

# PROTECTION OF MALE AND FEMALE SEXED CHILDREN FROM GENITAL CUTTING: MAKING SENSE OF RECENT LEGAL DEVELOPMENTS

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## I. INTRODUCTION

In addition to those born with differences of sex development (“DSD”) or intersex traits both children born with female-typical sex traits (“females”) and those born with male-typical sex traits (“males”)<sup>1</sup> sometimes undergo removal of genital tissue as children in the name of culture, religion, and/or health.<sup>2</sup> The debate over intersex genital modification is as important as it is complex, and the scholarly literature on this debate is expanding rapidly.<sup>3</sup> This Article, however, focuses primarily on the statistically more common practice of non-intersex genital cutting of females or males. As anthropologist Michela Fusaschi notes in a recent, topical paper, genital modification rituals involving both female and male children have been a major topic of research in anthropology since the late nineteenth century.<sup>4</sup> In contrast to scholars from some other disciplines, as well as advocates and policymakers in recent times, anthropologists have noted the wide variety of genital modification practices across societies, while also stressing that their cultural meanings are not simple or straightforward but rather, “multiple and changing in time and space.”<sup>5</sup> However, Fusaschi writes, “according to WHO, since the 1950s, Female Genital Mutilation or Cutting (FGM/C) has been considered a form of Violence Against Women and Girls (VAWG). Interpreted as VAWG, FGM/C has progressively been isolated from its complementary male rite, selected for special condemnation, and banned.”<sup>6</sup> Accordingly, dominant Western views over the past several decades have been radically different for “FGM/C” (which in this Article will be referenced under the potentially more value-neutral term “female genital cutting” (“FGC”)) and “male circumcision” (to be referenced as “male genital cutting” (“MGC”)). More specifically, the former has been widely

<sup>1</sup> It is also important to acknowledge that assigned sex is not determinative of one’s gender. As “gender” is a social and legal status and includes gender roles, it is useful to invoke binary gender identities when exploring the social and legal dynamics that influence vastly different, binary perceptions of genital cutting for females and males. For this reason, this Article sometimes refers to those with female genitalia as “girls” or “women” and those with male genitalia as “boys” or “men.” See *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> (last visited Nov. 17, 2024) [<https://perma.cc/8ASZ-JYFU>].

<sup>2</sup> See, e.g., Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law?*, 11 HEALTH MATRIX 487 (2001).

<sup>3</sup> See, e.g., Debra L. DeLaet, Brian D. Earp & Elizabeth Mills, *Which Children Have Rights? The Child’s Right to Bodily Integrity and Protection Gaps for Children with Intersex Traits under International and National Laws*, 5 AMICUS CURIAE 448 (2024); Eliana Rubashkyn & Ilia Savelev, *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics*, ILGA WORLD <https://ilga.org/resources/intersex-legal-mapping-report-2023> (last visited Jan. 10, 2025) [<https://perma.cc/G5G2-BJ2M>].

<sup>4</sup> Michela Fusaschi, *Gendered Genital Modifications in Critical Anthropology: From Discourses on FGM/C to New Technologies in the Sex/Gender System*, 35 INT’L J. IMPOTENCE RSCH. 6 (2023).

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.*

considered to be essentially violent, harmful, and oppressive; the latter, benign or beneficial. However, scholarship has in recent years started to cast a more sympathetic eye toward protecting children from MGC as well as FGC. For example, E. Katariina Paakkanen notes the starkly different analytical tracks used in analyzing the two practices:

If an operation is done to a male, it is seen as acceptable whatever the motives behind the operation are, and regardless of consent. However, if the genitalia of a female is cut, this is acceptable only if the motives behind the operation are related to (western) aesthetic standards and not to culture or religion.<sup>7</sup>

The author goes on to analyze the “discursive turn” by which the division is “justified using the language of science and medicine” that describes MGC using the more medical-sounding term “circumcision” while FGC done in low- and middle-income countries is described as “genital cutting/mutilation” (and cosmetic FGC done in the wealthier countries “is separated and placed in the field of medicine . . . since it is seen to be a manifestation of the autonomy of women over their own bodies.”<sup>8</sup> More recently, further concrete signs of change appear in a chapter of a book focusing on FGC, which passionately contends that, despite being largely or entirely neglected by FGC scholars, MGC should—like FGC—receive zero tolerance:

Unlike FGM/C . . . male genital cutting, namely male circumcision, has been relatively unchallenged and rarely (if ever) discussed by major bodies advocating for human rights. This chapter is inspired by a call for a more coherent sex- and gender-inclusive approach to the debate on genital cutting, that recognize[s] the special vulnerability of children and young people, regardless of the race, religion, immigration status of their parents, to medically unnecessary genital cutting; and the moral importance of bodily integrity, respect for bodily/sexual boundaries, and free, full, and informed consent. No one, certainly no child, *including infant males and young boys*, should be left behind.<sup>9</sup>

As this recent work suggests, misconceptions of the supposed differences between FGC and MGC belie a much more complicated reality.

For example, although many societies only perform MGC and have no equivalent ritual for females, virtually every society that ritually practices a

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<sup>7</sup> E. Katariina Paakkanen, *Genital Autonomy, Entitled, Empowered or Victims – An Analysis of Discourses on Male and Female Circumcision, Genital Mutilation/Cutting and Genital Cosmetic Surgery*, 23 INT’L J. HUM. RTS. 1494, 1509 (2019).

<sup>8</sup> *Id.* at 1509-10.

<sup>9</sup> Yuko Higashi, *Autonomy, Bodily Integrity and Male Genital Cutting*, in *FEMALE GENITAL MUTILATION/CUTTING* (Kyoko Nakamura, Kaori Miyachi, Yukio Miyawaki & Makiko Toda eds., 2023) (emphasis added).

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form of FGC also practices MGC in parallel.<sup>10</sup> As Fusaschi notes, from an anthropological perspective, these female and male genital modifications have long been understood “as symbolically linked, complementary practices within a sex/gender system . . . *both* practices [working] together to support, reinforce, and reproduce gendered relations in accordance with the prevailing norms of the local culture (often local names are the same for the female and male rite).”<sup>11</sup> Thus, contrary to common misconceptions:

[T]hese gender roles or norms were not necessarily organized around a hierarchical principle of female oppression and subordination; rather, prescriptive norms for men and women have varied widely across practicing cultures, with power or status hierarchies often operating over age, for example, more than sex or gender per se . . . . Thus, it is an oversimplification to assume that, wherever male and female ritual genital modifications occur, the female ritual is primarily oriented around socializing girls into a subordinate role.<sup>12</sup>

Anthropologist Ellen Gruenbaum and her colleagues have recently argued regarding the level of physical harm or benefit caused by genital cutting:

In terms of physical implications, for instance, the level of harm or benefit caused by genital cutting is a function of several factors that do not reliably track biological sex categories . . . it depends on the subtypes of cutting that have been adopted within a group and the extent to which each has been medicalized . . . both types of cutting vary across cultures, with commensurate functional-anatomical effects in many cases.<sup>13</sup>

In other words, there is a substantial gap between what anthropologists and other subject area experts have long argued about the overlaps and shared features of FGC and MGC, and what goes for “common knowledge” among many Westerners (namely, that the two practices are entirely incomparable).<sup>14</sup> A plausible explanation for this gap (or at least part of an explanation), is that the Western discourse on these practices is heavily influenced by the United States, where MGC, but not FGC, is a majority cultural practice.<sup>15</sup> More specifically, although systematic data regarding

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<sup>10</sup> Gabriel Saffa, Jan Zrzavy & Pavel Duda, *Global Phylogenetic Analysis Reveals Multiple Origins and Correlates of Genital Mutilation/Cutting*, 6 NATURE HUM. BEHAV. 635 (2022); Ellen Gruenbaum, Brian D. Earp & Richard A. Shweder, *Reconsidering the Role of Patriarchy in Upholding Female Genital Modifications: Analysis of Contemporary and Pre-Industrial Societies*, 35 INT’L J. IMPOTENCE RSCH. 202 (2023); see also James DeMeo, *The Geography of Male and Female Genital Mutilations*, in SEXUAL MUTILATIONS: A HUMAN TRAGEDY 1 (George C. Denniston and Marilyn Fayre Milos eds., 1997).

<sup>11</sup> Fusaschi, *supra* note 4, at 7 (emphasis in original) (internal citations omitted).

<sup>12</sup> *Id.* at 7.

<sup>13</sup> Gruenbaum, Earp & Shweder, *supra* note 10, at 202.

<sup>14</sup> See, e.g., Bell, *supra* note 3.

<sup>15</sup> *Id.*

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MGC rates is scanty, more than half of U.S. males are still being circumcised.<sup>16</sup> By contrast, only a few isolated incidents or suspected cases of FGC have been uncovered in the U.S. in recent years—primarily among certain immigrant communities.

On the legal front, the difference is stark between how United States law treats genital cutting depending on the sex of the person being cut.<sup>17</sup> Two cases decided sixteen years apart by the same United States federal judge, one involving MGC and the other involving allegations of FGC, exemplify this contrast<sup>18</sup> In this Article, therefore, I use these contrasting cases as a springboard for exploring the latest developments in law regarding female and male genital modification of children. Additionally, in the former case, I draw on my experience as one of the attorneys representing the boy who was circumcised and his family.

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For several decades now, scholars have produced books and papers interrogating the law and ethics of medically unnecessary genital cutting practices.<sup>19</sup> A number of authors, representing a variety of perspectives, have engaged with the issue of the differential treatment of FGC and MGC.<sup>20</sup> A

<sup>16</sup> Maria Owings, Sayeedha Uddin, & Sonja Williams, *Trends in Circumcision for Male Newborns in U.S. Hospitals: 1979-2010*, NCHS HEALTH E-STATS (Aug. 2013), [https://www.cdc.gov/nchs/data/hestat/circumcision\\_2013/circumcision\\_2013.pdf](https://www.cdc.gov/nchs/data/hestat/circumcision_2013/circumcision_2013.pdf) (last visited Nov. 17, 2024) [<https://perma.cc/79YQ-FA3E>].

<sup>17</sup> See JONATHAN MEDDINGS, *THE FINAL CUT: THE TRUTH ABOUT CIRCUMCISION* 82 (2022); 18 U.S.C. § 116 (1996) (originally enacted as Act of Sept. 30, 1996, Pub. L. 104-208, § 645, 110 Stat. 3009-546); STOP FGM Act of 2020, Pub. L. No. 116-309, 134 Stat. 4922.

<sup>18</sup> *Armatas v. Elmhurst Hosp. Cent.*, 1999 WL 1495420 (E.D.N.Y. Nov. 22, 1999); *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

<sup>19</sup> Jacqueline Smith, *Male Circumcision and the Rights of the Child*, in *TO BAEHR IN OUR MINDS: ESSAYS IN HUMAN RIGHTS FROM THE HEART OF THE NETHERLANDS* 465-98 (Mielle Bultermann et al. eds., 1998); S.K. Hellsten, *Rationalising Circumcision: From Tradition to Fashion, From Public Health to Individual Freedom—Critical Notes on the Cultural Persistence of the Practice of Genital Mutilation*, 30 J. MED. ETHICS 248 (2004); J. Steven Svoboda, *Promoting Genital Autonomy by Exploring Commonalities Between Male, Female, Intersex, and Cosmetic Female Genital Cutting*, 3 GLOB. DISCOURSE 237 (2013) [hereinafter *Promoting Genital Autonomy*]; Kai Möller, *Male and Female Genital Cutting: Between the Best Interest of the Child and Genital Mutilation*, 40 OXFORD J. OF LEGAL STUD. 508 (2020).

<sup>20</sup> The Brussels Collaboration on Bodily Integrity, *Genital Modifications in Prepubescent Minors: When May Clinicians Ethically Proceed?*, AM. J. BIOETHICS 1 (2024) [hereinafter *Genital Modifications in Prepubescent Minors*]; Christine Mason, *Exorcising Excision: Medico-Legal Issues Arising From Male and Female Genital Surgery in Australia*, 9 J. L. & MED. 58 (2001); Davis, *supra* note 2; Bell, *supra* note 3; J. Steven Svoboda & Robert Darby, *A Rose By Any Other Name? Symmetry and Asymmetry in Male and Female Genital Cutting*, in *FEARFUL SYMMETRIES: ESSAYS AND TESTIMONIES AROUND EXCISION AND CIRCUMCISION* 251 (Chantal Zabus ed., 2009); Zachary Androus, *Critiquing Circumcision: In Search of a New Paradigm for Conceptualizing Genital Modification*, 3 GLOB. DISCOURSE 266 (2013); Brian D. Earp, *Female Genital Mutilation and Male Circumcision: Toward an Autonomy-based Ethical Framework*, 5 MEDICOLEGAL & BIOETHICS 89 (2015) [hereinafter *Female Genital Mutilation and Male*

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recent article by a large group of eminent scholars trenchantly calls for equal treatment of the different forms of genital cutting.<sup>21</sup> Scholars increasingly argue that studying the great diversity of genital cutting practices in isolation from one another obscures important commonalities and leads to myopic theorizing.<sup>22</sup> No single practice can be fully understood without appreciating how the range of practices relate to one another both within and between different social systems and historical contexts.<sup>23</sup> An emerging consensus among these scholars holds that independent of whether the individual is male, female, or intersex, the capacity of the affected individual to provide morally valid consent to genital cutting should be the determining factor as to its legality and consistency with ethical requirements.<sup>24</sup> In late 2019, a large group of more than ninety scholars in a range of disciplines argued that “the ethics of female, male, and intersex cutting must be considered together.”<sup>25</sup> The Brussels Collaboration on Bodily Integrity recently issued a follow-up statement, expanding on and re-emphasizing the principles outlined in its 2019 article.<sup>26</sup> As bioethicist Brian D. Earp contends, the fact that these practices share the property of being medically unnecessary is morally significant.<sup>27</sup>

Around the world, many laws have been enacted prohibiting FGC.<sup>28</sup> The United States, first passed a law in 1996 that sat unused and uninterpreted until November 2018 when the Federal District Court for the Eastern District of Michigan decided *United States v. Nagarwala*.<sup>29</sup> As I discuss more fully in Part III, this 2018 court decision resulted in Congress passing a law that

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*Circumcision: Toward an Autonomy-based Ethical Framework*]; Kate Goldie Townsend, *Child's Right to Genital Integrity*, 46 PHIL. & SOC. CRITICISM 878 (2019).

<sup>21</sup> *Genital Modifications in Prepubescent Minors*, *supra* note 20.

<sup>22</sup> See generally Smith, *Male Circumcision and the Rights of the Child*, *supra* note 19.

<sup>23</sup> Debra L. DeLaet, *Genital Autonomy, Children's Rights, and Competing Rights Claims in International Human Rights Law*, 20 INT'L J. CHILD.'S RTS. 554 (2012); Ralph Sandland, *The Construction of Gender and Sexuality in the Approach of Key International Law Actors to the Circumcision of Children*, 19 HUM. RTS. L. REV. 617 (2019); Fusaschi, *supra* note 4.

<sup>24</sup> Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555, 603-04 (1997); J. Steven Svoboda, Robert S. Van Howe & James G. Dwyer, *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61 (2000).

<sup>25</sup> The Brussels Collaboration on Bodily Integrity, *Medically Unnecessary Genital Cutting and The Rights Of The Child: Moving Toward Consensus*, 19 AM. J. BIOETHICS 17, 21 (2019) [hereinafter *Medically Unnecessary Genital Cutting and the Rights of the Child*]; *Genital Modifications in Prepubescent Minors*, *supra* note 20.

<sup>26</sup> *Genital Modifications in Prepubescent Minors*, *supra* note 20.

<sup>27</sup> Brian D. Earp, *Male or Female Genital Cutting: Why "Health Benefits" Are Morally Irrelevant*, 47 J. MED. ETHICS 1, 4 (2021) [hereinafter *Male or Female Genital Cutting: Why "Health Benefits" Are Morally Irrelevant*].

<sup>28</sup> *FGM: A Global Picture*, EQUALITY NOW, <https://www.equalitynow.org/fgm-a-global-picture> (last visited May 3, 2023) [<https://perma.cc/6EYA-5J4T>].

<sup>29</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

prohibits medically unnecessary FGC, called the STOP FGM Act of 2020, which President Trump signed into law as he left office in 2020.<sup>30</sup> Many African and Western countries<sup>31</sup> and forty-one states in the United States<sup>32</sup> have passed legislation explicitly forbidding medically unnecessary FGC, especially of minors. An emerging legal view, however, is that medically unnecessary genital cutting of a non-consenting person does not need to be, and perhaps should not be, forbidden by means of a special statute.<sup>33</sup> Rather, according to this view, such cutting is already illegal under existing law such as that concerning physical assault and battery and, in some cases, child abuse.<sup>34</sup>

By sharp contrast, male genital cutting of minors, in the form of penile circumcision, is legally allowed everywhere, either explicitly or in practice.<sup>35</sup> This includes no fewer than nine states in the United States that have passed special statutory exceptions for circumcision to otherwise facially applicable child abuse laws and laws against performing surgery without a license.<sup>36</sup> Similarly, a tenth state, Alabama, passed a law against gender-affirming care, including surgery in 2022, and felt compelled to explicitly exclude male circumcision from the reach of the law, despite the fact that male circumcision is normally unrelated to gender-affirming surgery for transgender individuals.<sup>37</sup> As discussed in Part IV.A, *infra*, there have recently been attempts to ban medically unnecessary, non-consensual MGC, such as in California and the countries of Finland, Iceland, and Denmark. But, so far, such attempts have not succeeded.<sup>38</sup>

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<sup>30</sup> STOP FGM Act of 2020, 134 Stat. 4922.

<sup>31</sup> *FGM: A Global Picture*, *supra* note 28.

<sup>32</sup> *US Laws Against FGM – State by State*, EQUALITY NOW (2024), [https://www.equalitynow.org/us\\_laws\\_against\\_fgm\\_state\\_by\\_state](https://www.equalitynow.org/us_laws_against_fgm_state_by_state) [https://perma.cc/694W-BMXU].

