “sacrifice of Isaac,” which occurs in Genesis 22-23. Abraham is called by God to sacrifice Isaac, his “only” son, as a “burnt offering.” Abraham takes the boy to the mountain God designates, along with wood, fire, and a knife. He builds an altar and lays the boy on it, bound and tied, on top of the wood. Just as Abraham picks up the knife to kill his son, God’s voice is heard directing Abraham to “stay his hand.” This has been a test, and now that God knows that Abraham “fears” him, God provides a ram as a substitute sacrifice for Isaac.

The narrative is usually interpreted as a story about the testing of Abraham’s faith. But Pollack points out a different perspective. Sarah, she says, Isaac’s mother, is the one “who is destroyed, body and soul.” Sarah, who is ignored throughout the entire episode, is mentioned again in the beginning of the next chapter only so that the reader can learn of her death. (Actually, it is Sarah for whom Isaac is an only child; Abraham has another son, Ishmael, with Hagar.) Pollack writes that Sarah’s motherhood is “denied by God and ignored by Abraham, as he prepares to take her only child to sacrifice for this higher cause.”³¹²

Sarah’s authority as a mother and her position as the grand matriarch of her people is completely undermined by this God’s demand and Abraham’s compliance. She is utterly disempowered by this cataclysmic event. In this context her death makes sense. It is the defeat of the matriarch, the subordination of the mother that had to precede the new covenant. Abraham passed

³¹⁰ On the other hand, many parents, fathers and mothers alike, express their relief when the baby is a girl, so that they do not have to experience the emotional trauma of MGA. See, e.g., GOLDMAN, *supra* note 2, at 47; Pollack, *supra* note 147, at 171; Rabbi Sheldon Marder, *Flexibility, Rigidity, and Ethical Issues in Berit Mila*, (Dec. 9, 1992) <<http://www.rj.org/beritmila/bmnews.html>> (discussing a berit from a Rabbi’s perspective).

³¹¹ Pollack, *supra* note 147, at 171 (discussing maternalism and conflicts inherent in a mother opposing her male child’s circumcision).

³¹² *Id.* at 179 (explaining the Biblical story of Abraham and Sarah).

the test. He not only was willing to obey his God's command to attempt to sacrifice his most beloved son, but he also succeeded in subverting the mother's authority over her child. He is now worthy to become the primary progenitor of a new nation. . . . [T]his story . . . is not only about faith. It is also, and most profoundly, about the shift of power and authority from women to men, about male domination which is always undergirded by the threat or implied threat of violence. The *akedah* is the definitive narrative of this paradigm shift.³¹³

4. Alternative Rituals

As a parallel to discussion of alternative rituals to FGA above, it is worth taking a quick look at alternatives to MGA in the Jewish context. First, as noted above, it is now quite common to perform some sort of "naming ceremony" for newborn girls; this ritual seeks to elevate the birth of a girl to the same importance that the *berit mila* celebration gives to the birth of a boy.³¹⁴

With regard to the boys' ritual, a small number of Jews who are actively religious but who refuse to have their newborns altered have come up with some version of an alternative that celebrates the birth while omitting the procedure. In some versions, something other than the child's body is cut, to symbolize the traditional circumcision.³¹⁵ This alternative service, sometimes called a "Bris Shalom," has the advantage of being appropriate for both boy and girls babies, thus redressing a gender inequity that could otherwise only be addressed by cutting some part of the girl's body, "an idea that is repugnant and rejected by virtually all Jews."³¹⁶ A few rabbis will preside over a naming ceremony for a boy that proceeds without genital cutting, and will later allow that boy to have a *bar mitzva* ceremony.³¹⁷ Another alternative ceremony that works for both girls

³¹³ *Id.* at 179-80.

³¹⁴ There has also been the rare suggestion that a ritual for newborn girls also include a physical manifestation, but that seems to have fallen on deaf ears. See Cramer, *supra* note 306.

³¹⁵ See GOLDMAN, *supra* note 2, at 95 (discussing alternative rituals to circumcision).

³¹⁶ *Id.* at 96; see also *id.* at app. G, 95-108 (providing examples of alternative ceremonies to circumcision).