<sup>33</sup> Gregory J. Boyle, J. Steven Svoboda, Christopher P. Price, & J. Neville Turner, *Circumcision of Healthy Boys: Criminal Assault?*, 7 J.L. & MED. 301 (2000); MARGARET SOMERVILLE, *THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT* 209 (2000); Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law*, 39 J. MED. ETHICS 443 (2013).

<sup>34</sup> William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 3 J. FAM. L. 337(1984-85); Nancy Irene Kellner, *Under the Knife: Female Genital Mutilation as Child Abuse*, 14 J. JUV. L. 118 (1993); Boyle, Svoboda, Price & Turner, *supra* note 33; SOMERVILLE, *supra* note 33; Peter W. Adler, Robert Van Howe, Travis Wisdom & Felix Daase, *Is Circumcision a Fraud?*, 30 CORNELL J.L. & PUB. POL’Y. 45, 45, 56, 57, 59, 63 (2020); Merkel & Putzke, *supra* note 33.

<sup>35</sup> MEDDINGS, *supra* note 17, at 82.

<sup>36</sup> J. Steven Svoboda, *Routine Infant Male Circumcision: Examining the Human Rights and Constitutional Issues*, in *SEXUAL MUTILATIONS: A HUMAN TRAGEDY*, *supra* note 10, at 205, 211 [hereinafter *Routine Infant Male Circumcision*]; John V. Geisheker, *The Completely Unregulated Practice of Male Circumcision: Human Rights, Abuse Enshrined in Law*, 2 NEW MALE STUD. 18, 31 (2013); J. Steven Svoboda, Peter W. Adler & Robert S. Van Howe, *Circumcision is Unethical and Unlawful*, 44 J.L. MED. & ETHICS 263, 273 (2016).

<sup>37</sup> Alabama Vulnerable Child Compassion and Protection Act (V-CAP), 2022 Ala. Laws 184.

<sup>38</sup> *California Slaps Down Attempts to Ban Circumcision*, MED. XPRESS (Oct. 4, 2011), <https://medicalxpress.com/news/2011-10-california-circumcision.html> (last visited May 3, 2023); *MPs*

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Notably, Lunde and colleagues argue that Western societies will soon have to decide an “unresolvable dilemma” as to whether (1) “girls should have the same access to cultural identity-promoting genital rituals as boys by allowing a minor cutting or ‘pricking’ of their genitalia,” or (2) “boys should be granted the same human rights as girls with the ritual cutting of their genitalia being regarded as a breach of the right to bodily integrity.”<sup>39</sup>

In this Article, I argue that there is a strong Western legal basis for preferring the second resolution to the dilemma over the first. That is, like girls, boys should be protected from major and minor breaches of their bodily integrity—especially where this concerns their sexual anatomy—that are not medically necessary and to which they do not consent. The cases, decided by Judge Friedman and discussed in Part II.A and II.B, offer us a concrete opportunity to examine the bifurcation between how MGC and FGC are approached in terms of both legal treatment and popular perception. In Part IV.B, I also summarize several European cases, which I have identified and had translated, that support all children’s right to be legally protected from genital cutting (that is, regardless of their sex designation at birth).<sup>40</sup>

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*support Law Proposed to Ban Circumcision*, FINLAND TIMES (Apr. 3, 2014), <https://www.arclaw.org/wp-content/uploads/MPs-support-law-proposed-to-ban-circumcision-Finland-Times.pdf> [https://perma.cc/BYB5-5TYG]; Lauren Notini & Brian D. Earp, *Iceland’s Proposed Circumcision Ban*, PURSUIT BY UNIV. MELB. (Apr. 22, 2018), <https://pursuit.unimelb.edu.au/articles/iceland-s-proposed-circumcision-ban> [https://perma.cc/FKJ6-H7BE].; Martin Selsøe Sørensen, *Denmark Talks (Reluctantly) About a Ban on Circumcising Boys*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/2018/06/02/world/europe/denmark-circumcision.html> [hereinafter Sørensen, *Denmark Talks*]; *Denmark: Renewed debate on circumcision of boys*, EUR. COMM’N (Sept. 10, 2020), [https://migrant-integration.ec.europa.eu/news/denmark-renewed-debate-circumcision-boys\\_en](https://migrant-integration.ec.europa.eu/news/denmark-renewed-debate-circumcision-boys_en) [https://perma.cc/9PZH-UYRA].

<sup>39</sup> Ingvild Bergom Lunde, Mona-Iren Hauge, Ragnhild Elise, Brinchmann Johansen & Mette Sagbakken, *‘Why Did I Circumcise Him?’ Unexpected Comparisons to Male Circumcision in a Qualitative Study on Female Genital Cutting Among Kurdish-Norwegians*, 20 ETHNICITIES 1003, 1005 (2020), <https://journals.sagepub.com/doi/10.1177/1468796819896089> [https://perma.cc/C2J5-7RM8].

<sup>40</sup> *Case 4 O 11/02 Regional Court of Frankenthal*, ATT’YS FOR THE RTS. OF THE CHILD (Sept. 14, 2005), <https://www.arclaw.org/wp-content/uploads/German-Frankenthal-Case-2004-English-Translation.pdf> (translated from German to English) [https://perma.cc/C8D6-3339]; *Case Number 83927 JE RK 07-110, Court of Zutphen*, ATT’YS FOR THE RTS. OF THE CHILD (July 31, 2007), <https://www.arclaw.org/wp-content/uploads/Dutch-Zutphen-Case-2007-English-Translation.pdf> (translated from Dutch to English) [https://perma.cc/V49R-SGNV]; *Case number 4 W 12/07, OLG, ATT’YS FOR THE RTS. OF THE CHILD* (Aug. 21, 2007), <https://www.arclaw.org/wp-content/uploads/German-Frankfurt-Court-Decision-2007-English-Translation.pdf> (translated from German to English) [https://perma.cc/U7AW-HQ7A]; *Case Number 3 UF 133/33, OLG, ATT’YS FOR THE RTS. OF THE CHILD* (Aug. 30 2013), <https://www.arclaw.org/wp-content/uploads/German-Hamm-Case-2013-English-Translation.pdf> (translated from German to English) [https://perma.cc/7JQ8-GK26]; *Case number PQ190030-O/U, Super. Ct. Canton Zurich*, ATT’YS FOR THE RTS. OF THE CHILD (Jun. 4, 2019), <https://www.arclaw.org/wp-content/uploads/Swiss-Zurich-Case-2019-English-Translation.pdf> (translated from German into English) [https://perma.cc/CN84-8F8U]; *X. v. Decision of the Children and Adult Protection Authority of Nordbünden*, 11, ATT’YS FOR THE RTS. OF THE CHILD (Oct. 8, 2013), <https://www.arclaw.org/wp-content/uploads/Swiss-Graubunden-Case-2013-English-Translation.pdf> [https://perma.cc/4XTT-MSW3].



## II. GENITAL CUTTING BEFORE ONE JUDGE

*Armatas v. Elmhurst Hospital Center* (“MGC Case”)<sup>41</sup> and *United States v. Nagarwala* (“FGC Case”),<sup>42</sup> which were decided by Judge Bernard Friedman in 2003 and 2018, respectively, reach somewhat opposed conclusions regarding genital cutting.

The two cases have in common that, in different ways, each is unique in American jurisprudence. The FGC Case is the first and only criminal prosecution under the original Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>43</sup> which was revised in 2021. The MGC Case, as discussed in Part II.A, is also unique in that it is apparently the only case ever brought on civil rights grounds and as a class action against the practice of male circumcision. A team of three attorneys, which included the author of this Article,<sup>44</sup> brought the *Armatas* case as a civil rights class action against defendants who systematically discriminated against Spanish-speaking parents when obtaining parents’ permission to circumcise their sons.<sup>45</sup> While the outcome in both cases failed to punish genital cutting, the cases reveal different beliefs about whether and how nonconsensual childhood MGC and FGC should be punished.<sup>46</sup> In the MGC matter, the case never received a fair hearing on its merits.<sup>47</sup> In the FGC Case, the judge declined to punish the defendant under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 but nevertheless provided Congress with clues as to how it might amend the law in order to meaningfully safeguard victims of FGC,<sup>48</sup> which it did in 2021.<sup>49</sup> Now I will delve into the specifics and broader implications of these two cases decided by the same jurist fifteen years apart.

### A. Part One—The Queens Circumcision Case

Judge Friedman was nominated in 1988 to a seat in federal district court for the Eastern District of Michigan.<sup>50</sup> In the summer of 2002, after the

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<sup>41</sup> *Armatas v. Elmhurst Hosp. Cent.*, 1999 WL 1495420 (E.D.N.Y. Nov. 22, 1999).

<sup>42</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

<sup>43</sup> 18 U.S.C. § 116 (1996).

<sup>44</sup> J. Steven Svoboda, *A Treatise from the Trenches: Why are Circumcision Lawsuits So Hard to Win?*, in *CIRCUMCISION AND HUMAN RIGHTS: PROCEEDINGS OF THE NINTH INTERNATIONAL SYMPOSIUM ON CIRCUMCISION, GENITAL INTEGRITY AND HUMAN RIGHTS 201-17* (George C. Denniston, Frederick Mansfield Hodges, and Marilyn Fayre Milos eds. 2009) [hereinafter *A Treatise from the Trenches*]. The case I identified in this article as the “Pappas” case is the *Armatas* case.

<sup>45</sup> *Armatas*, 1999 WL 1495420.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

<sup>49</sup> STOP FGM Act of 2020, 134 Stat. 4922.

<sup>50</sup> *BALLOTPEDIA Bernard Friedman*, *BALLOTPEDIA*, [https://ballotpedia.org/Bernard\\_Friedman](https://ballotpedia.org/Bernard_Friedman) (last visited Nov. 17, 2024) [<https://perma.cc/C5RA-G5AY>].

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reassignment of two previously appointed judges in the case and the death of a third, Judge Friedman was appointed to decide *Armatas v. Elmhurst Hospital Center* in the Federal District for the Eastern District of New York. The case involved a Greek boy who was circumcised without parental permission at Elmhurst Hospital in Queens, New York City.<sup>51</sup> At the time, the area in which Elmhurst was located was said to be the most racially diverse square mile on the planet and included a high percentage of Latino parents.<sup>52</sup>

This was the first known MGC case ever brought as a federal civil rights case in the United States.<sup>53</sup> The case was assigned to Judge Friedman, a visiting judge. Judge Friedman was tasked with bringing the court's oldest cases to a close, including this MGC case, involving a boy named Evangelos Armatas. As mentioned above, the author of this Article was one of the attorneys on the case.<sup>54</sup>

Evangelos, the son of a Greek father and an Ecuadorian mother, had been circumcised as a newborn despite his parents' strong opposition to the procedure.<sup>55</sup> Evangelos was circumcised shortly after being born by a first-year medical resident who lacked specialized training in the procedure.<sup>56</sup> His mother had specifically and repeatedly withheld consent for her son's circumcision.<sup>57</sup> The potential circumcision of Evangelos was never discussed with the child's primary care physicians prior to the procedure being carried out.<sup>58</sup> The mother's "agreement" to the procedure was obtained while she was still recovering from natal anesthesia, using a form written only in English and not translated to her native Spanish.<sup>59</sup> The mother later remembered being asked, while still feeling "woozy" from the anesthesia, to sign the authorization form so that she may take her child home.<sup>60</sup> She complied.<sup>61</sup>

The circumcision caused Evangelos considerable pain and anguish and left him with a permanent physical scar. The practice of circumcision is

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<sup>51</sup> *Armatas*, 1999 WL 1495420.

<sup>52</sup> Aisha Powell, *The Most Diverse Place on Earth? Exploring Queen's Diversity*, COLIGO, <http://coligo.co/diverse-place-earth-exploring-queens-diversity/> (last visited Nov. 25, 2024) [<https://perma.cc/8YE9-Y4MU>].

<sup>53</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>54</sup> *Id.*

<sup>55</sup> *Armatas*, 1999 WL 1495420.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Armatas*, 1999 WL 1495420.

foreign to both the Ecuadorian and Greek cultures of Evangelos' parents.<sup>62</sup> Evangelos' father Peter Armatas told me that in Greece, naked baths are taken daily, starting at age four or five.<sup>63</sup> Peter further told me that this was the age at which Evangelos became aware of and upset that he was visibly different from other Greek boys as well as from his father.<sup>64</sup>

After bringing the *Armatas* case in state court on behalf of Evangelos, while investigating the case, we discovered that the hospital had a pattern of routinely obtaining fraudulent "consent" (i.e., parental proxy permission) agreements from Latina mothers that ostensibly authorized circumcision of their newborn sons.<sup>65</sup> This finding prompted us to seek to amend the complaint and remove the case to federal court to pursue a civil rights claim.<sup>66</sup> The final complaint alleged that, by systematically obtaining fraudulent content, the defendants—Elmhurst Hospital, its parent corporation, the doctor who oversaw the circumcision, and the hospital administrator—had all engaged in systematic racial discrimination, thus violating federal civil rights law.<sup>67</sup>

The Fifth and Fourteenth Amendments to the United States Constitution legally guarantee "equal protection" under the law regardless of race, ethnicity, and national origin.<sup>68</sup> Both the now obsolete Illegal Immigration Reform and Immigrant Responsibility Act of 1996 outlawing FGC, as well as its updated, presumably more bulletproof 2020 version (which was signed into law in 2021), facially appear to violate the Fifth Amendment's guarantee of equal protection.<sup>69</sup> That is, the laws appear to be clear examples of unequal treatment of individuals based on sex. Both statutes only protect non-consenting persons with female-typical sexual anatomy from genital cutting but do not safeguard non-consenting persons with either male-typical or intersex traits.<sup>70</sup> Accordingly, to create a consistent legal standard that aligns with equal protection, one of two things must happen: (1) males must be included alongside female children in legal protections against genital cutting, or (2) at least some forms of FGC of non-consenting minors must be

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<sup>62</sup> Brian J. Morris, Richard G. Wamai, Esther B. Henebeng, Aaron A.R. Tobian, Jeffrey D. Klausner, Joya Banerjee & Catherine A. Hankins, *Estimation of Country-specific and Global Prevalence of Male Circumcision*, POPULATION HEALTH METRICS (2016).

<sup>63</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Equal Protection*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/equal\\_protection](https://www.law.cornell.edu/wex/equal_protection) (last visited Nov. 17, 2024) [<https://perma.cc/X975-S8XF>].

<sup>69</sup> 18 U.S.C. § 116 (1996); STOP FGM Act of 2020, 134 Stat. 4922.

<sup>70</sup> *Id.*

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legally tolerated alongside current tolerance of MGC.<sup>71</sup> Scholars Ross Povenmire, Shea Lita Bond, and Dena Davis similarly point out that state laws are equally vulnerable to Fourteenth Amendment constitutional challenges.<sup>72</sup>

Given all this, as we prepared our strategy in the *Armatas* case, we felt that if we could convince the court that our plaintiffs had been treated differently by New York State and by a hospital the state helped fund because of their Latino race, ethnicity and/or national origin, the mothers would be entitled to compensation for the harm they thereby suffered.<sup>73</sup> We specifically alleged that the defendants had breached this Fourteenth Amendment guarantee.<sup>74</sup> We believed our prospects for success were excellent. We sued under the Fourteenth Amendment because we knew that the Supreme Court had a history of finding that the amendment protects mothers' and fathers' rights to make decisions regarding their children's upbringing.<sup>75</sup>

During the six weeks preceding the federal trial in October 2003, I interviewed families to gather our evidence as we prepared to bring the case as a class action lawsuit.<sup>76</sup> I personally spoke every day to press on Spanish language television and print media, with the local New York City Spanish language newspaper, *El Diario La Prensa*, which prominently featured developments in the case, including on page one.<sup>77</sup>

The defendant hospital, we alleged, engaged over a number of years in deliberate, wide-ranging discrimination against its Spanish-speaking mothers based on both their race and national origin.<sup>78</sup> The hospital's practice was to secure parental proxy permission for MGC from the mothers, including Evangelos' mother, purposefully preventing the mothers' full understanding of what they were signing and without the mothers being properly informed,

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<sup>71</sup> *Male or Female Genital Cutting: Why Health Benefits "Are Morally Irrelevant"*, *supra* note 27, at 1-13.

<sup>72</sup> Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?: The Practice of Circumcision in the United States*, 7 J. GENDER SOC. POL'Y L. 87 (1998); Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*, 32 J. MARSHALL 353 (1999); Davis, *supra* note 2.

<sup>73</sup> *See generally* *Equal Protection*, *supra* note 68; *A Treatise from the Trenches*, *supra* note 44.

<sup>74</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>75</sup> *See generally* *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>76</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>77</sup> Gloria Medina, *Circuncision 'Ilegal' de Recien Nacido Hispano*, EL DIARIO LA PRENSA, Aug. 4, 2003, at 4, 5; Gloria Medina, *A Juicio Demanda por Circuncision*, EL DIARIO LA PRENSA, Aug. 6, 2003, at 3; Gloria Medina, *Opero Como Practicante*, EL DIARIO LA PRENSA, Aug. 7, 2003, at 3; Gloria Medina, *Frustrante Veredicto por Circuncision*, EL DIARIO LA PRENSA, Aug. 9, 2003, at 3.

<sup>78</sup> *A Treatise from the Trenches*, *supra* note 44.

so that there was any realistic chance they could have such an understanding.<sup>79</sup> The “consent” forms were not properly translated into Spanish (which was most of the mothers’ first language) so that the mothers could understand them, nor did the forms describe the proposed procedure.<sup>80</sup> Moreover, the “consent” forms failed to meet the legally required level of detailing the risks, benefits, and harms of the procedure; nor were these forms properly witnessed and executed.<sup>81</sup> Based on the interviews we conducted of those mothers whom we were able to locate, the forms were signed at the top of page two, without the mothers being shown the first page at all.<sup>82</sup>

Our legal team interviewed fourteen other potential plaintiffs at length, where I personally conducted most of the Spanish-language interviews.<sup>83</sup> Our team painstakingly assembled strong circumstantial evidence that Elmhurst Hospital was targeting Latino boys for circumcision by using their parents’ surnames.<sup>84</sup> We also assembled a wealth of evidence indicating that the hospital’s procedures had led to the Armatas family and other families being denied the right to make their own decisions regarding their children’s medical treatment.<sup>85</sup> Along with the federal causes of action, we included state law claims based on medical malpractice, gross negligence, intentional infliction of emotional distress, a lack of informed consent, and parental loss of society of the child.<sup>86</sup> After considerable resistance by the defendants, we eventually obtained our discovery demands: data on all circumcisions at Elmhurst Hospital during a thirteen-year period that encompassed 1997, the year of Evangelos’ birth and circumcision.<sup>87</sup> The data suggested that Elmhurst Hospital had a pattern and practice of routinely circumcising boys born to Latino mothers.<sup>88</sup> We identified additional Latino parents who also had not truly consented to circumcisions of their newborn boys.<sup>89</sup>

After the heartening success of obtaining this discovery material, the class action lawsuit unfortunately went downhill for Evangelos and his parents, as well as for the other potential plaintiffs.<sup>90</sup> During the trial, Judge Friedman only permitted testimony by Evangelos’ parents, not any other witnesses such as other Latino parents of boys who were circumcised at

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>85</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

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Elmhurst.<sup>91</sup> These other witnesses' participation was essential for us to present our case properly. Judge Friedman excluded their testimony, finding that their presence in the courtroom would lead to "mini-trials" regarding their cases and, therefore, they would not be permitted to testify.<sup>92</sup> The judge's exclusion of the other witnesses arguably unfairly prejudiced the jury in its deliberation in violation of Federal Rule of Evidence 403.<sup>93</sup>

The court was charged with deciding whether the defendants circumcised Evagelos in violation of the law and also if their practice of circumcising boys born to Latino parents without meaningful consent violated the Civil Rights Act.<sup>94</sup> The judge approved the verdict form prepared by the defendants' attorneys and sent to the jurors so that a finding for the defendant necessitated only a single quick "no" response, while a finding for the plaintiffs would require the jurors to answer each of a long series of questions a specific way.<sup>95</sup> He then sent the jury out to deliberate at 5 PM on a Friday, timing that put jurors in a position where they could only avoid missing more days of work by quickly deciding against the Armatas boy.<sup>96</sup> Predictably, the jury reached a conclusion rejecting the Armatas' case.<sup>97</sup> Because the case was decided by the jury, we were not given any details of the reasoning behind the decision. Regrettably, at the last minute, we discovered that some serious logistical issues prevented us from properly creating a record in the trial that we could have then used to appeal the jury's decision.<sup>98</sup>

While I believe we probably had bad luck with the judge we drew for the case and also with the logistical issues we encountered, the phrase "bad luck" may be misleading given the difficulty to date in protecting males from MGC despite the panoply of protections that exist from FGC.<sup>99</sup> That is, we faced an uphill battle regardless of our jurist given the current acceptance of MGC.

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<sup>91</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>92</sup> *Id.*

<sup>93</sup> 28 U.S.C. § 403 (2000). On the other hand, the exclusion of the additional witnesses could be argued to lie within the judge's discretion pursuant to FED. R. EVID. 615.

<sup>94</sup> 42 U.S.C. § 2000(d) (1964).

<sup>95</sup> *A Treatise from the Trenches*, *supra* note 44.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* The case I identified in this Article as the "Pappas" case is the *Armatas* case. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> MEDDINGS, *supra* note 17; *Laws Against Female Genital Mutilation - A Global Picture*, *supra* note 28; *US Laws Against FGM - State by State*, *supra* note 32.

*B. Part Two—Judge Friedman Rules on FGC*

In November 2018, Judge Bernard Friedman decided another case relating to genital cutting, this time involving FGC,<sup>100</sup> brought under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>101</sup> In 1996, Congress had outlawed FGC on minors, except in cases where the operation is deemed medically necessary.<sup>102</sup> The statute was tested for the first time when, more than two decades later, federal prosecutors charged eight defendant members of the Dawoodi Bohra sect of Islam who were living in Detroit, Michigan.<sup>103</sup> The charges included conspiracy to commit FGM, committing FGM, aiding and abetting the co-defendants in committing FGM, for Dr. Nagarwala, “conspiracy to travel with intent to engage in illicit sexual conduct,” and, for four of the defendants, conspiracy to obstruct an official proceeding.<sup>104</sup>

Before I discuss this FGC case, some context is needed to understand Judge Friedman’s decision. The defendants argued that the statute was unconstitutional under the commerce clause of the federal Constitution. Article 1, Section 8, Clause 3 of the Constitution states, “Congress has the power to regulate commerce with foreign nations, among states, and with Indian tribes.”<sup>105</sup> Courts often view activities affecting interstate commerce as a “catch-all” category that permits federal legislation to regulate local crimes that would otherwise be a subject area reserved for regulation by the states.<sup>106</sup> Four years after the FGC law’s passage, in 2000, the United States Supreme Court set important limits on the scope of Congress’s power to use the Interstate Commerce Act as justification for passing a law that might infringe on issues more properly subject to state regulation.<sup>107</sup> In *United States v. Morrison*, the Supreme Court found against the government’s argument that the commerce clause justified passage of the Violence Against Women Act.<sup>108</sup> The Court noted a growing judicial trend toward increasingly

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<sup>100</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

<sup>101</sup> 18 U.S.C. § 116 (1996).

<sup>102</sup> *Id.*

<sup>103</sup> *Nagarwala*, 350 F. Supp. 3d 613; Pam Belluck, *Michigan Case Adds U.S. Dimension to Debate on Genital Mutilation*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/10/health/genital-mutilation-muslim-dawoodi-bohra-michigan-case.html> [<https://perma.cc/H56S-SGVA>]; Allison Thoet, *First-ever Federal Charges of Female Genital Mutilation Seen as Landmark*, PBS NEWS (Aug. 14, 2017), <https://www.pbs.org/newshour/nation/first-ever-federal-charges-female-genital-mutilation-seen-landmark> [<https://perma.cc/JY2N-J7BX>].

<sup>104</sup> *Nagarwala*, 350 F. Supp. 3d at 613-614.

<sup>105</sup> *Commerce Clause*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause) [<https://perma.cc/2YYF-Y4ZA>] (last visited Nov. 8, 2024).

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>108</sup> *Id.*

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restricting use of the “interstate commerce” exception to justify federal drafting of criminal statutes.<sup>109</sup>

The Dawoodi Bohra, a religious denomination of Shia Islam practice both FGC and MGC of minors for religious reasons.<sup>110</sup> Strikingly, the forms of FGC that are most common among the Bohra are the ritual pricking, nicking, or partial removal of the clitoral hood, which often leave no physical evidence of altered genital morphology.<sup>111</sup> Among the Bohra, the most common form of MGC involves the surgical removal of roughly thirty to fifty percent of the penis’ skin system, including the skin that is most sensitive to light touch,<sup>112</sup> which frequently leaves a permanent scar.<sup>113</sup> In other words, among the Bohras, the form of cutting done to boys is markedly more invasive than the form done to girls within the very same families, even as both procedures are performed for explicitly religious reasons.<sup>114</sup>

The defendants in Judge Friedman’s FGC case included two mothers who brought their daughters to a clinic in Livonia, Michigan, and had them, as the Dawoodi Bohra call it, “circumcised.”<sup>115</sup> Two doctors and two others, including a medical billing specialist and the wife of one of the doctors, involved in the procedures were also among the named defendants in the case brought before Judge Friedman.<sup>116</sup>

At trial, the government presented evidence of how the defendants contributed to cutting nine female minors in their care, but Judge Friedman granted the defendants’ motion to dismiss the charges, citing constitutional flaws in the 1996 law that he said made it impossible to find the defendants guilty.<sup>117</sup> Judge Friedman’s holding implied that in order to have the right to draft a law relating to FGC, Congress should have crafted it in a way that the

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<sup>109</sup> *Id.*

<sup>110</sup> Yasmin Bootwala, *A Review of Female Genital Cutting (FGC) in the Dawoodi Bohra Community: Part I—FGC Terminology, Western Genital Cutting Practices, Southeast Asian Type and Type IV FGC Practices*, 11 CURRENT SEXUAL HEALTH REP. 212 (2019); Brian D. Earp, *Why Was the U.S. Ban on Female Genital Mutilation Ruled Unconstitutional, and What Does this Have to Do with Male Circumcision?*, 15 ETHICS, MED. & PUB. HEALTH 1 (2020) [hereinafter *Why Was the U.S. Ban on Female Genital Mutilation Ruled Unconstitutional, and What Does this Have to Do with Male Circumcision?*].

<sup>111</sup> Richard A. Shweder, *The Prosecution of Dawoodi Bohra Women: Some Reasonable Doubts*, 12 GLOBAL DISCOURSE 9, 19 (2022).

<sup>112</sup> Morris L. Sorrells, James L. Snyder, Mark D. Reiss, Christopher Eden, Marilyn F. Milos, Norma Wilcox, & Robert S. Van Howe, *Fine-touch Pressure Thresholds in the Adult Penis*, 99 BJU INT’L 864 (2007); Jennifer A. Bossio, Caroline F. Pukall, & Stephen S. Steele, *Examining Penile Sensitivity in Neonatally Circumcised and Intact Men Using Quantitative Sensory Testing*, 195 J. UROLOGY 1848 (2016).

<sup>113</sup> Mohamed A. Baky Fahmy, *Nonaesthetic Circumcision Scarring*, in COMPLICATIONS IN MALE CIRCUMCISION 99-134 (2019).

<sup>114</sup> Bootwala, *supra* note 110.

<sup>115</sup> Belluck, *supra* note 103; Thoet, *supra* note 103.

<sup>116</sup> *Id.*

<sup>117</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).



law required a nexus between interstate commerce and federally prosecutable FGC.<sup>118</sup> In Judge Friedman’s view, Congress had failed to do this with the 1996 law.<sup>119</sup>

The government attempted to defend the law by arguing that its passage lay within Congress’ power under Constitution Article II, Section 2, Clause 2, to pass legislation to effectuate a treaty.<sup>120</sup> The government argued that Congress was effectuating a treaty, namely the International Convention on Civil and Political Rights (ICCPR) and specifically Article 24 of the ICCPR.<sup>121</sup> Judge Friedman commented in his decision that this contention could not withstand careful examination.<sup>122</sup> Judge Friedman wrote, “Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, *sex*, or other characteristics,”<sup>123</sup> adding that however laudable “prohibition of a particular type of abuse of *girls* may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.”<sup>124</sup> Judge Friedman is correct that ICCPR Article 24 requires protection of children, males *and* females, from abuse, which certainly includes genital cutting.<sup>125</sup> In fact, his statement also applies to the MGC case and requires the opposite result to the one he reached in his decision here. Instead, however, the judge ruled that Congress is not allowed to regulate “local criminal activity” under the Constitution unless it substantially affects interstate commerce.<sup>126</sup> This implies that the federal law against FGC, passed over a full quarter-century ago, stretched Congress’ authority beyond legally permissible bounds.<sup>127</sup> Judge Friedman cited the *Morrison* case in his ruling that held that Congress had failed to clearly draw a connection between interstate commerce and the practice of FGC.<sup>128</sup>

### III. CONGRESSIONAL AMENDMENTS TO THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

The United States Department of Justice “reluctantly determined” that appealing Judge Friedman’s FGC decision would not lead to a convincing

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Nagarwala*, 350 F. Supp. 3d 613.

<sup>124</sup> *Id.*

<sup>125</sup> J. Steven Svoboda, *Circumcision of Male Infants as a Human Rights Violation*, 39 J. MED. ETHICS 469, 31-74 (2013) [hereinafter *Circumcision as a Human Rights Violation*].

<sup>126</sup> *Nagarwala*, 350 F. Supp. 3d 613.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

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case because the 1996 statute needed instead to be redrafted in a more careful fashion that could justify a federal law outlawing FGC. As a result of the *Nagarwala* decision,<sup>129</sup> Solicitor General Noel J. Francisco wrote a letter to Senator Dianne Feinstein of California, the top Democrat on the Senate Judiciary Committee, recommending possible changes to a prospective replacement federal law.<sup>130</sup> The proposed replacement bill would strengthen the nexus with interstate commerce while retaining the federal ban on FGC.<sup>131</sup> Solicitor General Francisco noted: “Although the Department has determined not to appeal the district court’s decision, it recognizes the severity of the charged conduct, its lifelong impact on victims, and the importance of a federal prohibition on FGC committed on minors.”<sup>132</sup> To provide some perspective on this historic decision, one of the principal functions of the United States Department of Justice (DOJ) is defending federal laws.<sup>133</sup> The DOJ generally defends any federal law as long as a reasonable argument can be found that the law is constitutional, which is almost always possible.<sup>134</sup> According to former Solicitor General Walter E. Dellinger III, since World War II only about once a decade has the DOJ declined to enforce a federal law.<sup>135</sup> Federal prosecutors did not feel a reasonable argument was available in this case, concluding that the statute was weak and needed to be rewritten.<sup>136</sup> This turn of events was quite notable given the rarity of the DOJ declining to enforce a valid federal law.<sup>137</sup>

The STOP FGM Act of 2020 passed both houses of Congress, and then, on January 5, 2021, President Donald Trump signed the bill into law.<sup>138</sup> This Act plugs the holes in the 1996 law, outlawing all forms of medically unnecessary FGC of minors, including non-tissue-removing pricking or scraping of the vulva and partial or total removal of the clitoral prepuce or labia without modification of the clitoral glans.<sup>139</sup> The STOP FGM Act of 2020 explains that Congress has the power to create the new statute under the

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<sup>129</sup> Letter from Noel J. Francisco, Solicitor General, to Diane Feinstein, Senator, Ranking Committee on the Judiciary (Apr. 10, 2019) (on file with U.S. Dep’t of Just.).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Katie Benner, *Justice Dept. Declines to Defend Law Against Female Circumcision, Citing Flaw*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/politics/justice-department-declines-defending-laws.html>.

<sup>134</sup> Benner, *supra* note 133.

<sup>135</sup> *Id.*

<sup>136</sup> Robert Snell, *Feds Abandon Female Genital Mutilation Appeal*, DETROIT NEWS (Apr. 12, 2019), <https://www.detroitnews.com/story/news/local/detroit-city/2019/04/12/feds-abandon-female-genital-mutilation-fight/3445497002> [<https://perma.cc/8ZKU-A99D>].

<sup>137</sup> Benner, *supra* note 133.

<sup>138</sup> STOP FGM Act of 2020, 134 Stat. 4922.

<sup>139</sup> *Id.*

Constitution's Article I, Section 8 provision, which authorizes Congress to make all laws necessary to carry into execution treaties entered into by the United States.<sup>140</sup> While the Act does not explicitly name the exact treaties intended, presumably they include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the ICCPR.

Importantly, the act does not permit, as a defense to prosecution, the parents' motives for authorizing FGC.<sup>141</sup> The STOP FGM Act of 2020 specifically states, "It shall not be a defense to a prosecution under this section that female genital mutilation is required as a matter of religion, custom, tradition, ritual, or standard practice."<sup>142</sup> The Act lists a number of different ways in which FGC can implicate interstate or foreign commerce—for example, by involving interstate or foreign travel, or by involving payment made using an "instrumentality of interstate or foreign commerce."<sup>143</sup> The law also specifies that its reach can encompass anyone performing FGC on a minor within the United States.<sup>144</sup> Thus, the STOP FGM Act of 2020 outlaws FGC occurring in the U.S. regardless of whether in a given case, the practice strictly involves interstate or foreign commerce.<sup>145</sup>

This last aspect of the law—asserting federal reach regardless of whether the usually required factual connections are present—may potentially be open to legal challenge. The 2020 law may violate guarantees under the Fifth Amendment to the United States Constitution of "equal protection" of males and females by protecting only females from genital cutting.<sup>146</sup> The same is true of the now-superseded 1996 law.<sup>147</sup>

#### *A. What the MGC Case and the FGC Case Say About the United States's Binary Approach to Genital Cutting*

What can the MGC Case and the FGC Case potentially teach us about reasons behind the substantially different levels of concern with MGC and FGC we see in the United States (and in the world)? While the disparity may not comport with 2025 ideals, many people have different perceptions of males and females. To many, men may seem less vulnerable, less in need of compassion and protection. We see that even very young girls are treated

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<sup>140</sup> STOP FGM Act of 2020, 134 Stat. 4922.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at § 3(1)(c).

<sup>143</sup> *Id.* at § 2.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 18 U.S.C. § 116 (1996) (originally enacted as Act of Sept. 30, 1996, Pub. L. 104-208, § 645, 110 Stat. 3009-546); Povenmire, *supra* note 72; Bond, *supra* note 72; Davis, *supra* note 2.

<sup>147</sup> Povenmire, *supra* note 72; Bond, *supra* note 72; Davis, *supra* note 2.

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more empathetically and with more discussion of feelings than are boys. Try though we may, many people still tend to perceive two sexes that we assume to be different from one another in numerous important ways. Thus, to those with such views, FGC just seems much more compelling and in need of eradication than MGC. Also, FGC mostly happens in low- and middle-income countries, rather than in the U.S.; and, thus, safeguarding against it is, in the U.S., less costly on all levels. In my opinion, with all the issues we have to be concerned about today, empathy fatigue is also setting in for many people. So, males get the short end of the stick in terms of protection from genital cutting.

### IV. LEGISLATORS AND COURTS START TO BREAK DOWN GENDER BIFURCATION

European legislators are passing laws regulating circumcision, and European courts, in particular, are deciding cases forbidding the practice, usually (at least for now) on narrow, factually focused grounds.

#### *A. Legislators*

Legislative bodies, particularly those outside of the United States, are starting to pass statutes regulating various details of who can perform circumcisions, where they can be performed, and ages of children who may undergo such procedures.<sup>148</sup> For example, beginning in 2001, Sweden's authorities have mandated both anesthesia and the presence of a doctor or a nurse during circumcision procedures.<sup>149</sup> Since 2007, Australia's public hospitals are not allowed to perform medically unnecessary circumcisions, but private circumcisions can be legally performed.<sup>150</sup> In Germany, "specially qualified members of religious communities" may only perform circumcisions for boys who are six months old or younger; for older children, a physician must do the circumcision.<sup>151</sup>

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<sup>148</sup> *Sweden Restricts Circumcisions*, BBC NEWS (Oct. 1, 2001), <http://news.bbc.co.uk/1/hi/world/europe/1572483.stm> [<https://perma.cc/ME3G-H8HQ>]; *Protection Offered by Circumcision Does Not Warrant Lifting Ban, Say Doctors*, THE GUARDIAN (Feb. 9, 2017), <https://www.theguardian.com/society/2017/feb/09/protection-offered-by-circumcision-does-not-warrant-lifting-ban-say-doctors> [<https://perma.cc/H96K-MAC2>]; *German Court Sets New Circumcision Rules*, DER SPIEGEL (Sept. 13, 2013), <https://www.spiegel.de/international/germany/new-circumcision-ruling-requires-doctors-to-discuss-procedure-a-924984.html> [<https://perma.cc/KJ7Y-2YC8>]; Children's Act 2005, GN R. 610 of GG 28944 (June 19, 2006).