³¹⁷ See Silverman, *supra* note 290, at 32 (noting reformed rabbis' ideas on circumcision).

and boys is *brit rekhitza* or “covenant of washing,” which harks back to Abraham’s washing the feet of strangers. “This ceremony is a lovely way to welcome a baby boy into the covenant while acknowledging that as a ‘stranger’ he is entitled to gentle treatment.”³¹⁸

Although it will be interesting to see whether these alternative ceremonies grow in years to come, it is certainly true that, for the foreseeable future, MGA will be practiced by most American Jews, whether or not they are in the minority who practice a ritually correct version of the rite, or settle for a surgical operation outside of a ritual context. For those who are concerned about the pain and trauma to male infants, therefore, it appears that the best strategy is to concentrate on advocating for adequate pain control.

C. Summary

Before proceeding to the legal discussion in Part V it will be helpful to pause and make some comparisons between MGA and FGA. Because the focus of this article is on United States laws, I will compare the (illegal) practice of FGA on minors in the U.S., with MGA in the U.S.

FGA does not bring any health benefits. In the third world countries where most FGA takes place, it is associated with horrendous risk of death and serious complications, even into maturity. It is usually performed without pain control, and young girls are often emotionally traumatized. When FGA is performed in the West, its illicit and “back room” nature makes it reasonable to assume that the risks remain very high. With the exception of the small nick proposed in Seattle, all forms of FGA remove substantial parts of a woman’s sexual organs. The effect on the subjects’ sexuality, while not adequately studied, is clearly negative. The procedure can be understood as gender subjugation, as a rite of passage to maturity and membership in the group, or as a sign of female independence and self-respect, as some practitioners and supporters insist. The reasons why parents subject their daughters to FGA include a mix of religion, custom, group cohesion, concern for cultural survival, family pressure, a misunderstanding of medical benefits, and economic concerns.

³¹⁸ Moss, *supra* note 301, at 23.

MGA's health benefits are controversial and attenuated. No major medical group currently supports the practice of MGA. Despite clear calls for pain control from, e.g., the AAP, fewer than half of baby boys receive adequate analgesia. The risks of death and serious complications appear quite small, although better data is needed. Although MGA removes less tissue than most forms of FGA, some scientists argue that the foreskin is a substantial factor in sexual feeling and behavior. MGA removes significantly more tissue than the "nick" proposed in Seattle. The effect on the subjects' sexuality has not been adequately studied, but there is some evidence to suggest that it is negative. For Americans who are neither Jews nor Muslims, the procedure is purely a matter of aesthetics and custom, or some generally misunderstood view of the supposed health benefits. For religious Jews it is an obligation of the highest order, but the majority of American Jews do not have their sons' genital alteration performed in a ritually correct manner. The procedure can be understood as deeply sexist, as a celebration of group identity and cultural survival, as anti-erotic, and as a rite of passage. The reasons why parents subject their sons to MGA include religion, custom, group cohesion, family pressure, a misunderstanding of medical benefits, and economic motivations from those who perform circumcisions.³¹⁹

Our revulsion toward cutting the genitals of girls should give us pause . . . for the themes the Western world abhors—removing part of the genitals to reduce sexual pleasure, carving children's bodies to conform to certain social ideals, visiting pain on helpless children—are all fully present in the history of male circumcision.³²⁰

V. FIRST AMENDMENT ISSUES

At the present time, MGA is no longer considered routine, has no strong medical benefit, and is a decision made by parents largely on religious and cultural grounds. MGA is legal in this country, with no oversight, whether it is practiced by physicians

³¹⁹ See Jimmy Fowler, *Prime Cut*, DALLAS OBSERVER, Nov. 5, 1998 (available at <<http://www.dallasobserver.com/issues/1998-1105/feature.html/page1.html>>) (discussing future ramifications of circumcision along with rationales behind the procedure).

³²⁰ GOLLAHER, *supra* note 7, at 205.

or by traditional *mohels*. FGA, on the other hand, a decision also made by parents on religious and cultural grounds, is illegal even if its actual expression is a ritual nick of less physical import and carrying less risk than the traditional male procedure. What this boils down to is, if you are an American Jew, you can have your baby boy genitally altered with impunity, even if it is done outside a hospital by an unlicensed ritual practitioner, and without the analgesia deemed "essential" by the AAP. But if you are recent immigrant from Somalia, even if you would take the enlightened route and subject your daughter to a ritual nick at the Seattle clinic, you (and the doctor) would be subject to criminal prosecution. This is unacceptable on First Amendment grounds.

The "religion clauses" of the First Amendment of the U.S. Constitution read: *Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.* It is primarily the "free exercise" clause that relates to the issue before us.

Criminalizing FGA clearly limits the ability of some parents to put their religious beliefs into practice. Of course, that is not necessarily a winning argument. There are many religious practices that are appropriately made illegal, because they present some danger to a state interest. We do not countenance human sacrifice, even for religious reasons, nor do we allow parents to refuse lifesaving therapies for their children on religious grounds.³²¹

Until 1990, the U.S. Supreme Court employed a "balancing" test when a state interest conflicted with a religious practice. The Court inquired whether the law that burdened the free exercise of religion was necessary to meet some compelling state interest.³²² If the law could not meet that test, it was struck down. However, in 1990, in a case involving a Native American who lost his job due to ritual use of peyote, the Court took a much less generous view of the Free Exercise Clause. After *Employment Division v. Smith*, the government no longer has to

³²¹ See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³²² See *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the eligibility provisions of the South Carolina Unemployment Compensation Act may not be applied to force a person to work on their religious Sabbath); see also *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (stating that compelling state interest of a child finishing high school did not outweigh the parents' First and Fourteenth Amendment rights to withdraw their children after eighth grade).

prove that its law is narrowly tailored to meet some compelling state interest. It need only show that the law is “neutral” and “generally applicable.”³²³ In other words, as long as the law was not written in order to target a specific religious practice,³²⁴ it does not matter if it happens to burden that practice, even if the state’s interest is not compelling, and even if the law could have been written in a less onerous way. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the law forbidding ritual sacrifice of animals was struck down because it criminalized only animal sacrifice associated with the Santeria religion; kosher (Jewish) butchering and non-religious killing of animals for food or sport were not criminalized. Therefore the law violated “the principle of general applicability.”³²⁵

In the case of FGA, the law forbidding any non-medical surgery on the genitals of a female minor is constitutionally flawed because it does not forbid parallel non-medical surgery on the genitals of a male minor. Other writers have focused on the equal protection problem here, as the law appears to protect little girls but not little boys.³²⁶ In this article, I focus on the “free exercise” problem. It is obvious that the writers of the federal and state laws criminalizing FGA had religion very much in mind, as they made clear that “any belief that the operation is required as a matter of custom, ritual, or standard of practice may not be taken into consideration.”³²⁷

In this case, we may imagine male and female genital alterations as two circles with some degree of overlap. Although there are many important differences between the two practices, there is clearly an area where the risks of harm to the child are substantially the same. Indeed, if we compare the Seattle proposal to the unregulated practice of traditional *berit mila*, it ap-

³²³ *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

³²⁴ See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (finding city ordinance unconstitutional because it violated the First Amendment right of freedom of religion by prohibiting animal sacrifices).

³²⁵ *Id.* at 524 (applying constitutional principles to city ordinance prohibiting ritual animal sacrifice).

³²⁶ This article will not deal with the equal protection issues raised by laws that protect female minors from genital alteration but not male minors. For a discussion of that issue, see, for example, Shea Lita Bond, Comment, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment?*, 32 J. MARSHALL L. REV. 353 (1999).

³²⁷ N.D. CENT. CODE § 12.1-36-01(2) (1997). The avoidance of the term “religion” and the use of the terms “ritual” and “custom” reflect the rhetorical stance taken by most persons in favor of this law, that FGA is not a religious practice.

pears that the latter involves more skin removed, with less likelihood of adequate pain control and no systematic reporting system for complications. The Seattle proposal was “less injurious to the health, welfare and safety of girls than male circumcision is to the health, welfare and safety of boys.”³²⁸ The primary difference between the operation proposed in Seattle (as well as some extremely minor forms of FGA already in practice) and the one performed daily on newborn males in America, is that the first is associated with “bizarre” practices brought to America by strange people practicing strange customs, while the other is a Western practice with which we are comfortable and familiar. (To be fair, another important difference is that the circle comprising all of FGA includes much more horrible practices, both quantitatively and qualitatively. I will address that issue below.)