<sup>149</sup> *Sweden Restricts Circumcisions*, *supra* note 148; *Protection Offered by Circumcision Does Not Warrant Lifting Ban, Say Doctors*, *supra* note 148; *German Court Sets New Circumcision Rules*, *supra* note 148; Children's Act 2005, *supra* note 148.

<sup>150</sup> *Protection Offered by Circumcision Does Not Warrant Lifting Ban, Say Doctors*, *supra* note 148.

<sup>151</sup> *German Court Sets New Circumcision Rules*, *supra* note 148.

The strictest law regulating MGC was passed in 2005 by South Africa, where deaths from traditional circumcisions during initiation rites are quite common.<sup>152</sup> For example, in late 2021, the country's Cultural Rights Commission stated that almost "700 young men . . . died in the past decade during initiation rites [involving circumcisions], while countless more suffered botched circumcisions."<sup>153</sup> The South African law requires consent from boys sixteen years of age and older and also forbids circumcision of boys younger than sixteen except for religious or medical reasons.<sup>154</sup> In practice, this exception clause, and thus medically unnecessary ritual circumcisions of those under sixteen, are routinely performed.<sup>155</sup>

None of these laws actually outlaw MGC outright.<sup>156</sup> Rather, they regulate a practice that, unlike FGC, has generally been treated as both legal and permissible.<sup>157</sup> Elsewhere, there have been several legislative attempts to regulate or outlaw MGC, although no law has actually been passed.<sup>158</sup> For instance, a 2011 citizens' initiative in California aimed to outlaw medically unnecessary circumcision of non-consenting minors—the so-called "MGM Bill"—but the bill did not move forward.<sup>159</sup> Similarly, in 2014, a draft law aimed at banning circumcision received substantial support from Finnish lawmakers, a majority of whom favored some form of legal regulation of MGC.<sup>160</sup> Then, in 2020, MGC was nearly included in a Finnish bill regarding FGC but was omitted after lobbying by religious groups.<sup>161</sup> Additionally, in 2018, Icelandic legislators unsuccessfully attempted to pass a law forbidding circumcision of minors under the age of eighteen unless medically required.<sup>162</sup> Finally, since 2018, Danish lawmakers have been considering,

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<sup>152</sup> Children's Act 2005, *supra* note 148; Linda Givetash, 34 *South African Youth Die During Initiation Rites*, VOICE OF AM. NEWS (Dec. 24, 2021), <https://www.voanews.com/a/south-african-youth-die-during-initiation-rites/6368466.html> [<https://perma.cc/Q546-H7CT>].

<sup>153</sup> Givetash, *supra* note 152.

<sup>154</sup> Children's Act 2005, *supra* note 148.

<sup>155</sup> Givetash, *supra* note 152.

<sup>156</sup> Möller, *supra* note 19.

<sup>157</sup> Povenmire, *supra* note 72; Bond, *supra* note 72; Davis, *supra* note 2.

<sup>158</sup> Möller, *supra* note 19.

<sup>159</sup> California Slaps Down Attempts to Ban Circumcision, MED. XPRESS (Oct. 4, 2011), <https://medicalxpress.com/news/2011-10-california-circumcision.html> [<https://perma.cc/X2E6-GPYB>].

<sup>160</sup> *MPs Support Law Proposed to Ban Circumcision*, FINLAND TIMES (Apr. 3, 2014), [www.finlandtimes.fi/health/2014/04/03/5886/MPs-support-law-proposed-to-ban-circumcision](http://www.finlandtimes.fi/health/2014/04/03/5886/MPs-support-law-proposed-to-ban-circumcision) [<https://perma.cc/Q9GL-QMVG>].

<sup>161</sup> Rosie Duivenbode, *Criminalizing Medically Unnecessary Child Genital Cutting in Western Countries: The Terms of the Debate and Some Reasons for Caution*, 35 INT'L J. IMPOTENCE RSCH. 21, 22 (2023).

<sup>162</sup> Lauren Notini and Brian D. Earp, "Iceland's Proposed Circumcision Ban," [University of Melbourne] Pursuit, April 22, 2018, <https://pursuit.unimelb.edu.au/articles/iceland-s-proposed-circumcision-ban> (last visited June 23, 2023) [<https://perma.cc/X3QF-YBCP>].

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but have not passed, an initiative to prohibit MGC.<sup>163</sup> None of these three Nordic attempts resulted in any codified law.<sup>164</sup>

One other development from a European entity bears mention. On October 1, 2013, the Council of Europe passed a recommendation endorsing all children's rights to physical integrity. On the same date, the Council also passed a resolution protecting genital integrity for children by opposing several genital cutting practices including MGC, FGC, and "early childhood medical interventions in the case of intersex children."<sup>165</sup> Following these events, Jewish and Muslim organizations lobbied the Council of Europe to overturn the actions, and two years later the measures were reversed.<sup>166</sup>

### *B. Courts*

Before turning to the cases specifically addressing protection of males from MGC, it is important to note that a broader conception of bodily integrity has been repeatedly upheld in Europe, as well as in the United States (as discussed in this Section). First, the fundamental importance attached to bodily autonomy is highlighted in British common law. The Court of Appeal of England and Wales held in the case, *Re A (Minors) (Conjoined Twins: Separation)*, "Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy – the right to have one's own body whole and intact and (upon reaching an age of understanding) to take decisions about one's body."<sup>167</sup>

Similarly, an international human rights court found that forcibly excising a healthy body part constitutes cruel and inhuman treatment, even when the procedure is painless and removes regenerative tissue, both of which are obviously not true of MGC.<sup>168</sup> These cases provide an overall

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<sup>163</sup> *Denmark Talks*, *supra* note 38.

<sup>164</sup> See generally *Medical and Ethical Positions on Circumcision*, ATT'YS FOR THE RTS. OF THE CHILD, [www.arclaw.org/medical-and-ethical-positions](http://www.arclaw.org/medical-and-ethical-positions) (last visited Nov. 22, 2024) [<https://perma.cc/FN5H-L3LU>].

<sup>165</sup> *Recommendation 2023: Children's Right to Physical Integrity*, PARLIAMENTARY ASSEMBLY (Oct. 1, 2013), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20176&lang=en> [<https://perma.cc/F943-Z9HL>]; *Recommendation 1952: Children's Right to Physical Integrity*, PARLIAMENTARY ASSEMBLY (Oct. 1, 2013), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20174> [<https://perma.cc/D9XP-SNYV>].

<sup>166</sup> Laura Harkov, *Council of Europe Cancels Anti-Circumcision Measure After Joint Jewish-Muslim Effort*, JERUSALEM POST (Oct. 1, 2015), <https://www.jpost.com/international/council-of-europe-cancels-anti-circumcision-measure-after-joint-jewish-muslim-effort-419616> [<https://perma.cc/ZJE5-DD3Q>].

<sup>167</sup> *Re A (Minors) (Conjoined Twins: Separation)*, Court of Appeal of England and Wales, Lloyd's Law Reports, Medical 425, 494 (2000), <https://www.i-law.com/ilaw/doc/view.htm?id=304835> [<https://perma.cc/E99Z-LBWC>].

<sup>168</sup> *Tarhan v. Turkey*, Eur. Ct. H.R., App. No. 9078/06 (2012) (discussing a Turkish male citizen who refused to perform military service due to conscientious objection to war and refused to allow his hair and beard to be cut held to have had his rights under Article 9 of the Convention for the Protection of Human

framework that is usable to help contextualize the more contentious issue of MGC.<sup>169</sup>

Several European courts have issued decisions upholding a boy's right to bodily integrity. I discern a general principle in these legal decisions: Courts are finding creative, fact-based ways not to authorize specific instances of MGC while at the same time avoiding an overall ban on the procedure. In 2012, a judge in Cologne, Germany, held that male circumcision of a minor constitutes unlawful physical assault causing bodily harm.<sup>170</sup> The court further held, "the parents' right to religious upbringing of their children, when weighed against the right of the child to physical integrity and to self-determination, has no priority, and consequently their consent to the circumcision conflicts with the child's best interests."<sup>171</sup>

After the Council of Europe's actions, the Cologne decision was met with protests led by religious supporters of circumcision that ultimately led to the reversal of the outcomes.<sup>172</sup> The Cologne judicial decision was later legislatively overturned when the German Parliament passed a new law permitting ritual male circumcision of minors.<sup>173</sup>

A British case decided in 1990 addressed the legality of MGC.<sup>174</sup> A young boy's Muslim father requested a court order to have his son ritually circumcised.<sup>175</sup> His mother did not support the circumcision, and the *Re J* court did not allow the requested circumcision to be carried out.<sup>176</sup> As legal scholar Kai Möller observed, "The U.K. Parliament has never legislated on male genital cutting, but the practice has always been assumed to be lawful in the U.K. as well as in other countries."<sup>177</sup>

More recently, an important United Kingdom judicial decision was handed down in *Re L and B* that further affirms a right to genital integrity for

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Rights and Fundamental Freedoms to freedom of thought, conscience, and religion violated when seven soldiers forcibly cut off his hair and beard).

<sup>169</sup> See generally Möller, *supra* note 19.

<sup>170</sup> *People v. Dr. K*, Urteil Ns 169/11, Judgment in Cologne Regional Court (Landgericht) (May 7, 2012), <https://www.arclaw.org/wp-content/uploads/German-Cologne-Court-Case-2012-English-Translation.pdf> [<https://perma.cc/5VL9-94TR>] [hereinafter Cologne Case].

<sup>171</sup> Cologne Case, Urteil Ns 169/11, at \*3.

<sup>172</sup> *German Jews, Muslims Unite to Protest Against Circumcision Ban*, REUTERS (Sept. 9, 2012), <https://www.reuters.com/article/uk-germany-circumcision/german-jews-muslims-unite-to-protest-against-circumcision-ban-idUKBRE8880JK20120909> [<https://perma.cc/L9V7-6GPH>].

<sup>173</sup> Bürgerliches Gesetzbuch [BGB] [Civil Code] §1631d (Jan. 1, 2013), [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p6500](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6500) [<https://perma.cc/VW5E-A2N6>].

<sup>174</sup> *Re J* (child's religious upbringing and circumcision), 1 FCR 307 (May 6, 1999), [https://www.cirp.org/library/legal/Re\\_J](https://www.cirp.org/library/legal/Re_J) [<https://perma.cc/DCV2-HNWM>].

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Möller, *supra* note 19.

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males.<sup>178</sup> An Exeter family court judge cited the procedure's irreversible nature, risks, and the lack of a guarantee that the boys "will wish to continue to observe the Muslim faith with the devotion demonstrated by their father."<sup>179</sup> Reviewing the recent decisions in *Re J* and the 2015 dicta by Sir James Munby discussed in Part IV.C below, the Exeter judge summarized the conclusions of these cases: (1) circumcision can be lawful only with both parents' agreement; (2) circumcision is an irreversible procedure without a sound medical basis that is painful and carries some risks and so can only be ordered by a court if somehow clear benefits exist despite the risks; and (3) because of the lack of an upper age limit for circumcision to be carried out in the Muslim religion, the procedure is better left for the child to decide upon himself upon attaining maturity.<sup>180</sup> Accordingly, the *L and B* court disallowed the circumcision, upholding the child's rights to bodily and genital integrity, explaining that the child can always decide later in early adulthood whether to proceed with MGC.<sup>181</sup> Notably, legal scholars Katherine Dunseath and James Chegwiddden observed that "the key reasoning employed by the judge would also apply to all male infants at risk of circumcision."<sup>182</sup>

As I outline below, in my view, courts in other European countries are also providing boys with similar protections from MGC. My analysis of the cases discussed herein suggests that judges sometimes imply that their holdings are fact-specific decisions whose applicability does not necessarily extend beyond the case immediately at hand. Nevertheless, I believe that the results seem to align with protecting children's human rights so that they can make their own decisions upon reaching adulthood.

The European decisions protecting male children against MGC include five cases I found and translated, all of which upheld the plaintiff boys' rights to be legally safeguarded against MGC. As we will see, three of the cases are from Germany, two from Switzerland, and one from the Netherlands.

In July 2002, a German District Court may have gone the furthest of any court other than the Cologne court.<sup>183</sup> More than a decade before the Cologne case, the Frankenthal district court decided a civil case in which a ritual circumcision led to two skin transplants and hospitalization.<sup>184</sup> There,

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<sup>178</sup> *Re L and B (Children: Specific Issues: Temporary Leave to Remove from the Jurisdiction: Circumcision)* 2016, EWHC 849 (Family), [2016] Family Law Reports, reported at [2016] Family Law 690.

<sup>179</sup> *Id.* at ¶ 142.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at ¶ 142-143.

<sup>182</sup> Katherine Dunseath & James Chegwiddden, "'A clear conclusion': Religious Circumcision for Boys," 46 FAM. L. 1012, 1015 (2016).

<sup>183</sup> *Case 4 O 11/02 Regional Court of Frankenthal*, *supra* note 40.

<sup>184</sup> *Id.*



both the nine-year-old boy and his parents agreed to the procedure.<sup>185</sup> The court held that the consent of parents to a non-medically indicated surgical procedure performed by a non-physician under non-sterile medical conditions is contrary to the best interests of the child and therefore constitutes a violation of the parents' right of care and custody.<sup>186</sup> Despite the fervent claims of parent rights advocates, the court found that "parents do not have the authority to make unreasonable decisions to the detriment of their children, which is why their freedom of decision is generally limited to medically indicated interventions."<sup>187</sup> Perhaps even more importantly, in a finding with potential applicability to other cases, the Frankenthal court decided that a nine-year-old boy, with the level of both mental and moral maturity that goes along with this age, cannot fully appreciate the ramifications of—and even the meaning of—the circumcision procedure and therefore cannot give meaningful permission for it to occur.<sup>188</sup>

In July 2007, an unusual case, identified only by Court of Zutphen (The Netherlands), Family Division, Case Number 83927 JE RK 07-110, was brought in the Netherlands by a child's biological mother, who sought a circumcision for asserted hygienic reasons, despite the opposition of both foster parents.<sup>189</sup> The Family Division court disallowed the requested surgery, holding that circumcision is irreversible, not medically necessary, and not in the child's best interests.<sup>190</sup> Later that same year, in August 2007, an appeals court in Frankfurt, Germany held that an eleven-year-old boy's circumcision by a physician without the boy's consent constituted an unlawful personal injury.<sup>191</sup>

An August 2013 decision from Hamm, Germany, addressed a Kenya-born mother who sought a circumcision of her six-year-old son "according to the cultural custom rite in Kenya, because otherwise, during his visits there, he would not be seen and acknowledged as a full-fledged man."<sup>192</sup> The court forbade the mother from having her son circumcised because of a risk of psychological damage.<sup>193</sup> Other factors the court noted as relevant to its decision were the mother's intention not to be present for the procedure<sup>194</sup> and the fact that the boy had been baptized Protestant.<sup>195</sup> The court also easily

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Case Number 83927 JE RK 07-110, Court of Zutphen, supra* note 40.

<sup>190</sup> *Id.*

<sup>191</sup> *Case number 4 W 12/07, OLG, supra* note 40.

<sup>192</sup> *Case Number 3 UF 133/33, OLG, supra* note 40.

<sup>193</sup> *Id.* at 7-8.

<sup>194</sup> *Id.* at 7.

<sup>195</sup> *Id.* at 6.

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rejected hygienic benefits vaguely claimed by the mother.<sup>196</sup> The court wrote that:

The question of circumcision is furthermore a question of hygiene and cleanliness. Although these two named motives are noteworthy insofar as they generally can justify a non-medically indicated circumcision. Yet, especially through her second marriage to a German, the center of the mother's and her son's lives are in Germany, where the child has his friends and attends school. Indisputably, the mother can only undertake rare visits to Kenya with her son. Moreover, he is indisputably baptized Protestant, so that religious reasons do not indicate a circumcision . . . . As far as an opposing will of G, which could be expected in case of a child-oriented explanation of the intended surgery, would not be observed and the mother of the child does not even intend to accompany her son during the procedure, this can also, to the conviction of the Senate, have an extremely negative effect on the psyche of the child, in particular with regard to the relationship of his mother as his main reference person.<sup>197</sup>

The court found inapplicable a custody law that appeared to permit the procedure because, in this case, the circumcision would lead to endangerment of the child's well-being.<sup>198</sup>

As Rolf Dietrich Herzberg points out, everything the Hamm court says is potentially applicable to any circumcision performed within the country of Germany.<sup>199</sup> A close reading of the decision might even be taken to imply that the law's tolerance of circumcision, despite the attendant medical risks and pain, may be invalid.<sup>200</sup>

Along similar lines, in October 2013, a Swiss cantonal court held in *X. v. Decision of the Children and Adult Protection Authority of Nordbünden* that a four-year-old Muslim boy could not be circumcised because (a) the proposed procedure was inconsistent with the child's welfare (thereby suggesting that it would constitute a harm) and (b) the decision could be delayed until the child could make the choice himself.<sup>201</sup> The court noted, in passing, the inconsistent legal treatment of FGC and MGC and commented on the incongruity of "a special offense solely for injury to the female genitals but not to the male genitals."<sup>202</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 6-7.

<sup>198</sup> *Case Number 3 UF 133/33, OLG, supra* note 40, at 7, 9.

<sup>199</sup> Rolf Dietrich Herzberg, *Ethical and Legal Aspects of Genital Cutting*, in *CIRCUMCISION OF BOYS: A SAD LEGACY* 27 (Matthias Franz, ed., 2014).