If then, we “match up” a deeply religious Muslim couple who wish to have their daughter altered and who believe it is a religious obligation, and who are willing to accept the Seattle compromise, with a deeply religious Jewish couple who wish to have their son altered because they believe it is a religious obligation, it is hard to justify why the first couple’s wish is illegal and the second’s is not. If we imagine that the Muslim girl’s experience will be a tiny nick with proper pain control in a hospital context, while the Jewish boy’s experience will be a somewhat larger operation by a nonmedical practitioner without adequate pain control, the justification becomes even more difficult. We could also imagine a second set of “matched” couples. In this case, we could have a Jewish couple who are planning a surgical operation, without the attendant ritual, by a physician who is not a *mohel*. Nonetheless, if questioned about their decision they insist that it is part of being Jewish, and that leaving their boy unaltered is unthinkable; they don’t know if they will ever join a synagogue, educate the boy religiously, or have him *bar mitvah*, but they do know that leaving him uncut will make him look odd to his Jewish friends, may have a negative effect on his ability to marry a Jewish girl, and will bring down the wrath of their parents. Match that couple with a couple from sub-Saharan Africa who are vague about their religious beliefs but have a general feeling that to leave their little daughter uncut is somehow non-Islamic; further, they have

³²⁸ Coleman, *supra* note 77, at 761.

good reason to fear that their daughter, if left uncircumcised, will be laughed at, perhaps ostracized, and have a very difficult time marrying within their culture. Again, what is the justification for respecting the first couple's mix of beliefs and custom, but not the second?

In *Lukumi Babulu Aye*, the Court said that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." To survive that scrutiny, the law must be "narrowly tailored" in pursuit of state interests "of the highest order."³²⁹ What state interests can be identified which meet that criterion?

The best argument in defense of the constitutionality of laws criminalizing FGA is that allowing even the benign Seattle compromise will handicap health and government workers in stamping out the more horrible forms of this practice. Because FGA in its most common forms around the world is mutilating and life-threatening, it is reasonable to adopt a "zero tolerance policy" to make it absolutely clear to immigrants that this practice is never acceptable. When the debate became public in Seattle, a number of activists, including those from cultures where FGA is the rule, protested that offering *any* form of FGA would seriously dilute their efforts to educate immigrant parents. Further, an argument could be made that, once a "nick" is allowed, it would be difficult if not impossible for the state to make sure that this did not become a loophole through which the worst elements of FGA would slide.³³⁰ As MGA is not anywhere close to as mutilating and threatening to life and health as are many forms of FGA, this argument would serve as a constitutionally valid distinction between the two practices.

On the other hand, our First Amendment jurisprudence tells us that the law must be narrowly tailored to meet the state interest, or be "the least restrictive means."³³¹ With respect to FGA, other possibilities exist. The law could require that FGA only be

³²⁹ *Church of Lukumi Babalu Aye*, 508 U.S. at 546 (explaining the rigorous scrutiny required of laws constraining religious freedom).

³³⁰ Justice O'Connor makes this argument with respect to Oregon's law criminalizing even the religious use of peyote. "[I]n view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote." *Employment Div. v. Smith*, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring).

³³¹ *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

performed by physicians (or other licensed health care providers, such as nurse practitioners), or at least be performed under medical supervision. That would address the concern that traditional practitioners would use the loophole of a “nick” to perform larger surgeries and without proper precautions. True, this would still place upon FGA a burden that does not currently exist with respect to MGA, but given the real dangers associated with FGA, such a requirement might well pass muster as “the least restrictive means.”

A number of commentators have made the point that allowing something like the Seattle compromise will strengthen, not weaken, the ability of educators to persuade immigrants away from their traditional FGA practices. A willingness to compromise shows respect for the immigrants’ culture and religion and exhibits tolerance within the necessary limits of protecting children against abuse.³³² The fact that a significant number of Somali women were willing to take up Harborview Hospital’s offer suggests that the “ritual nick” could have become an important tool in educating the immigrant community and in giving parents an alternative to sending their girls back to Somalia or hiring a backstreet traditional practitioner.

Further, as long as the U.S. continues to countenance MGA, the criminalization of even the “ritual nick” cannot fail to dilute the persuasiveness of the official stance against FGA, while carrying the unmistakable taint of intolerance and double standards. Gollaher comments, “if male circumcision were confined to developing nations, it would by now have emerged as an international *cause célèbre*, stirring passionate opposition from feminists, physicians, politicians, and the global human rights community.”³³³ It is helpful to remember how the Seattle story began: with cognitive dissonance on both sides, as doctors routinely asked patients if they wanted their newborn boys circumcised, and patients (routinely!) answered that yes, they wanted both their boys *and* their girls circumcised. “Female circumcision will never stop as long as male circumcision is going on. How do you expect to convince an African father to leave his daughter uncircumcised as long as you let him do it to his son?”³³⁴

³³² See Coleman, *supra* note 77, at 773.

³³³ GOLLAHER, *supra* note 7, at xiv.

³³⁴ Abu-Sahlied, *supra* note 211, at 612 (citation omitted).

VI. CONCLUSION AND RECOMMENDATIONS

Doriane Lambelet Coleman asserts:

[A] state such as Washington has two options. It can begin performing symbolic female circumcisions, or it can stop circumcising or condoning the circumcision of boys. While the latter option would immediately raise substantial and very legitimate First Amendment concerns for parents whose religion requires circumcision—concerns that could be articulated just as easily by parents of boys and girls—it is clear that the choice must be made one way or the other. The bottom line is that the state cannot treat parents differently on the basis of their child's gender.³³⁵

Nor, I would add, can a state or the federal government treat parents differently on the basis of their differing religious beliefs.

Facing up to the religious discrimination inherent in the current legal state of affairs is a good beginning. Just acknowledging that the complex, fuzzy reasons why a secular Jew would alter her son are no more or less worthy of respect than the complex, fuzzy reasons why a Somali mother would alter her daughter, is an important first step. Beyond that, I make the following recommendations. These recommendations are a compromise that seeks to protect young girls and boys from traumatic genital alteration, while respecting the important motivations that underlie both FGA and MGA. Further, by closing somewhat the gap between the total legal condemnation of any form of FGA and the complete legal indifference to MGA, these recommendations will go some way toward showing respect for immigrants from cultures that practice FGA and removing the taint of religious intolerance.

(1) Federal and state laws should be rewritten to allow the sort of minor genital nick, with proper pain control and in hygienic circumstances, contemplated by Harborview General Hospital. (Of course, this would not *obligate* health care providers to offer that service.)

³³⁵ Coleman, *supra* note 77, at 766.

(2) States should exercise some control over the practice of MGA when performed without medical necessity on minors.

(a) States should gather data on all MGA, whether or not it is performed in the hospital, and whether or not the practitioner is a physician. All complications of MGA should be reported, to allow for a better understanding of the medical implications of this practice and also to allow oversight over nonmedical practitioners.

(b) Nonphysician ritual practitioners of MGA should be certified. At present, this is probably the most serious operation one can perform without being charged with practicing medicine without a license. While requiring a medical license might well be overkill, requiring some sort of board certification, effected by the religious community but with government oversight, seems reasonable. The state regulates the hygienic practices of the people who cut our hair and our fingernails, so why not a baby's genitals?

(c) Adequate pain control should be a legal requirement. Failure to provide it, within a clinical or a traditional setting, should be considered grounds for child abuse.

In conclusion, it has not been my goal to soften or subvert the opposition to FGA of minors. However, a close look at the suggested Seattle compromise and its outcome shows us that there is significant overlap between some forms of FGA and the common practice of MGA in America. But one practice is illegal, while the other is not even the object of governmental oversight or record-keeping. Analysis of the motives behind the two practices—religious, medical, cultural, social—do not support such a disparity. The rhetoric of the activists, and the language of the federal and state laws against FGA, all suggest that this disparity is driven at least in part by a deep lack of respect for motivations that drive parents to perform FGA, as contrasted with the respect given the motivations behind MGA. Because

laws criminalizing FGA burden the free exercise of religion, and because they appear to target only one type of religious practice while ignoring other like practices, they must be narrowly tailored to meet a substantial government interest. However, the crude sweep of the current laws criminalizing FGA does not meet that standard. In the recommendations above, I suggest a number of steps to address the disparity of treatment, while strengthening society's proper concern for the health and welfare of all children in America.