<sup>200</sup> *Case Number 3 UF 133/33, OLG, supra* note 40.

<sup>201</sup> *X. v. Decision of the Children and Adult Protection Authority of Nordbünden, supra* note 40.

<sup>202</sup> *Id.* at 11.

A 2019 decision by the Superior Court of the Canton of Zurich, Switzerland, barred a mother from having her son circumcised for religious reasons.<sup>203</sup> The decision was partially based on the son's unusual sensitivity due to unrelated past trauma that he had suffered.<sup>204</sup> The court held:

Parental decision-making authority . . . is, on the one hand, subject to the child's legal capacity and, on the other hand, restricted by the welfare of the child and respect for the personality of the child . . . . [C]ircumcision is permissible with the consent of the parents if it does not endanger the welfare of the child. If circumcision would endanger the welfare of the child, there must be no intervention until the boy himself has the necessary competence to make a judgment and give valid consent.<sup>205</sup>

The judge thus emphasized that parental rights are constrained by the child's welfare and respect for the child's personality.<sup>206</sup>

In the United States, the right to bodily integrity has been recognized for 130 years.<sup>207</sup> In 1891, the Supreme Court held, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>208</sup>

Oregon's *Boldt v. Boldt* parental circumcision dispute case ended in the Oregon Supreme Court honoring a fourteen-year-old boy's wishes to remain intact despite his father's insistence otherwise.<sup>209</sup> The case's conclusion agrees with recent European precedents, even if perhaps the outcome was partially attributable to a five-year delay in resolving the case.<sup>210</sup> During this time, the boy went from age nine to age fourteen, at which point the court accorded great weight to the adolescent's own wishes not to be circumcised.<sup>211</sup>

I contend that, at least in Europe and the one known U.S. case, the prior assumption of legality no longer accurately reflects current opinion. Case law is evolving toward greater protection of boys from MGC. The protection accorded does vary, presumably depending not only on the specific jurisdiction and decisionmaker but also on specific facts—age of procedure, whether the parents both agreed, whether the procedure was consistent with

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<sup>203</sup> Case number PQ190030-O/U, *supra* note 40.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at §§ 5.1, 6-7.

<sup>206</sup> *Id.* at §§ 5.1, 6-7.

<sup>207</sup> See *Union Pacific Railway Company v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>208</sup> *Id.* at 251.

<sup>209</sup> *In Re Marriage of Boldt and Boldt*, 176 P.3d 388 (2008).

<sup>210</sup> *C.f. id.*

<sup>211</sup> *Id.*

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their religion(s), and so on. Courts are thus generally feeling their way, case by case, toward providing a higher level of safeguarding of boys from genital cutting.

*C. Munby Case Indirectly Addresses MGC*

Having reviewed case law addressing MGC on the merits, I now consider one interesting case that directly relates only to FGC but may, like the foregoing cases, also support boys' entitlement to being safeguarded from MGC, albeit indirectly. In January 2015, Sir James Munby, President of the U.K. Family Division, issued a groundbreaking decision that builds on the 2013 Swiss decision questioning differential legal analyses of FGC and MGC.<sup>212</sup> In the case of *Re B and G (Children)*—wherein B was a four-year-old boy and G a three-year-old girl<sup>213</sup>—Sir James Munby held that the most minor types of FGC, such as a ritual nick of the clitoral hood that removes no tissue at all, legally creates “significant harms.”<sup>214</sup> Sir James Munby added a dictum, noting that because male circumcision as it most commonly occurs is more invasive physically than these relatively minor forms of FGC, then, male circumcision must also constitute “significant harm.”<sup>215</sup> By commenting thus, Sir James Munby followed in the footsteps of the 2013 Swiss decision, again querying the dramatic legal distinctions between the treatment of FGC and MGC.

Sir James Munby explained:

Circumcision involves the removal of a significant amount of tissue, creates an obvious alteration to the appearance of the genitals and leaves a more or less prominent scar around the circumference of the penis. . . . It can readily be seen that although [the] FGM [types considered here] . . . of are all very much more invasive than male circumcision, at least some forms . . . for example, pricking, piercing and incising, are on any view much less invasive than male circumcision.<sup>216</sup>

Sir James Munby demonstrated that he was not afraid to think through the implications of his observations: If FGC of all types constitutes significant harm, then male circumcision must also be a significant harm.<sup>217</sup>

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<sup>212</sup> *X. v. Decision of the Children and Adult Protection Authority of Nordbünden*, *supra* note 40.

<sup>213</sup> *Re B and G (No. 2)*, Case Number LJ13C00295, [Royal Court of Justice, England and Wales Family Court] (EWFC 3) [hereinafter *Re B and G*]; Brian D. Earp, *On the Supposed Distinction Between Culture and Religion: A Brief Comment on Sir James Munby's Decision in the Matter of B and G (children)*, PRACTICAL ETHICS (Feb. 2015), <http://blog.practicaethics.ox.ac.uk/2015/02/on-the-supposed-distinction-between-culture-and-religion-a-comment-on-sir-james-munbys-decision-in-the-matter-of-b-and-g-children> (last visited May 12, 2023) [<https://perma.cc/FD6C-Q446>].

<sup>214</sup> *Re B and G*, Case Number LJ13C00295, at 20, § 68.

<sup>215</sup> *Id.* at 20, § 69.

<sup>216</sup> *Id.* at 20 (§ 69).

<sup>217</sup> *Id.* at 20-21 (§§ 71-72).

However, in seeking to explain the current differential treatment of these two types of procedures under British law, Sir James Munby grasped at two possible explanations. First, Sir James Munby invoked the contention that potential “health” benefits allegedly flow from MGC and not from FGC, while at the same time conceding that “opinions are divided.”<sup>218</sup> Secondly, the decision invokes an alleged distinction between the religious and cultural nature of the types of genital cutting.<sup>219</sup> Regarding FGC, Sir James Munby evidenced unwillingness to permit any form of religious or cultural rationale: “The fact that it may be a ‘cultural’ practice does not make FGM reasonable; indeed, the proposition is specifically negated by section 1(5) of the 2003 Act. And, as I have already pointed out, FGM has no religious justification.”<sup>220</sup> By somewhat striking contrast, the decision stated an openness to permitting, without much fuss or even explanation, the same religious or cultural bases for MGC: “Society and the law, including family law, are prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms.”<sup>221</sup> Thus the decision evidenced an apparent willingness to tolerate an admittedly uncertain and only partially held societal support of or tolerance of MGC while simultaneously (and, I would contend, contradictorily) strictly refusing to entertain any form of FGC.

## V. THREE COMMON JUSTIFICATIONS OF MGC

### A. Health Benefits

The asserted health benefits that are sometimes attributed to male circumcision can neither overcome the harms mentioned above nor justify withholding from males the same legal protections available to females. Rhona Schuz is one such scholar who professes that health benefits justify infant circumcision and overcome human rights considerations.<sup>222</sup> She confidently maintains that the benefits of circumcision are “considerable”<sup>223</sup> and that “a considerable body of reputable medical opinion supports neonatal circumcision.”<sup>224</sup> Schuz also suggests that “the justifications for the practice are not purely social, but also religious, emotional and psychological.”<sup>225</sup> In

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<sup>218</sup> *Id.* at 20-21 (§§ 71-72).

<sup>219</sup> *Id.* at 20-21 (§§ 71-72).

<sup>220</sup> *Re B and G*, Case Number LJ13C00295, at 20 (§ 71).

<sup>221</sup> *Id.* at 20-21 (§ 72).

<sup>222</sup> Rhona Schuz, *The Dangers of Children’s Rights’ Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case*, 21 CARDOZO J.L. & GENDER 347 (2015).

<sup>223</sup> *Id.* at 357.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 380.

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her paper, however, Schuz failed to provide sufficient references.<sup>226</sup> In fact, most of her citations are to articles co-authored by a fringe circumcision proponent, Brian Morris, and a now-expired American Academy of Pediatrics (AAP) report, which is discussed below.<sup>227</sup> As Sir James Munby also suggested, proponents of treating MGC differently from FGC frequently argue that the medical benefits offered by MGC are not available from FGC, which, by contrast, is only perceived to provide “social” advantages such as promoting marriage eligibility, community acceptance, esthetics, and the like.<sup>228</sup>

National medical associations in Canada, Sweden, the United Kingdom, Denmark, Australia, Belgium, Finland, Norway, and the Netherlands expressly address the health benefits of MGC.<sup>229</sup> In their current (i.e., non-expired) reports, all associations to have formally addressed the topic have found that MGC performed before an acceptable age of consent, such as in the newborn period, does not offer children health benefits sufficient to compensate for the disadvantages in countries with advanced health care systems.<sup>230</sup>

For example, the Canadian Paediatric Society found:

In cases in which medical necessity is not established or a proposed treatment is based on personal preference, interventions should be deferred until the individual concerned is able to make their own choices. With newborn circumcision, medical necessity has not been clearly established . . . . The CPS does not recommend the routine circumcision of every newborn male.<sup>231</sup>

Other comparable organizations squarely oppose the procedure.<sup>232</sup> In 2016, the Danish Medical Association stated that it considers “circumcision of boys without medical indication is ethically unacceptable if the procedure is carried out without the informed consent of the person who gets the procedure.”<sup>233</sup> The Royal Dutch Medical Association (in Dutch, the

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Re B and G*, Case Number LJ13C00295.

<sup>229</sup> *Medical and Ethical Positions on Circumcision*, *supra* note 164.

<sup>230</sup> *Id.*

<sup>231</sup> S. Todd Sorokan, Jane C. Finlay & Ann L. Jeffries, *Canadian Paediatric Society Position Statement: Newborn Circumcision*, 20 PAEDIATRICS & CHILD HEALTH 311 (2015).

<sup>232</sup> *Medical and Ethical Positions on Circumcision*, *supra* note 164.

<sup>233</sup> *The Medical Association's Policy Regarding Circumcision of Boys Without Medical Indication*, DANISH MED. ASS'N, [https://www.arclaw.org/wp-content/uploads/laegeforeningens\\_politik\\_vedroerende\\_omskaering\\_af\\_drengeboern\\_uden\\_medicinsk\\_indikation\\_dec\\_2016.pdf](https://www.arclaw.org/wp-content/uploads/laegeforeningens_politik_vedroerende_omskaering_af_drengeboern_uden_medicinsk_indikation_dec_2016.pdf) [<https://perma.cc/LA6J-V66T>] (last visited Apr. 4, 2025), translation, [https://www.arclaw.org/wp-content/uploads/Danish-Medical-Association\\_2016-Circumcision-Policy\\_English-Translation.pdf](https://www.arclaw.org/wp-content/uploads/Danish-Medical-Association_2016-Circumcision-Policy_English-Translation.pdf) [<https://perma.cc/53XT-SUHG>] (last visited Apr. 4, 2025).

Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (KNMG)) advises that routine infant circumcision is not justified on grounds of health and that the procedure should be delayed until the individual can provide his own consent.<sup>234</sup>

Recently, Deacon and Muir—both senior U.K. surgeons who perform therapeutic circumcisions—published a paper in which they noted that it is “impossible” to frame a successful argument for infant circumcision as a preventive for penile cancer, cervical cancer, phimosis, or really any other suggested conditions.<sup>235</sup> They conclude that any seeming health benefit is small, largely only evident upon adulthood (such that the child can later make the decision for himself), and, in any event, is outbalanced by the attendant harm:

We would argue that, even where small potential benefits for non-therapeutic infant circumcision exist, *these apparent benefits only take significance when the infant becomes an adult, and are far out-weighed by the harms.* There appears to be little evidence that confers significant medical advantage from having this irreversible surgical procedure performed as a baby rather than as an adult. For this reason, *there does not appear to be any compelling reasons [sic] why parents (or doctors) should be making this intervention on behalf of children before the child reaches an age at which he can review the evidence and consent for himself.*<sup>236</sup>

The, now outdated, position taken by the American Academy of Pediatrics (“AAP”) Task Force on Circumcision is a striking exception to the international consensus. The AAP’s 2012 position statement—which notably expired in 2017—asserted that MGC provided health benefits that outweighed the procedure’s known surgical risks.<sup>237</sup> One problem, however, is that the AAP did not explain how they weighed the importance of the benefits and risks, nor did they provide any reasoned method for comparing the two.<sup>238</sup> The AAP admitted that because of shortcomings in the literature, “the true incidence of complications after newborn circumcision is unknown.”<sup>239</sup> If, as the AAP said, the true incidence of circumcision

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<sup>234</sup> *Non-Therapeutic Circumcision of Male Minors*, KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT BEVORDERING DER GENEESKUNST (KNMG) (2010).

<sup>235</sup> Matthew Deacon & Gordon Muir, *What is the Medical Evidence on Non-Therapeutic Child Circumcision?*, 35 INT’L J. IMPOTENCE RSCH., 256 (2023).

<sup>236</sup> *Id.* at 260-61 (emphasis added).

<sup>237</sup> AM. ACAD. OF PEDIATRICS TASK FORCE ON CIRCUMCISION, *Male Circumcision*, 130 PEDIATRICS 756 (2012), <https://publications.aap.org/pediatrics/article/130/3/585/30235/Circumcision-Policy-Statement>.

<sup>238</sup> *Id.*

<sup>239</sup> *Cf. id.* at 772.

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complications is unknown, no credible computation can then be made that something unknown was outweighed by benefits of the procedure.<sup>240</sup>

Consequently, the AAP was criticized, both in its own flagship journal and by a large team of senior physicians, ethicists, and representatives of national medical organizations outside the United States.<sup>241</sup> For example, Dr. Morten Frisch and colleagues argued that the AAP's conclusions were likely to have been culturally biased; the United States, they pointed out, is unique among Western nations in circumcising a majority of male newborns at birth for non-religious reasons.<sup>242</sup> The AAP later clarified that the benefits were only subjectively "felt" to outweigh the risks.<sup>243</sup> In 2018, the Centers for Disease Control and Prevention ("CDC") issued a similar report that recycled some of the AAP's faulty claims.<sup>244</sup>

Frisch et al. contested allegations that "health" benefits can justify MGC, finding that only 1 of the arguments put forward by the American Academy of Pediatrics has some theoretical relevance in relation to infant male circumcision; namely, the possible protection against urinary tract infections in infant boys, which can easily be treated with antibiotics without tissue loss. The other claimed health benefits, including protection against HIV/AIDS, genital herpes, genital warts, and penile cancer, are questionable, weak, and likely to have little public health relevance in a Western context, and they do not represent compelling reasons for surgery before boys are old enough to decide for themselves.<sup>245</sup>

Thus, the only asserted "benefit" of MGC that seems arguably viable is reduced risk of acquiring a urinary tract infection (UTI).<sup>246</sup> For boys, any such reduction is at most very slight, requiring, according to the AAP, at least 100 surgeries to prevent one UTI.<sup>247</sup> However, also according to the AAP, girls are four to eight times more likely than boys to acquire a UTI before age five.<sup>248</sup> Yet, as bioethicist Brian D. Earp points out, no Western organization

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<sup>240</sup> *Cf. id.*

<sup>241</sup> Morten Frisch et al., *Cultural bias in The AAP's Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796 (2013), <https://publications.aap.org/pediatrics/article-abstract/131/4/796/31907/Cultural-Bias-in-the-AAP-s-2012-Technical-Report>.

<sup>242</sup> *Id.* at 796, 797.

<sup>243</sup> AM. ACAD. OF PEDIATRICS TASK FORCE ON CIRCUMCISION, *The AAP Task Force on Neonatal Circumcision: A Call for Respectful Dialogue*, 39 J. MED ETHICS, 442, 442 (2013).

<sup>244</sup> *Information for Providers to Share with Male Patients and Parents Regarding Male Circumcision and the Prevention of HIV Infection, Sexually Transmitted Infections, and Other Health Outcomes*, CDC <https://stacks.cdc.gov/view/cdc/58456> (last visited Nov. 22, 2024) [<https://perma.cc/J5WC-VBTQ>].

<sup>245</sup> Frisch, et al., *supra* note 241, at 796.

<sup>246</sup> *Id.* at 797.

<sup>247</sup> *Id.*

<sup>248</sup> *Recurrent Urinary Tract Infections (UTIs) in Children*, HEALTHYCHILDREN.ORG (May 23, 2018) <https://www.healthychildren.org/English/health-issues/conditions/genitourinary-tract/Pages/Urinary-Tract-Infections-in-Teens.aspx> [<https://perma.cc/W56B-ZZ67>].



would consider proposing research to determine whether removing healthy tissue from the pediatric vulva can prevent a female UTI.<sup>249</sup>

Appeals to statistical health benefits as a way of distinguishing male and female genital cutting are ultimately a red herring. Given all this, one can appreciate legal scholar Kai Möller’s skepticism about American justifications for the procedure.<sup>250</sup> Möller wrote that the American argument relating to the health benefits associated with genital cutting is so weak that its value can be considered “zero” for practical purposes, and it can therefore be concluded that routine “circumcision” limits an infant’s future options for no valid reason and therefore violates his “right to an open future.”<sup>251</sup>

### B. Religion/Culture

I now address the two potential justifications for MGC that Munby mentioned, health benefits and religion/culture, along with a third that is commonly invoked, an asserted lack of harm caused by MGC.<sup>252</sup> Years of scholarship have chipped away at these three putative distinctions.<sup>253</sup>

Religion and culture as rationales for MGC seem partly to derive any power they may have from their very lack of specificity, as well as from a general unwillingness to offend religious communities.<sup>254</sup> While a range of academic opinions is certainly in evidence, a growing plurality of observers—including this author—refuses to accept either explanation as justifying a painful procedure that removes tissue without the individual’s consent.<sup>255</sup> Legal scholar Kai Möller finds “unconvincing, both empirically and normatively” Sir James Munby’s assertion that FGC has no basis in religion whereas MGC does have such a basis.<sup>256</sup> On the other hand, bioethicists Marie Fox, Michael Thomson, and Joshua Warburton comment hopefully on the potential for Sir James Munby’s dictum to help debunk analyses of FGC and MGC as worlds apart from each other:

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<sup>249</sup> *Male or Female Genital Cutting: Why “Health Benefits” Are Morally Irrelevant*, *supra* note 27.

<sup>250</sup> Möller, *supra* note 19.

<sup>251</sup> *Id.*

<sup>252</sup> Boris Friedman et al, *Pros and Cons of Circumcision: An Evidence-Based Overview*, 22 CLINICAL MICROBIOLOGY & INFECTION 768 (2016).

<sup>253</sup> *Genital Modifications in Prepubescent Minors*, *supra* note 20; Mason, *supra* note 20; Davis, *supra* note 2; Bell, *supra* note 3; Svoboda & Darby, *supra* note 20; Androus, *supra* note 20; Earp, *supra* note 20; Townsend, *supra* note 20.

<sup>254</sup> Carolyn Bridge, *Religion, Culture and the Body of the Child*, in BODY LORE AND LAWS 265-287 (Andrew Bainham et al. eds., 2022); *Female Genital Mutilation and Male Circumcision: Toward an Autonomy-based Ethical Framework*, *supra* note 20.

<sup>255</sup> *Genital Modifications in Prepubescent Minors*, *supra* note 20; Mason, *supra* note 20; Davis, *supra* note 2; Bell, *supra* note 3; Svoboda & Darby, *supra* note 20; Androus, *supra* note 20; Earp, *supra* note 20; Townsend, *supra* note 20.

<sup>256</sup> Möller, *supra* note 19.

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This dictum marks a distinct departure from previous case law, and in our view has the potential to align judicial thinking with the growing academic literature challenging . . . understandings of female and male genital cutting as categorically different . . . . Focusing on the actual corporeal harm occasioned by the cutting of children reveals a commonality between cutting practices that is generally obscured by the different cultural understandings of their meanings.<sup>257</sup>

Religion and culture seem, to me, particularly susceptible to different interpretation by different authors, who sometimes come to opposing conclusions from similar starting points. Scholars Patrick Lenta and Jacqui Poltera find some basis in defenses of religiously based circumcision, but finally conclude that any alleged right of raising one's children according to one's own values and inclinations cannot overcome their ultimate conclusion that circumcision must be legally prohibited.<sup>258</sup>

On the other side of the debate, scholar Joseph Mazor argues the religious case cogently, even fervently.<sup>259</sup> He rightly invokes the desirability of tolerance for cultural diversity and then argues that allowing parents to circumcise their children is consistent with growing general permissiveness toward reasonable parental decision-making. Mazor then intriguingly puts forth a “flipped” parental proxy permission argument that contends (unfortunately without a substantiating reference) that a child of Jewish or Muslim parents is quite likely to choose circumcision for himself.<sup>260</sup>

The likelihood of the child choosing circumcision in the religious case also reduces the extent to which infant circumcision violates his interest in self-determination. I conclude that male infant circumcision falls within the prerogative of parental decision-making in the secular case and even more clearly so in the religious case.<sup>261</sup>

Yet, a little later, Mazor sets up a strained analogy that asks us to “[i]magine that there is an operation that has some negligible health benefits for a child but that also moderately reduces the pleasure the child obtains from eating sweet foods.”<sup>262</sup> Next, Mazor attempts to justify infant circumcision through repeated mentions of the costs of adult circumcision being higher than those of infant circumcision.<sup>263</sup> First, the relative costs,

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<sup>257</sup> Marie Fox, Michael Thomson & Joshua Warburton, *Non-Therapeutic Male Genital Cutting and Harm: Law, Policy and Evidence from U.K. Hospitals*, 33 *BIOETHICS* 467, 469 (2019).

<sup>258</sup> Patrick Lenta & Jacqui Poltera, *The Legal Status of Infant Male Circumcision*, 45 *J. LEGAL PHIL.* 27, 41, 47, 48 (2020).

<sup>259</sup> Joseph Mazor, *The Child's Interests and The Case for the Permissibility of Male Infant Circumcision*, 39 *J. MED. ETHICS* 421 (2013).

<sup>260</sup> *Id.* at 421.

<sup>261</sup> *Id.* at 421.

<sup>262</sup> *Id.* at 424.

<sup>263</sup> *Id.* at 425, 427.

also invoked by numerous other authors,<sup>264</sup> and contested by others,<sup>265</sup> only appear to be reduced because infant circumcisions cannot accommodate adequate pain relief, something which any adult would understandably insist on.<sup>266</sup> Thus, costs are essentially saved on the backs of the infants who must endure the pain without anesthesia.<sup>267</sup> Second, this argument places the cart before the horse. Surely, we first need to make a principled analysis of whether the practice is permissible in the first place. And third, as discussed in more detail below in Part V.C., Mazor fails to give any consideration in his analysis of “costs” versus “benefits” to harm caused by loss of the foreskin.<sup>268</sup>

Lenta and Poltera have no sympathy for Mazor’s argument that MGC is less problematic when performed on infants: “This objection is unsuccessful. As Robert Darby points out, “research into the effects and complications of circumcision is too inadequate for anybody to know whether it is safer and less harmful in infancy in infancy [sic], childhood or maturity.”<sup>269</sup> In fact, a recent systematic review and meta-analysis found that children and adults had *nonsignificantly* higher complication rates than infants.<sup>270</sup>

In 2019, Mazor wrote a second paper that takes a different tack, claiming the importance to analyzing children’s rights against MGC of parental motives for the procedure. He contends that “[t]he non-negligently benevolent motives of the agents who authorise circumcision make children’s rights against this practice weaker than they would be in the case of malevolent harms of similar magnitude.”<sup>271</sup>

This argument cannot withstand serious scrutiny and, in fact, was rejected in both the 2002 Frankenthal district court case and the 2019 Zurich

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<sup>264</sup> Edgar J. Schoen, *Cost Analysis of Neonatal Circumcision in a Large Health Maintenance Organization*, 175 J. UROLOGY 1111 (2006); Stephanie L. Sansom et al., *Cost-Effectiveness of Newborn Circumcision in Reducing Lifetime HIV Risk among U.S. Males*, 5 PLOS ONE e8723 (2010); Seema Kacker et al., *Costs and Effectiveness of Neonatal Male Circumcision*, 166 ARCHIVES PEDIATRIC & ADOLESCENT MED. 910 (2012).

<sup>265</sup> Robert S. Van Howe, *A Cost-Utility Analysis of Neonatal Circumcision*, 24 MED. DECISION MAKING 584 (2004); Dan Bollinger, *High Cost of Circumcision \$5.7 Billion Annually*, ACADEMIA (2012), [https://www.academia.edu/6442587/High\\_Cost\\_of\\_Circumcision\\_3\\_6\\_Billion\\_Annually](https://www.academia.edu/6442587/High_Cost_of_Circumcision_3_6_Billion_Annually) [<https://perma.cc/N534-NYWG>].

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Mazor, *supra* note 259.

<sup>269</sup> Lenta & Poltera, *supra* note 258, at 38-39.

<sup>270</sup> Daniel M. Shabanzadeh, et al., *Male Circumcision Complications – A Systematic Review, Meta-Analysis and Meta-Regression*, 152 UROLOGY 25, 28 (2021).

<sup>271</sup> Mazor, *supra* note 259, at 266.

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decision, as discussed above.<sup>272</sup> First, in my analysis, the cases suggest that the precise level of genuineness of a parent's motivations may be ultimately indeterminable. Second, while we may possibly view the benevolence of *the parents'* motivations as relevant to whether their decisions should be permitted—or even punished—rationales of third parties cannot fairly affect a child's right to the integrity of his own body.<sup>273</sup>

Allan J. Jacobs and Kavita S. Arora provide a detailed test as to whether a religious or cultural practice should be permissible, which may be applied to circumcision.<sup>274</sup> They state that to be permissible, the practice being considered:

[M]ust not significantly burden either society or members outside the minority group. Second, the practice must not (a) create burdens that the large majority of reasonable persons in that society, but outside the minority group in question, would not accept for themselves or their children (such as, in the United States, child marriage or slavery); or (b) carry a substantial chance of death or of major disruption of a physiological function. Third, the burden on society or individuals must be actual and substantial, and not hypothetical or unlikely.<sup>275</sup>

This approach sounds reasonable as far as it goes. The devil seems to lie here in the authors' application of their test to MGC, which leaves Jacobs and Arora concluding:

It is evident that infant circumcision has little effect on the general society or its members. It also is safe and is unlikely to impact adversely on quality of life . . . . Thus, circumcision as a religious or cultural practice fulfills the Jacobs test as a parental prerogative and does not constitute a human rights violation.<sup>276</sup>

Numerous authors agree that this simplistic assertion fails to pass muster when the procedure is examined with reference to both its multifarious harms (which are discussed in detail in Part V.C) and existing international human rights protections.<sup>277</sup> Rhona Schuz contends, not without reason, that the rights of the child laid out in the Convention on the

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<sup>272</sup> *Case 4 O 11/02 Regional Court of Frankenthal*, *supra* note 40; *Case number PQ190030-O/U*, *supra* note 40.

<sup>273</sup> *See, e.g.*, Bell, *supra* note 3.

<sup>274</sup> Allan J. Jacobs & Kavita S. Arora, *Ritual Infant Male Circumcision and Human Rights*, 15 AM. J. BIOETHICS 30, 35 (2015).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 35-36.

<sup>277</sup> *See, e.g.*, *Genital Modifications in Prepubescent Minors*, *supra* note 20; Mason, *supra* note 20; Davis, *supra* note 2; Bell, *supra* note 3; Svoboda & Darby, *supra* note 20; Androus, *supra* note 20; Earp, *supra* note 20; Townsend, *supra* note 20.

Rights of the Child (“CRC”)<sup>278</sup>—one of the documents these authors most commonly reference—are formulated generally and thus are hard to specifically interpret.<sup>279</sup> Nevertheless, these are some of the only formal declarations, and along those lines, these scholars find that MGC as a traditional practice violates numerous provisions of the CRC and the ICCPR.<sup>280</sup> MGC, as a practice prejudicial to children’s health, falls squarely within the scope of CRC Article 24(3).<sup>281</sup> CRC Article 19(1) protects the right to freedom from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”<sup>282</sup> Other CRC and ICCPR provisions violated by MGC include the right to freedom against discrimination, the right to security of person, the right to freedom from torture, and the right to health.<sup>283</sup> Every country in the world, except the United States, has ratified the CRC.<sup>284</sup> The CRC, thus, is a particularly perfect example of customary law, which the United States Supreme Court has repeatedly held is binding on the United States as part of the supreme “law of the land.”<sup>285</sup>

Another human right sometimes forgotten is the child’s own right to freedom of religion under CRC article 14(1).<sup>286</sup> Even if religion did somehow justify MGC, which is clearly not the case, CRC Article 14(3) and ICCPR Article 18(3) still provide an exception to an asserted right of freedom of religion where it would violate fundamental rights and freedoms of another human being.<sup>287</sup> The Cologne case emphasized the importance of safeguarding the child’s right to determine their own religion.<sup>288</sup> The court held, “[t]his change conflicts with the child’s interest of later being able to make his own decision on his religious affiliation.”<sup>289</sup> Here, Lenta and Poltera argue that although the procedure does in fact create an enduring

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<sup>278</sup> *U.N. Convention on the Rights of the Child*, U.N. DOCS. (Nov. 20, 1989), 1577 U.N.T.S. 3.

<sup>279</sup> Schuz, *supra* note 222, at 363.

<sup>280</sup> *U.N. International Covenant on Civil and Political Rights*, U.N. DOCS. (Dec. 9, 1966), 999 U.N.T.S. 171.

<sup>281</sup> *U.N. Convention on the Rights of the Child*, *supra* note 278.

<sup>282</sup> *Id.*

<sup>283</sup> Smith, *Male Circumcision and the Rights of the Child*, *supra* note 19; Boyle, Svoboda, Price & Turner, *supra* note 33; DeLaet, *supra* note 23; *Circumcision as a Human Rights Violation*, *supra* note 125; Peter W. Adler, *Is Circumcision Legal?*, 16 RICHMOND J. L. & PUB. INTEREST 439, 464-66 (2013); Sandland, *supra* note 23.

<sup>284</sup> *Frequently Asked Questions on The Convention on the Rights of the Child*, U.N. INT’L EMERGENCY FUND, <https://www.unicef.org/child-rights-convention/frequently-asked-questions> (last visited Nov. 14, 2024).

<sup>285</sup> *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900).

<sup>286</sup> *U.N. Convention on the Rights of the Child*, *supra* note 278.

<sup>287</sup> Svoboda, Adler & Howe *supra* note 36.

<sup>288</sup> Cologne Case, Urteil Ns 169/11.

<sup>289</sup> *Id.*

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mark, “a child on whom [MGC] is performed is not constrained by the ‘physical mark’ to adopt a particular religious or cultural identity in perpetuity.”<sup>290</sup> Because MGC “does not infringe the infant’s right to an open future,” Lenta and Poltera argue that it does not “mak[e] it appreciably harder or more costly than it would otherwise be for men to leave the religious group in which they were reared or to decide upon their religious affiliation.”<sup>291</sup>

This contention also cannot survive scrutiny. Surely, a person may feel influenced (one way or the other) to follow a particular spiritual path if their body bears a physical change aligned with that path. But arguments that advocate against a right of marking a child with the parents’ religion seem more intuitive.<sup>292</sup> Scholars Reinhard Merkel and Holm Putzke ask, “If parents do not have the right to determine their child’s religious affiliation for the child’s lifetime, why should they have a right to permanently mark their children’s bodies with a symbol of that affiliation?”<sup>293</sup> Here, Möller summarizes the balancing of rights:

Thus, *irreversibly* imprinting the mark of the parents’ religion or religious-cultural community on a child exceeds the parents’ entitlements. What parents may legitimately do is to introduce the boy to and raise him in their religious or cultural tradition. They may hope that he, too, will come to endorse these values and practices – and if he does, he may choose to get circumcised as an adult, thus writing an important chapter of his life story – but they must respect his autonomy-based entitlement not to.<sup>294</sup>

On this point, scholar Peter Adler succinctly agrees: “[I]t violates a boy’s right to freedom of religion to brand him permanently as belonging to a religion that he may choose to renounce.”<sup>295</sup> In fact, some religious leaders, such as Chief Rabbi of Israel, Yona Metzger, view circumcision as leaving a permanent mark representative of the faith or culture.<sup>296</sup> He described male circumcision as “a stamp, a seal on the body of all Jews [well, only the males], a seal one can never retreat from.”<sup>297</sup>

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<sup>290</sup> Lenta & Poltera, *supra* note 258, at 32.

<sup>291</sup> *Id.*

<sup>292</sup> *Genital Modifications in Prepubescent Minors*, *supra* note 20; Davis, *supra* note 2; Bell, *supra* note 3; Svoboda & Darby, *supra* note 20; Androus, *supra* note 20; Earp, *supra* note 20; Townsend, *supra* note 20; Merkel & Putzke, *supra* note 33.

<sup>293</sup> Merkel & Putzke, *supra* note 33, at 448.

<sup>294</sup> Kai Möller, *Ritual Male Circumcision and Parental Authority*, 8 JURIS. 461, 475 (2017).

<sup>295</sup> Adler, *supra* note 283, at 459.

<sup>296</sup> Merkel & Putzke, *supra* note 33, at 447 (quoting Metzger).

<sup>297</sup> *Id.* at 447.

Even if, as Mazor and Schuz imply,<sup>298</sup> some adults would later feel alright that they were circumcised because of their culture, the practice, Kate Goldie Townsend writes, is still a violation of their bodily and genital integrity:

[T]he child's rights to bodily and genital integrity are grounded in their interest in having their bodily integrity respected irrespective of whether they would or would not retrospectively endorse any cutting or modification of their genitalia as adults. It may well be the case that some adults who had their genitals cut or modified in childhood would affirm it as something they are content with because it coheres with the wider sociocultural values of their group (majority or minority, dominant or marginalised); but the practice would still be a violation of their bodily and genital integrity and simply cannot be justified by appealing to group rights to religious freedom within a liberal political framework.<sup>299</sup>

Lenta and Poltera agree with Townsend that subsequent acceptance of the procedure by an adult who undergoes MGC as a child cannot retroactively act as some sort of "constructive consent" that can excuse or justify it for any particular infant.<sup>300</sup>

Arguments or ideas may still filter through society to help defend or justify MGC. Some such arguments derive from cultural constructions of normality and may have merit even if they do not ultimately justify non-consensual MGC. The foregoing cultural arguments for MGC do not, alone, explain the differential treatment of MGC and FGC in Western countries, particularly in the United States.<sup>301</sup> As scholar Peter A. Clark points out, precisely the same reasoning used to justify culturally motivated MGC can be invoked in defense of culturally motivated FGC.<sup>302</sup> Scholar Max Buckler persuasively argues that MGC's acceptability at least partly stems from its medicalized nature and Western culture's acceptance of the circumcised penis as "normal:"

[T]hat it is not respect for the concept of religious freedom which has enabled the religious defense of one type of cutting—rather, it is the more broadly perceived acceptability of the specific state produced by penile circumcision,

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<sup>298</sup> Mazor, *supra* note 259; Schuz, *supra* note 222, at 368-70; Katie Goldie Townsend, *Defending an Inclusive Right to Genital and Bodily Integrity for Children*, 35 INT'L J. IMPOTENCE RSCH. 27, 29 (2023) (emphasis added).

<sup>299</sup> Townsend, *supra* note 298.

<sup>300</sup> Lenta & Poltera, *supra* note 258, at 39.

<sup>301</sup> See generally Peter A. Clark, *To Circumcise or Not to Circumcise?*, 87 HEALTH PROGRESS 30 (2026).

<sup>302</sup> *Id.*

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where this perceived acceptability, in turn, depends on non-religious factors, particularly medicalization.<sup>303</sup>

Sir James Munby's findings are dicta that cannot serve as legal precedent, yet my analysis suggests that courts outside the United States at least may be moving toward more sympathy for protecting non-consenting males from MGC. Cultural and religious arguments can be and have been invoked in defense of MGC. Yet, ultimately, neither can trump an individual's own human rights to self-determination and bodily integrity.

### *C. Lack of Harm*

Allegations of a lack of harm from MGC are common in the literature.<sup>304</sup> For example, Schuz suggests that MGC is legally permissible because, unlike with FGC,

[T]he available evidence shows that men who have been ritually circumcised do not feel any lack of wholeness . . . there is no real evidence of any significant adverse physical and psychological effects . . . [and] the justifications for the practice are not purely social, but also religious, emotional and psychological.<sup>305</sup>

As noted above, Jacobs and Arora imply negligible harm in writing that "[t]hird, the burden on society or individuals must be actual and substantial, and not hypothetical or unlikely."<sup>306</sup>

A wealth of evidence and scholarship exists to contradict this position.<sup>307</sup> MGC necessarily alters sexual experience, as it removes irreplaceable tissue having erogenous, protective, immunological, and tactile

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<sup>303</sup> Max Buckler, *The Ethics of Child Genital Cutting. When Does a Violation Occur? Comments on Defending an Inclusive Right to Genital and Bodily Integrity for Children by Dr. Katie Goldie Townsend*, 35 INT'L J. IMPOTENCE RSCH. 31, 32 (2023).

<sup>304</sup> See, e.g., Schuz, *supra* note 222, at 380; Stefan A. Bailis, Stephen Moreton & Brian J. Morris, *Critical Evaluation of a Survey Claiming Long-Term Adverse Outcomes from Neonatal Circumcision*, 9 ADVANCES IN SEXUAL MED. 67 (2019).

<sup>305</sup> Schuz, *supra* note 222, at 380.

<sup>306</sup> Jacobs & Arora, *supra* note 274, at 35.

<sup>307</sup> See, e.g., Adler, Howe, Wisdom, & Daase, *supra* note 34, at 49; Brian D. Earp, *Between Moral Relativism and Moral Hypocrisy: Reframing the Debate on FGM*, 26 KENNEDY INST. OF ETHICS J. 105 (2016) [hereinafter *Between Moral Relativism and Moral Hypocrisy*]; RONALD GOLDMAN, CIRCUMCISION THE HIDDEN TRAUMA: HOW AN AMERICAN CULTURAL PRACTICE AFFECTS INFANTS AND ULTIMATELY US ALL (1997) [hereinafter CIRCUMCISION THE HIDDEN TRAUMA]; Anna Taddio, Joel Katz, A Lane Illersich & Gideon Koren, *Effects of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 THE LANCET 599, 602 (1997); Tracey Gemmell & Gregory J. Boyle, *Neonatal Circumcision: Its Long-term Harmful Effects*, in UNDERSTANDING CIRCUMCISION: A MULTI-DISCIPLINARY APPROACH TO A MULTI-DIMENSIONAL PROBLEM 241-52 (George C. Denniston, Frederick Mansfield Hodges & Marilyn Fayre Milos eds., 2002); Gregory J. Boyle, Ronald Goldman & J. Steven Svoboda, *Male Circumcision: Pain, Trauma and Psychosexual Sequelae*, 7 J. HEALTH PSYCH. 329, 332 (2002).



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functions.<sup>308</sup> Recent scholarship explains the immunohistological functions and dense innervation of the foreskin.<sup>309</sup> Furthermore, Anna Taddio and colleagues found that “the long-term consequences of surgery done without anaesthesia are likely to include post-traumatic stress.”<sup>310</sup> Some survivors consider circumcision among the most problematic and harmful events they have endured in their entire lives.<sup>311</sup> One recent study found that survivors report a wide variety of psychological impacts including a compromise to their body integrity, the creation of feelings of inadequacy and/or insecurity, violation of bodily autonomy, and fostering obsessive and/or suicidal thoughts.<sup>312</sup> Moreover, evidence suggests that at least “tens of thousands of English-speaking circumcised males are currently practicing something called “foreskin restoration” to restore an inevitably imperfect “foreskin” by stretching their penile skin.<sup>313</sup> This indicates that circumcision is a serious issue for these men, who are motivated to undergo considerable inconvenience, trouble, and expense, typically lasting for several years, to

<sup>308</sup> Adler, Howe, Wisdom, & Daase, *supra* note 34, at 49.

<sup>309</sup> Alfonso Cepeda-Emiliani, Marina Gándara-Cortés, María Otero-Alén, Heidy García, Juan Suárez-Quintanilla, Tomás García-Caballero, Rosalía Gallego & Lucía García-Caballero, *Immunohistological Study of the Density and Distribution of Human Penile Neural Tissue: Gradient Hypothesis*, 35 INT’L J. IMPOTENCE RSCH. 286 (2023).

<sup>310</sup> Taddio, Katz, Illersich & Koren, *supra* note 307, at 602; CIRCUMCISION THE HIDDEN TRAUMA, *supra* note 307, at 313; Gemmell & Boyle, *supra* note 307, at 241; Boyle, Goldman & Svoboda, *supra* note 307, at 332.

<sup>311</sup> Tim Hammond, *Long-Term Consequences of Neonatal Circumcision: A Preliminary Poll of Circumcised Males*, in SEXUAL MUTILATIONS: A HUMAN TRAGEDY, *supra* note 10 [hereinafter *Long-Term Consequences of Neonatal Circumcision: A Preliminary Poll of Circumcised Males*]; Tim Hammond, *A Preliminary Poll of Men Circumcised in Infancy or Childhood*, 83 BJU INT’L 1 (1999) [hereinafter *A Preliminary Poll of Men Circumcised in Infancy or Childhood*]; Ronald Goldman, *The Psychological Impact of Circumcision*, 83 BJU INT’L 93 (1999) [hereinafter *The Psychological Impact of Circumcision*]; Robert Darby & Laurence Cox, *Objections of a Sentimental Character: The Subjective Dimensions of Foreskin Loss*, in FEARFUL SYMMETRIES: ESSAYS AND TESTIMONIES AROUND EXCISION AND CIRCUMCISIONS 145-68 (Chantal Zabus ed., 2009); Jerry K. Brayton, *My Circumcision Story*, in FEARFUL SYMMETRIES: ESSAYS AND TESTIMONIES AROUND EXCISION AND CIRCUMCISION 211-17 (Chantal Zabus ed., 2009); LINDSAY R. WATSON, *UNSPEAKABLE MUTILATIONS: CIRCUMCISED MEN SPEAK OUT* (2014).

<sup>312</sup> Megha Uberoi, Jasmine Abdulcadir, Dana A. Ohl, Javier E. Santiago, Gurpreet K. Rana & Frank W.J. Anderson, *Potentially Under-recognized Late-stage Physical and Psychosexual Complications of Non-therapeutic Neonatal Penile Circumcision: A Qualitative and Quantitative Analysis of Self-Reports from an Online Community Forum*, 35 INT’L J. IMPOTENCE RSCH. 234, 236 (2023).

<sup>313</sup> *Between Moral Relativism and Moral Hypocrisy*, *supra* note 307, at 105; JIM BIGELOW, THE JOY OF UNCIRCUMCISION (1995); John P. Warren, *Foreskin Restoration (Circumcision Reversal)*, in MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL, AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 303-09 (George C. Denniston, Frederick Mansfield Hodges & Marilyn Fayre Milos eds., 1999); Laura Novak, *The Foreskin Renaissance*, THE GOOD MEN PROJECT (Jan. 18, 2011), <https://goodmenproject.com/health/the-foreskin-renaissance>; Tim Hammond, Lauren M. Sardi, William A. Jellison, Ryan McAllister, Ben Snyder & Mohamed A. B. Fahmy, *Foreskin Restorers: Insights into Motivations, Successes, Challenges and Experiences with Medical and Mental Health Professionals—An Abridged Summary of Key Findings*, 35 INT’L J. IMPOTENCE RSCH. 309 (2023).

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regain a portion (not all) of what they lost.<sup>314</sup> Given all this harm, scholars Ronald S. Immerman and Wade C. Mackey’s description of the procedure as “low-grade neurological castration”<sup>315</sup> strikes one as no more than a factual description.

Recognition is growing of the inevitable harm that MGC causes—harm that is becoming increasingly difficult to credibly deny or minimize.<sup>316</sup> For example, Townsend recently provided a useful perspective, noting that “complications” cannot be only loss but also the absence of the excised tissue with all its benefits.<sup>317</sup> Townsend’s is a fundamental point that all too often is forgotten or obfuscated:

The view that penile prepuce removal is harmless assumes that the prepuce itself has no value, meaning that the only real harm at stake in its removal is the risk of surgical complications. But it is not standard to take this approach to other functional body tissues which are attributed their own value. The value given other body tissue means, for instance, that even when surgery is medically necessary, there is a moral and legal imperative to make every effort to preserve healthy tissue. Many men whose genitals were cut as children, teens, or infants express extreme discontent at having their sexual anatomy altered before they were able to make the decision for themselves. This does not mean, of course, that every person whose genitals were cut or modified in childhood experiences the same negative consequences, but it does cast serious doubt on the assertion that the harms of prepuce removal are minimal.<sup>318</sup>

As long ago as 2001, scholar Dena Davis devoted nearly seven full journal pages to “the problem of pain” arising from MGC.<sup>319</sup> Marcus C. Tye and Lauren M. Sardi agree that this is a major issue, noting:

[W]hile there is literature that addresses the ways in which pain experienced by neonates not only has negative short- and long-term psychological consequences, policymaking documents on neonatal circumcision do not address the fact that such pain is not adequately nor regularly controlled for

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<sup>314</sup> *Between Moral Relativism and Moral Hypocrisy*, *supra* note 307, at 105; BIGELOW, *supra* note 313; Warren, *supra* note 313; Novak, *supra* note 313; Hammond, Sardi, Jellison, McAllister, Snyder & Fahmy, *supra* note 313.

<sup>315</sup> Ronald S. Immerman & Wade C. Mackey, *A Proposed Relationship Between Circumcision and Sexual Reorganization*, 159 J. GENETIC PSYCH. 367, 372 (1998).

<sup>316</sup> Brigman, *supra* note 34; Kellner, *supra* note 34; Boyle, Svoboda, Price & Turner, *supra* note 33; SOMERVILLE, *supra* note 33; Adler, Howe, Wisdom, & Daase, *supra* note 34; Merkel & Putzke, *supra* note 33.

<sup>317</sup> Townsend, *supra* note 20.

<sup>318</sup> *Id.*

<sup>319</sup> Davis, *supra* note 2.

during the procedure, and that failure to control for pain can have lasting effects on the child, possibly into adulthood.<sup>320</sup>

Scholar Stephen Munzer distills the four “classes of harm” caused by circumcision as pain, medical complications, psychological impacts, and “functional impairments.”<sup>321</sup> And what are the medical complications? Here, Munzer summarizes:

Early complications, in alphabetical order, include chordee, death, destruction (ablation) of the penis, glanular amputation, glanular necrosis, hemorrhage, iatrogenic hypospadias, penile skin bridge, redundant foreskin, and surgical site infection. Late complications, in alphabetical order, include buried penis, chordee, epidermal inclusion cysts, excessive skin removal, meatal stenosis, meatitis, penile adhesions, phimosis, sepsis, and urethrocuteaneous fistula.<sup>322</sup>

The KNMG notes that “complete amputation of the penis” also sometimes becomes necessary.<sup>323</sup> Additional potential downsides for a circumcised male include experiencing decreased sensitivity to fine touch and possible erectile problems as an adult.<sup>324</sup> Just as one example of representative circumcision complication rates, in a single calendar year, one U.K. hospital had an alarming number of serious issues arising from circumcision.<sup>325</sup> “In 2011 in Birmingham Hospital, eleven boys under the age of one were treated for life-threatening hemorrhage, shock or sepsis relating to circumcision.”<sup>326</sup> This harm is a serious issue, especially considering, as discussed in the next Part, the lack of medical justification for the procedure.

Möller and the team of Merkel and Putzke point to the often-forgotten elephant in the hospital room, the loss of the functional and highly pleasurable body part, an important part of male anatomy.<sup>327</sup> Möller observes that the harms include “the removal of a body part, extreme physical pain,

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<sup>320</sup> Marcus C. Tye & Lauren M. Sardi, *Psychological, Psychosocial, and Psychosexual Aspects of Penile Circumcision*, 35 INT’L J. IMPOTENCE RSCH. 242 (2023).

<sup>321</sup> Stephen Munzer, *Examining Nontherapeutic Circumcision*, 28 HEALTH MATRIX 1, 5 (2018).

<sup>322</sup> *Id.* at 6.

<sup>323</sup> *Non-Therapeutic Circumcision of Male Minors*, KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT BEVORDERING DER GENEESKUNST (KNMG) (2010).

<sup>324</sup> Sorrells, Snyder, Reiss, Eden, Milos, Wilcox & Van Howe, *supra* note 112; Bossio, Pukall & Steele, *supra* note 112; Kenneth S. Fink, Culley C. Carson & Robert F. DeVellis, *Adult Circumcision Outcomes Study: Effect on Erectile Function, Penile Sensitivity, Sexual Activity, and Satisfaction*, 167 J. UROLOGY 2113 (2002).

<sup>325</sup> Rob Checketts, *Email Response to Freedom of Information Request*, BIRMINGHAM CHILDS.’ HOSP. (June 26, 2012), <http://www.secularism.org.uk/uploads/foi-bch-response-received-260612.pdf> [<https://perma.cc/5VBM-HQ4S>].

<sup>326</sup> *Id.*

<sup>327</sup> Christopher J. Cold & John R. Taylor, *The Prepuce*, 83 BRITISH J. OF UROLOGY 33 (1999); Merkel & Putzke, *supra* note 33.

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and lifelong consequences for the patient's embodied sexuality and sexual experience."<sup>328</sup>

Moreover, according to Reinhard Merkel and Holm Putzke, because of their importance and salience, the harms cannot fairly be minimized as they sometimes are:

[T]he disadvantages are manifest: Without a decisive medical reason, the boy irreversibly loses a healthy part of his body, a part that may have a significant, albeit not yet fully understood function as protective and erogenous tissue. As has long been established beyond a reasonable doubt, circumcision introduces a loss of genital sensitivity in adolescents and men. It is not unlikely that this may, at least in some cases, cause deficiencies in the boy's later sexual life whose natural development, unimpeded by unnecessary surgical intervention, is something he is ethically and legally entitled to.<sup>329</sup>

Scholar Henrietta Moore may have latched onto the impossibility of true objectivity regarding a form of genital cutting practiced by an observing culture when she wryly observed, "[t]he West, it turns out, has culture like everyone else."<sup>330</sup>

## VI. RESOLVING ASYMMETRY IN ETHICAL/LEGAL TREATMENT OF FGC AND MGC

Activist and author Soraya Mire, who was personally affected by FGC, has questioned whether the sex or gender of the individual being cut should be a determining factor in considering the ethics and legality of the procedure:<sup>331</sup>

The thing that really shocked me when I came to America was the reaction I got when people find out what was happening in Somalia, Sudan, Ethiopia, those parts of the world . . . about female genital mutilations, and people were horrified, they were shocked, they were angered: it was not even a feminist standpoint, but it was the rights of the child, taking her humanity and integrity. But behind closed doors, they were mutilating their own young boys, sons—and it's [an everyday] ritual here, but people don't see it as a ritual. But to me I would see it as a ritual, because it's the same thing to me: mutilation is mutilation. I feel this is really wrong, when it comes to

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<sup>328</sup> Möller, *supra* note 19.

<sup>329</sup> Merkel & Putzke, *supra* note 33, at 445.

<sup>330</sup> Henrietta L. Moore, *The Failure of Pluralism?*, in *TRANSCULTURAL BODIES: FEMALE GENITAL CUTTING IN GLOBAL CONTEXT* 311-30 (Ylva Hernlund & Bettina Shell-Duncan eds., 2007).

<sup>331</sup> Soraya Mire, *Soraya Mire on Male and Female Genital Mutilation*, YOUTUBE (Jan. 16, 2011), <https://www.youtube.com/watch?v=Ggqa6CCTR-4> [<https://perma.cc/X4KL-CUBZ>].

child rights: this is a human rights issue, and I think all of us need to protect young children's bodily integrity.<sup>332</sup>

Scholar Hanny Lightfoot-Klein included in her landmark 1989 book on FGC a full chapter on the importance of also protecting male children from MGC.<sup>333</sup> In the more than three decades since, the binary conceptions of gender on which the categories FGC and MGC are based are continuing to weaken, alongside greater understanding of the multi-dimensional character not only of gender (as an identity or social category) but also of sex (relating to a cluster of physical traits).<sup>334</sup> Scholars Michael Benatar and David Benatar note the “asymmetrical” contradictions inherent in the starkly different, gender-based views of FGC and MGC:

[W]e suspect that the opposition to excising the clitoral prepuce is based not so much on the absence of medical evidence for a benefit, as on an abhorrence for removing genital tissue from a girl. This suggests an asymmetrical judgment about the intrinsic acceptability of removing preputial tissue.<sup>335</sup>

This asymmetry is precisely the point of inequality that should not be ethically, morally, nor legally acceptable in our modern day and age. Moreover, as mentioned above, all forms of medically unnecessary genital cutting of non-consenting persons should be impermissible under existing assault laws, child abuse laws, and other relevant laws.<sup>336</sup> Furthermore, the criminal law does not punish perpetrators differently depending on the victim's sex, so it may be anomalous to divide genital cutting into FGC and MGC in the first place, let alone to then treat the two practices so differently.<sup>337</sup>

In 2001, Dena S. Davis decried what she saw as:

[A] complete laissez-faire attitude toward one practice coupled with total criminalization of the other, [which] runs afoul of the “free exercise” clause of the First Amendment. There are also troubling implications for the

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<sup>332</sup> *Id.*

<sup>333</sup> HANNY LIGHTFOOT-KLEIN, PRISONERS OF A RITUAL 183-92 (1989).

<sup>334</sup> Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2018); Anne Fausto-Sterling, *Dynamic Systems Framework for Gender/Sex Development: From Sensory Input in Infancy to Subjective Certainty in Toddlerhood*, 15 FRONTIERS HUM. NEUROSCIENCE (2021); Surya Monro, Morgan Carpenter, Daniela Crocetti, Georgiann Davis, Fae Garland, David Griffiths, Peter Hegarty, Mitchell Travis, Mauro Cabral Grinspan & Peter Aggleton, *Intersex: Cultural and Social Perspectives*, 23 CULTURE, HEALTH & SEXUALITY 431 (2021).

<sup>335</sup> Michael Benatar & David Benatar, *Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision*, 3 AM. J. BIOETHICS 35 (2003).

<sup>336</sup> Brigman, *supra* note 34; Kellner, *supra* note 34; Boyle, Svoboda, Price & Turner, *supra* note 33; SOMERVILLE, *supra* note 33; Adler, Howe, Wisdom, & Daase, *supra* note 34; Merkel & Putzke, *supra* note 33.

<sup>337</sup> Boyle, Svoboda, Price & Turner, *supra* note 33.

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constitutional requirement of equal protection, because the laws appear to protect little girls, but not little boys, from religious and culturally motivated surgery.”<sup>338</sup>

The time is coming when MGC and FGC will be considered coterminously, possibly with a recognition that the gender-based terminology is itself losing its relevance. Writing back in 2009, Marie Fox and Michael Thomson observed similarities between FGC and MGC, “[t]he notable discursive overlaps between male and female genital cutting practices render the differential responses of global civil society to the practices particularly striking.”<sup>339</sup> Nor, as Fox and Thomson note, can the two practices be distinguished based on different social roles, for in their view, “both forms of genital cutting are equally implicated in enforcing gender norms, by serving to demarcate the sexes and to manage sexuality.”<sup>340</sup> Here, Möller comments that based on Sir James Munby’s correct observation that some forms of MGC are more harmful than the most innocuous forms of FGC, noting, “we cannot justify the current differential treatment by the law of male and female cutting by pointing to the harm caused by the respective procedures.”<sup>341</sup> Recalling our review above of Fusaschi’s recent analysis of parallel cultural rationales for MGC and FGC,<sup>342</sup> Möller notes that the two practices typically go hand in hand, reinforcing complementary sex roles, as seen with the Dawoodi Bohra:

Perhaps the most important counter-argument to the claim about patriarchal oppression is the little known fact that *societies that engage in female genital cutting in almost all cases also engage in male genital cutting*; the two forms are seen as complementary practices and sacrifices that are about achieving and promoting wholeness . . . . Thus, one interpretation of the point of the practice of genital cutting at least in some contexts is that, rather than oppressing women and suppressing female sexuality, it is *intended to promote the achievement of fully developed femininity and female sexuality by removing “masculine” parts from her genitals*.<sup>343</sup>

Along similar lines, the moderate commentators Benatar and Benatar analogize the two practices as both created to limit erotic potential and to affirm one’s sex:

The culturally blinded person fails to see that just as female circumcision has been judged, both by its supporters and its opponents, to curb female

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<sup>338</sup> Davis, *supra* note 2, at 488.

<sup>339</sup> Marie Fox & Michael Thomson, *Foreskin is a Feminist Issue*, 24 AUSTRALIAN FEMINIST STUDS. 195, 205(2009).

<sup>340</sup> *Id.* at 199.

<sup>341</sup> Möller, *supra* note 19.

<sup>342</sup> Fusaschi, *supra* note 4.

<sup>343</sup> Möller, *supra* note 19 (emphasis added).

sexuality, so has male circumcision been said, again by both its supporters and detractors, to curb male sexuality. And they fail to see that just as male circumcision is seen (often simultaneously) as an affirmation of the male, so female circumcision is seen (often simultaneously) as an affirmation of the female.<sup>344</sup>

By contrast, and to remind ourselves how far we have traveled, it may be instructive to recall a starkly opposite viewpoint. Back in 1996, Layli Miller Bashir coded the foreskin as worthless, while valorizing the clitoris, contending that “FGM would only be similar to male circumcision if the penis were amputated.”<sup>345</sup> As Fox and Thomson observe, “[i]mplicitly this assumes that male sexual pleasure is not an issue provided the penis is adequate for penetration, thus privileging one popular understanding of male sexual function and pleasure.”<sup>346</sup>

Dena Davis’ historical perspective debunks monochromatic portrayals of FGC as anti-erotic and MGC as innocuous on the sexual front, adding lurid, regrettable details too often omitted in recent scholarly analyses.<sup>347</sup> Her comments also help us to appreciate the bizarre historical provenance of these practices, particularly MGC:

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 19<sup>th</sup> century America, the crusade against masturbation was very like our current “war against drugs.” One stimulus was the discomfort that an increasingly [P]uritan 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.<sup>348</sup>

As John Harvey Kellogg, inventor of Kellogg’s Corn Flakes, argued in 1882, touting pain as an actual advantage of the procedure, “the pain attending the operation will have a salutary effect on the mind, especially if it is connected with the idea of punishment.”<sup>349</sup>

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<sup>344</sup> Benatar & Benatar, *supra* note 335, at 44.

<sup>345</sup> Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 420 (1996).

<sup>346</sup> Fox & Thomson, *supra* note 339, at 200.

<sup>347</sup> Davis, *supra* note 2, at 551 (emphasis added, internal citations omitted).

<sup>348</sup> *Id.* (emphasis added, internal citations omitted).

<sup>349</sup> JOHN HARVEY KELLOGG, PLAIN FACTS FOR OLD AND YOUNG 383-84 (1882).

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Janice Boddy finds a possible reason for the differential treatment to lie in our ineluctable certainty that male and female are worlds apart: Males are simply constructed as more invulnerable than females.<sup>350</sup>

[W]e customarily amputate babies' foreskins, now with some controversy but little alarm . . . yet global censure of these practices is scarcely comparable to that leveled at female circumcision . . . is it because these excisions are performed on boys, and only girls and women figure as victims in our cultural lexicon?<sup>351</sup>

Such distinctions are hard to eradicate even by those genuinely aiming for sexual equality.

Auchter, in discussing forced circumcision of adult males, writes words that first enable us to empathize with views of MGC as less serious and then to debunk them:

The characteristics associated with masculinity pose difficulties for attempts to conceptualize men as victims of violence, particularly sexual violence, in many frameworks of counter-violence. The same stereotypes that discourage a man from reporting being raped because he fears being seen as less of a man, and that make men's stories less likely to be believed when they do speak up, because their very masculinity is supposed to render them inviolable, also exist in the performance of male circumcision. Men are assumed to be in full control of their sexual organs, so the idea that they could be violated against their will . . . seems inconceivable. This is particularly true in a context where circumcision is considered to be a positive act on health grounds.<sup>352</sup>

Even more recently, Kate Goldie Townsend writes, "[d]ifferent treatment of child genital cutting practices depending on the sex of the child is morally problematic and could potentially be ruled unconstitutional in Western states."<sup>353</sup> As Townsend and indeed all the authors reviewed in this Part suggest, I believe reasons for this disparity of how we address or fail to address MGC and FGC lie deep in our psychologies and cultures. As always, legal change follows cultural change. As we strive in this world for greater gender equity, presumably such issues will be among those we will address in the coming years and decades.

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<sup>350</sup> Janice Boddy, *Gender Crusades: The Female Circumcision Controversy in Cultural Perspective*, in *TRANSCULTURAL BODIES: FEMALE GENITAL CUTTING IN GLOBAL CONTEXT* 46, 58 (Ylva Hernlund & Bettina Shell-Duncan eds., 2007).

<sup>351</sup> *Id.*

<sup>352</sup> Jessica Auchter, *Forced Male Circumcision: Gender-Based Violence in Kenya*, 93 INT'L AFFS. 1339, 1342-43 (2017).

<sup>353</sup> Townsend, *supra* note 20.



## VII. CONCLUSION: RECONCILING THE SEEMINGLY IRRECONCILABLE

Judge Friedman denied the relief sought in the two cases we have discussed, *Armatas v. Elmhurst Hospital*<sup>354</sup> and *United States v. Nagarwala*.<sup>355</sup> Yet in my analysis, the two cases' practical implications could hardly differ more sharply. The judge failed to allow the jury in the MGC case to interrogate possible civil rights violations engaged in by a hospital promoting the latter practice, stopping a potentially groundbreaking constitutional class action in its tracks without allowing it a fair hearing.<sup>356</sup> Yet in the FGC Case, the judge pointed federal legislators in a direction they eventually followed to outlaw the practice in a legally sustainable manner.<sup>357</sup> Judge Friedman's different approaches to these cases reflect the dramatically different treatment in the West of the two practices.

As Benatar and Benatar muse, "one can only wonder what possessed ancient people to first think of removing the foreskin."<sup>358</sup> We can only speculate, as the Benatars do, how "many of those who would not think twice about circumcising a boy would balk at permitting even the partial removal of a young girl's prepuce."<sup>359</sup> Relevant here to further relaxing any reluctance we may have to treat the two practices consistently is the virtual identity between rationales for MGC and FGC.

The reasons cited by families for altering the genitalia of their children is nearly identical whether it is a girl in countries such as Somalia<sup>360</sup> or a boy in the United States . . . cleanliness, preventing illness, religion, looking like other children or like their parents, fear of promiscuity, and acceptance of the altered genitalia as more attractive to the opposite sex.<sup>361</sup> Lightfoot-Klein, in her groundbreaking 1989 book on FGC, stated:

The reasons given for female circumcision in Africa and for routine male circumcision in the United States are essentially the same. Both falsely tout the positive health benefits of the procedures. Both promise cleanliness and the absence of "bad" genital odors, as well as greater attractiveness and acceptability of the sex organs. The affected individuals in both cultures

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<sup>354</sup> *Armatas v. Elmhurst Hosp. Cent.*, 1999 WL 1495420 (E.D.N.Y. Nov. 22, 1999).

<sup>355</sup> *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

<sup>356</sup> *Armatas*, 1999 WL 1495420.

<sup>357</sup> *Nagarwala*, 350 F. Supp. 3d 613.

<sup>358</sup> Benatar & Benatar, *supra* note 335, at 43.

<sup>359</sup> *Id.* at 44.

<sup>360</sup> Somalia is a country in which FGC is an almost universal practice. *Female Genital Mutilation (FGM)*, UNICEF (2024), <https://data.unicef.org/topic/child-protection/female-genital-mutilation>. For statistics on other countries where FGC is practiced, see *id.*

<sup>361</sup> Fishbeck v. North Dakota, 115 F.3d 580 (8th Cir. 1997), quoted in Ylva Hernlund & Bettina Shell-Duncan, *Transcultural Positions: Negotiating Rights and Culture*, in *TRANSCULTURAL BODIES: FEMALE GENITAL CUTTING IN GLOBAL CONTEXT* 1, 18 (Ylva Hernlund & Bettina Shell-Duncan eds., 2007).

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have come to view these procures as something done *for* them, and not something that was done *to* them.<sup>362</sup>

Respect for parental wishes, discussed at length above in the genital cutting context, is an important principle also prominent in two hallowed U.S. Supreme Court parental decision-making cases.<sup>363</sup> Merkel and Putzke provide an extended analysis<sup>364</sup> of the famous U.S. Supreme Court case *Wisconsin v. Yoder*, upholding the rights of Amish people to school their children for two fewer years than the state mandated.<sup>365</sup> Merkel and Putzke note the extensive deference that is typically given to parents to make choices about their children without court interference.<sup>366</sup> They then distinguish as clearly impermissible parental actions that breach the bounds of the skin of the child.<sup>367</sup> “Matters are very different, however, with regard to a child’s bodily integrity.”<sup>368</sup>

In *Prince v. Massachusetts* (1944), the U.S. Supreme Court held that while adults have the right to become martyrs themselves, no one has the right to make a martyr of their children.<sup>369</sup> To allow for one’s perceived religious duty to excuse a crime would be—as a nineteenth century United States Supreme Court precedent phrased it—to “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>370</sup>

Merkel and Putzke later explain why these limits in religious authority are quite clear:

[I]ntruding into the child’s bodily integrity in a sufficiently deep way cannot be justified by a pure liberty right such as freedom of religion. No conceivable (positive) liberty right, roughly understood as a right to perform certain acts at one’s will, can possibly justify direct physical intrusion into someone else’s body.<sup>371</sup>

The gap between views of FGC and MGC is thus starting to close in academic circles. Möller trenchantly argues that “even if a plausible claim could be made that the child would benefit from being genitally cut, it is wrong as a matter of principle to ‘trade’ a part of the child’s genitals for

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<sup>362</sup> LIGHTFOOT-KLEIN, *supra* note 333, at 193 (emphasis in original).

<sup>363</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) 210; *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>364</sup> Merkel & Putzke, *supra* note 33, at 444-45.

<sup>365</sup> *Yoder*, 406 U.S. at 355.

<sup>366</sup> Merkel & Putzke, *supra* note 33, at 444-45.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>370</sup> *Reynolds v. United States*, 98 U.S. 145 (1879), 167.

<sup>371</sup> Merkel & Putzke, *supra* note 33, at 446.

another supposed benefit.”<sup>372</sup> In other words, regarding such an extremely personal matter as their own genitals, “genital salience” in Munzer’s words, each individual must make his or her own decision regarding such potentially momentous tradeoffs upon reaching an age of autonomy.<sup>373</sup>

True consent for any genital cutting practice, including MGC, can come only from the affected individual.<sup>374</sup> Lenta and Poltera concede that “it is strongly arguable, as Thomson says, that the trespass impacting on the sexuality of its recipient insults more profoundly than other trespass.”<sup>375</sup> As I have noted elsewhere, the social significance of the genitals is exactly the point for many communities that practice MGC.<sup>376</sup> Leaving them uncut is not a neutral action precisely because of their socio-religious significance.<sup>377</sup> However, this contention falls apart on closer inspection. Surely, I would think, males cannot legally and ethically be condemned to having their bodies used without their consent in order to satisfy whatever claims of social significance others may seek to impute. Since it would be dubious at best to contend that genitals somehow are more salient for males than for females, presumably this reasoning may be applied to justify FGC. More than two decades ago, Claire C. Robertson decried a failure to vigorously protect children against MGC as well as FGC based on an:

American assumption of a superior U.S. civilization and African barbarity. It is also the pervasiveness of these assumptions that explains a set of U.S. laws that criminalizes genital operations done by Africans or for Africans but not those done by North Americans, even if the results are the same or similar.<sup>378</sup>

Presumably, partially at least due to such considerations, courts that are outside the United States and therefore arguably more objective are

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<sup>372</sup> Möller, *supra* note 19, at 516.

<sup>373</sup> Munzer, *supra* note 321, at 17-25.

<sup>374</sup> See generally Brian Earp & Lori Bruce, *Medical Necessity and Consent for Intimate Procedures*, 49 J. Med. Ethics 591 (2023); Svoboda, Van Howe, & Dwyer, *supra* note 24; Steven Svoboda, *Tortured Bodies, Tortured Doctrines: Informed Consent as a Legal Fiction Inapplicable to Male Circumcision*, in SEXUAL MUTILATIONS: A HUMAN TRAGEDY, *supra* note 10, at 1-28 [hereinafter *Tortured Bodies*].

<sup>375</sup> Lenta & Poltera, *supra* note 258, at 37. However, scholar Rosie Duivenbode finds arguments “unsatisfactory” that contend “the genitals have a significant social and psychological meaning that justifies a higher standard for parental consent, namely that of medical necessity only.” Rosie Duivenbode, *Criminalizing Medically Unnecessary Child Genital Cutting in Western Countries: The Terms of the Debate and Some Reasons for Caution*, 35 INT’L J. IMPOTENCE RSCH. 21, 25 (2023).

<sup>376</sup> See generally Earp, *supra* note 374; Svoboda, Howe, & Dwyer, *supra* note 24; Svoboda, *supra* note 374; *Tortured Bodies*, *supra* note 374.

<sup>377</sup> See generally Earp, *supra* note 374; Svoboda, Howe, & Dwyer, *supra* note 24; Svoboda, *supra* note 374; *Tortured Bodies*, *supra* note 374.

<sup>378</sup> Claire Robertson, *Getting Beyond the Ew! Factor: Rethinking U.S. Approaches to African Female Genital Cutting*, in GENITAL CUTTING AND TRANSNATIONAL SISTERHOOD: DISPUTING U.S. POLEMICS 54, 77 (Stanlie M. James & Claire C. Robertson eds., 2002).

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repeatedly crafting decisions that use factual analyses of the specific case at issue to generally refuse to permit MGC.<sup>379</sup> For those opposed to non-consensual genital cutting regardless of the sex of the affected individual, this is heartening news that I believe may indicate a nascent and perhaps growing judicial awareness of the importance of protecting genital integrity. My analysis suggests that for the moment, the majority of these courts are still shying away from concretely arguing that the procedure should generally be illegal, instead (ostensibly anyway) limiting their holdings to the facts of the case at hand. The 2002 Frankenthal and 2013 Cologne courts did, however, point in the direction of illegality, so much so in the latter case that legislative override of the 2013 decision came to be viewed as a politically expedient way of ending religious controversy.<sup>380</sup>

We turn to Kai Möller for a succinct, pithy summary of the state of affairs: “[T]he correct way to think about the wrongness of genital cutting is to regard it as intrinsically wrong because it violates the right to physical integrity of the child; thus, the conclusion that genital cutting is wrong as a matter of principle applies equally to boys and girls.”<sup>381</sup>

Genital cutting is a complex, often contentious topic, implicating religion, culture, science, law, professional ethics, psychology, human rights, and countless other subjects.<sup>382</sup> The interrelationships of these many different aspects lie at the root of the preoccupation with and the difficulty of arriving at clear conclusions on which most can agree. Such a broad topic calls for humility and open-mindedness, even more so amidst the recent changes to how gender and sex are defined.

In the end, we all begin as children. And, thus, we should—indeed, we must—heed children’s best interests, do as close to no harm as possible, and do our imperfect best to protect their full potentialities. As always, legal change follows cultural change. As we strive in this world for greater gender equity, presumably such issues will be among those we will address in the coming years and decades.

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<sup>379</sup> *Case 4 O 11/02 Regional Court of Frankenthal*, *supra* note 40; *Case Number 83927 JE RK 07-110, Court of Zutphen*, *supra* note 40; *Case number 4 W 12/07, OLG*, *supra* note 40; *Case Number 3 UF 133/33, OLG*, *supra* note 40; *Case number PQ190030-O/U*, *supra* note 40; *X. v. Decision of the Children and Adult Protection Authority of Nordbünden*, *supra* note 40.

<sup>380</sup> Merkel & Putzke, *supra* note 33.

<sup>381</sup> Möller, *supra* note 19.

<sup>382</sup> See generally MEDDINGS, *supra* note 17; CIRCUMCISION THE HIDDEN TRAUMA, *supra* note 307.